Providing expert evidence: A matter for review

Expert evidence is often crucial in disputes decided before the State Administrative Tribunal (SAT). Requests for expert evidence from officers in the Environmental Health Directorate (EHD) have increased substantially in recent years. As a result, the matter of providing expert evidence has been the subject of recent review within the EHD. A key part of this review examined how expert witnesses were engaged and instructed by parties involved in the dispute. The review highlighted a number of common issues that arose regularly.

The purpose of this document is to:

- Identify the common issues
- Address the issues by providing guidance to the parties in dispute on engaging an EHD expert witness. Although EHD expert witnesses have generally been used quite effectively and efficiently to date, this guidance on engaging an EHD expert witness is provided to further increase the likelihood of a satisfactory outcome for all parties.
- Provide a Quick Reference Guide for requesting expert evidence from the EHD
- Provide guidance for EHD officers giving expert evidence.

Acknowledgements

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This document is relevant to government and anyone requiring expert evidence from the Environmental Health Directorate.
PART ONE: Providing expert advice

Issues raised and preferred actions

The following guidance is a set of preferred actions that is open to discussion and negotiation; they may not be applicable to every case.

1. **Issue: Requesting experts**

   Interested parties in a dispute often contact individual EHD officers directly to request expert evidence. Sometimes such requests may be incompatible with the officer’s duties or level of involvement in the matter under dispute. Other significant factors may need to be taken into account which may be outside the officer’s area or knowledge or experience. Occasionally the reason for requesting an EHD expert is not evident.

   **Action**

   Requests for expert evidence should be made directly to the Director of the Environmental Health Directorate with the subject line, “Request for Expert Evidence”, to facilitate processing the request. The issue under dispute should be described and the rationale for requesting an EHD officer should be provided. The party requesting the expert evidence will be notified of the decision to provide expert evidence on a case by case basis. The relevance to public health, level of EHD involvement with the matter under dispute and the availability of a suitable expert witness will be key factors governing the decision to provide expert evidence or capacity of the EHD to provide expert evidence.

2. **Issue: Timeliness**

   In many units across the EHD the capacity for an officer to act as an expert witness will be limited by their prior and ongoing core work commitments. EHD officers are responsible for a wide range of important public health issues that require their commitment many weeks or months in advance. This is particularly true for senior officers. For this reason, requests at short notice (<8 weeks) are unlikely to be supported in many instances. Some urgent requests for which there may be mitigating circumstances may be able to be accommodated at short notice. The availability of an appropriate officer and the nature and complexity of the matter under dispute will be a defining factor in whether expert evidence can be provided at short notice.

   **Action**

   Most matters that ultimately come before the SAT for mediation or a full hearing have a very long lead-in period, usually longer than 6 months. Parties may be undecided when the matter first arises whether public health is likely to be an issue in the case. Parties are urged to contact the EHD as early as possible to explore the need for EHD expert evidence in the case. Parties are encouraged to contact the
relevant Unit manager directly to discuss the case before requesting formal participation from the EHD Director.

3. Issue: **Relevance**

EHD provides public health advice on issues that span from days to years. Expert evidence is sometimes requested on matters actively on-going for the parties concerned but for which EHD is no longer actively involved or responsible or may have relatively minor, albeit important, involvement. Decisions and recommendations may have been made by the parties concerned that have significantly altered the nature of the case since EHD involvement. The case may no longer be relevant to public health nor have a significant public health component. Nevertheless the parties may still believe that the EHD could provide important expert evidence.

**Action**

Although public health is important and relevant to many environmental matters, the issue under dispute may not in-fact be a public health issue. Parties in the case may anticipate that public health evidence may be leveraged to advantage the case in place of other evidence however there may be important reasons why this approach is not desirable. This is a significant issue for the EHD. Where the party anticipates making public health precedent, parties are encouraged to contact the manager of the relevant Unit to discuss the matter before formally requesting participation from the EHD Director.

4. Issue: **Information**

Once an expert witness has been appointed the expert may discover during his or her investigation of the issue that significant developments, unbeknown to the EHD have taken place. Such developments may be crucial to the expert’s evidence.

**Action**

The EHD considers that a pre-case meeting of the parties engaging the expert, including the legal counsel, is very valuable. This is necessary to identify recent developments, identify relevant documents, agree on relevant timelines for preparation of witness statements, discuss each others expectations and correct any misapprehensions or misunderstandings. The meeting also provides an opportunity for the EHD expert to meet any supporting experts, where they have been appointed.

5. Issue: **Communication**

Once the expert witness has been appointed, he or she will need to be properly instructed on matters relevant to the case and the SAT proceedings. A significant issue for EHD officers is the often incomplete, unclear or conflicting instructions received from various parties in the dispute.
Action

The experience of senior EHD officers involved in SAT proceedings is that the most efficient and effective management of communications between the expert and the party engaging the expert is when communication is managed by a single key member of the party. This ensures that information exchange is coordinated through one key individual who will ensure that the expert is regularly informed about deadlines, has all disclosed documentation and relevant documents as they come to the attention of the party and is provided with all the SAT orders. Parties should bear in mind that one EHD officer may be involved in concurrent and overlapping SAT cases and inefficiencies arise when communications do not clearly identify the case in question by case number and case name.

6. Issue: Expertise

A common flaw in expert evidence is that the evidence offered fails to establish specialised knowledge of a type required or the expert evidence fails to address the key issues. EHD officers may decline to act as experts if they are unable to provide the expertise required by the SAT despite significant involvement in the case under dispute.

Action

Parties seeking to appoint experts should be very clear on the issues to be disputed and ensure the issues to be addressed do not fall outside the expert’s field or experience with the issue. The nature and extent of the expertise may require super- or sub- speciality knowledge or substantial experience with the case in question that may be outside the sphere of the expert’s knowledge or experience.

### Requesting Expert Evidence

| **Address:** | **Director**  
Environmental Health Directorate  
Department of Health  
PO Box 8172  
Perth Business Centre  
WA, 6849  
| **Units:** Environmental Health Hazards, Food, Radiation Safety, Science & Policy, Water | **Unit Managers** through EHD Reception  
Phone No.: 9388 4999 |
| **Subject Line contains:** | ‘Request for Expert Evidence’ |
| **The extent of the proceeding is described:** | Is a mediation or full SAT hearing anticipated? |
| **The nature of the dispute is described:** | A brief summary of the dispute and the principal known issues. The level of previous DOH involvement and any DOH advice provided is identified. |
| **Public Health** | The rationale for requiring public health expert evidence in the case is provided |
| **Timeliness** | The EHD is notified early in the proceedings of the intent to request an expert witness. |

#### Instructing the expert

| **Case number and name:** | Is used, as soon as available for all written communications with the expert and the EHD. |
| **Case manager:** | Preferably a single key individual instructs the expert and identifies all the parties in the dispute. The case manager acts as the conduit between the parties, legal counsel and the expert. |
| **Dates and Deadlines:** | The expert is advised of key dates and deadlines by the case manager. |
| **Emerging / Developing Issues** | The expert is advised of emerging or developing issues as soon as possible by the case manager. |
| **Documents** | All disclosed documents are made available to the expert by the case manager. |
| **SAT orders** | All SAT orders are communicated to the expert by the case manager. |
| **Pre Case meeting** | Is arranged to clearly define the principal issues and expectations. |
| **Legal counsel** | Briefs the expert with the relevant parties present on the principal issues, strengths & weaknesses of the case. The expert may also seek clarity on legal language and any related instructions or orders. |
| **Timelines** | Timelines for document submission and retrieval are managed by the party (case manager) instructing the expert. |
Definitions

**Case**  is the matter about which the dispute has arisen.

**Client**  is a statutory body, state government or local government that has requested the EHD to provide Expert Evidence. The client may also be a legal counsel involved in the case or member or the public.

**Dispute**  is any issue before the SAT.

**Expert Evidence**  is a report prepared by, or evidence given by an Expert Witness. The evidence usually pertains to a matter with which the EHD has substantial knowledge and involvement.

**Expert Witness**  is a person who provides a report or gives evidence in legal proceedings and related proceedings, based wholly or substantially on the witness’s specialised knowledge of a subject or experience with the matter under dispute. An expert witness is not confined to giving only factual evidence in so much as the expert may provide an opinion based on material relevant to the issue.

**EHD**  is the Environmental Health Directorate of the Department of Health. The role of the EHD covers those aspects of human health determined by physical, chemical, biological and social factors in the environment. Environmental health practice covers the assessment, correction, control and prevention of environmental factors that can adversely affect health, as well as the enhancement of those aspects of the environment that can improve human health.

**EHD officer**  is an officer of the EHD working in environmental health practice to provide advice governing public health of both the built and natural environment, in order to promote good public health.

**Instruction**  is the term often used to signify a request to an EHD officer to act as an expert witness and in doing so the officer accepts ‘instructions’ from the legal counsel or client. As used in sections 4 and 5 of this document.

**Legal Counsel**  is the solicitor(s) engaged by the parties involved in the dispute. Solicitors from the State Solicitors Office usually represent government.

**SAT**  is the State Administrative tribunal. The State Administrative Tribunal reviews decisions made by State Government and local governments regarding a range of matters concerning development, subdivision, notices, fisheries, water, rating, land valuation, land tax and soil and land conservation.

**Witness Statement**  is a compilation of evidence or report written by the Expert Witness on the dispute and must contain useful and reliable evidence.

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Contact

Environmental Health Directorate
Public Health Division
Department of Health
PO Box 8172
PERTH BUSINESS CENTRE 6849

P: 9388 4999
F: 9388 4955
E: ehinfo@health.ea.gov.au
W: www.public.health.wa.gov.au

Useful links

State Administrative Tribunal website:
www.sat.justice.wa.gov.au

State Solicitor's Office website:
PART TWO: Guidance for Environmental Health Directorate Officers: providing expert evidence

Introduction

Exposures to environmental contaminants are major contributors to acute and chronic illnesses such as respiratory disease, cardiovascular disease, and cancer. The Department of Health provides advice to other government agencies on the risk of potentially harmful environmental exposures that might arise from a range of public health matters, such as industrial development, conflicting land use and pest control. Occasionally disputes arise from decisions made by State Government and local governments that require an officer of the Environmental Health Directorate (EHD) to act as an expert witness in a matter where public health advice had been provided or is subsequently deemed relevant.

Disputes are usually decided by the State Administrative Tribunal (SAT) through either mediation or a full tribunal hearing. Expert witnesses are usually appointed by the parties to a dispute, but they may also be appointed by an adjudicator, arbitrator or judge of the SAT. The parties that retain EHD officers as expert witnesses are predominantly State or local government agencies, although statutory bodies, citizens, or private entities may also request an EHD expert witness.

A request for expert evidence is considered on a case by case basis by the Director of the EHD together with the units of the EHD that rendered the original advice or the units with the greatest expertise in the area under dispute.

This document reviews the responsibilities and the issues facing EHD officers when asked to act as expert witnesses in SAT legal proceedings.

Roles and responsibilities of an expert witness

1. Role of an Expert Witness

The role of an EHD officer providing Expert Evidence is to:

1.1 Examine and analyse the material provided for review and, using the skills and expertise expected from an EHD officer, interpret that material and form an opinion. The connection between fact and opinion has to be explained and since it is an opinion it is not uncommon for different witnesses to form different opinions about the same dispute.

1.2 Communicate that opinion or fact to the legal counsel or client requesting the expert evidence, in the form of a written Witness Statement (WS) and by appearing before the State Administrative Tribunal as an expert witness as required.

1.3 Be able to provide a fair impartial opinion.
2. Professional and ethical duty

The professional and ethical duty of an EHD officer providing Expert Evidence is to:

2.1 Respect confidentiality of all parties.

2.2 Ensure that the WS is impartial and factually correct.

2.3 Maintain objectivity at all times.

2.4 Recognise that his or her paramount duty as expert witness is to the SAT. His or Her duty is to be truthful as to fact, honest and correct as to opinion and complete as to coverage of relevant matters.

2.5 Avoid rendering an opinion as fact and avoid using emotive language when writing or giving evidence.

2.6 State when rendering an opinion outside his or her area of specialist knowledge or experience.

2.7 Take into account the spectrum of options or views considered reasonable at the time advice was provided rather than only the ideal option or view with the benefit of hindsight. Since many disputes come to the SAT months or years after the original advice was provided it is tempting to provide information that may be biased by hindsight.

2.8 Consider alternate views and opinions. The credibility of the expert is compromised by failure to make reasonable concessions or concede obvious propositions that may achieve a reasonable outcome and may even circumvent lengthy legal proceedings.

2.9 Focus on the issues to improve the quality and integrity of the WS. This approach helps narrow the issues and enhances the chances of a settlement which may avoid a full tribunal hearing.

2.10 Declare any pre-existing relationship with any party to the proceedings in question.

2.11 Deliver the WS in a timely fashion.

2.12 Adhere to the orders of the SAT.
3. The form of expert evidence

3.1 A WS must be written according to the standard procedures developed by the SAT\(^3\). This includes a disclosure of qualifications and relevant experience. If the matter goes to a full hearing, the tribunal will want to know the relevant qualifications and experience of each expert so tribunal members can weigh up the authority of each expert should the need arise.

3.2 All assumptions of fact should be clearly and fully stated. The evidence must be independent and objective. The evidence should be restricted to that which is reasonably required to help resolve the proceedings.

3.3 The WS should identify research, studies and writings of others including who carried out any decision making, sampling, analysis or modelling upon which the expert witness relied in compiling the report.

3.4 The WS should include a statement of the questions or issues that the expert witness has been asked to address and the titles of documents and other materials which the expert witness has been instructed or has chosen to consider.

3.5 An expert witness is obliged to discuss all aspects of the dispute within his or her expertise, even when this might go against the client’s opinion. Ultimately this is in the best interests of the client, since it is better to know the real strengths and weaknesses of a dispute early when something can be done about them either through consultation or mediation, rather than have them exposed in the SAT hearing.

3.6 If an expert witness changes a material opinion during his or her investigation of the case, the change should be communicated in a timely manner to the client and to the legal counsel.

3.7 If an expert witness’s opinion is not fully researched because he or she considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one.

3.8 Where an expert witness, who has prepared a report believes that it may be incomplete or inaccurate a qualification must be stated in the WS.

3.9 The expert witness should make it clear when a particular question or issue falls outside their relevant field of specialist knowledge (including area of super speciality or subspecialty interest).

3.10 After proceedings have commenced witnesses for both sides may be instructed by the SAT to meet and produce a Joint Statement of issues - agreed and disagreed. During the witness conferral poor arguments are

dropped and the better ones refined, so that the optimum arguments are established by the time the matter comes to the SAT hearing. The tribunal often refers to the Joint Witness Statement in preference to the individual witness statements during the proceedings therefore care should be taken during the conferral that any misconceptions, inaccuracies or omissions in the individual witness statements are clarified and or rectified.

3.11 If an expert witness withdraws from the proceedings at any time, the decision should be communicated in a timely manner to the client and legal counsel.

**Issues facing the EHD expert witness**

This section describes some of the issues facing the EHD officer as an expert witness that became evident during the EHD review. Writing a WS and then justifying it under pressure of a SAT proceeding is not easy, and while experience with the SAT proceedings is extremely valuable, equally valuable is early direction and management of the dispute by the parties involved.

An EHD officer may or may not have prior experience as an expert witness before the SAT. The EHD officer may be at a loss as to what he or she is expected to do. They may be unfamiliar with legal protocols, procedures and the legal language of the proceedings. The EHD officer may feel some tension between his or her duty to the SAT and his or her duty to the client. One way in which this becomes apparent is with regard to what constitutes legal process, what constitutes ‘privileged communications or privileged documents’ and what documents or communications are subject to disclosure. Another way is in regards to full disclosure of all documents related to the case and another is related to the expertise of the joint expert witnesses where appointed.

The EHD officer may need to rely completely on the legal counsel or the client for guidance.

No amount of guidance however can anticipate all the issues that will arise in practice when instructing expert witnesses. Presently no DOH or whole of government guidance statement or protocol on providing expert evidence is available. EHD officers who have acted as expert witnesses in previous proceedings have identified the following areas as requiring special attention when working through disputes.

**4. Instructing the Expert Witness**

To assist the EHD officers understand what is required of them, they often seek clear instructions or guidance from the legal counsel or client before the proceedings commence which includes the following:

- **4.1** Whether proceedings are being contemplated and, if so, the nature of the proceedings; whether mediation is being contemplated or a full SAT hearing including the expected timing of the proceedings.

- **4.2** The nature and extent of the expertise that is called for and the areas where the expert evidence will be required. A common flaw in expert evidence is that the evidence offered fails to establish specialised knowledge
of a type that supports the opinion. For example working as an investigating public health officer may not establish any specialised scientific expertise in exposure risk assessment and vice-versa.

4.3 How the expert evidence will be dealt with; including whether a joint expert may be appointed from within the Department of Health, another government agency or private entity and who that joint expert will or should be. Apart from credibility, there are experts whose factual knowledge or familiarity with people or places may be so limited that they are unlikely to be preferred as witnesses.

4.4 The purpose of requesting the evidence; a description of the matter to be investigated, the principal known issues and the identity of all parties.

4.5 All documents, which form part of the standard disclosure, and other witness’ statements that are relevant to the case are provided to the expert and are up-to-date.

4.6 The expert may request to discuss with the legal counsel and other relevant parties the strengths and weaknesses of the case. Also, to correct any misapprehensions of fact or any misunderstanding concerning the SAT processes such as witness conferral, appearing before the tribunal or legal matters.

4.7 The need for joint witness conferral. An expert may request a meeting of joint witnesses acting for the client before the start of proceedings.

4.8 The expert may seek clarity about who will be available for responding to any questions in relation to the legal process applicable to the case, identifying relevant documents, providing further materials on request; who will keep the expert informed regularly about deadlines for all matters concerning the expert and send the expert copies of all SAT orders and directions that may affect the preparation of their report or any matters concerning their obligations.

4.9 Where proceedings have been started, the dates of any hearings including any case management conferences and/or Pre-hearing interviews and reviews, the SAT claim number and case name.

4.10 What constitutes noncompliance with legal instruction and any consequences of non-compliance with legal instruction are set out including what constitutes ‘obstruction’ and ‘contempt’ of any SAT processes.
5. Accepting instructions

EHD officers acting as expert witnesses should confirm without delay whether or not they accept instructions. They should also inform those instructing them (whether on initial instruction or at any later stage) without delay if:

5.1 Instructions are not acceptable because, for example, they require work that falls outside their expertise or are insufficiently clear.

5.2 Instructions impose unrealistic deadlines.

5.3 They consider that instructions are or have become insufficient to complete the work.

5.4 They become aware that they may not be able to fulfil any of the terms of appointment.

5.5 The instructions and/or work have, for any reason, placed them in conflict with their duties as an expert.

5.6 They are not satisfied that they can comply with any orders that have been made.

6. Withdrawing from proceedings

Where experts' instructions remain incompatible with their duties, whether through incompleteness, a conflict between their duty to the SAT and their instructions, or for any other substantial and significant reason, they may consider withdrawing from the case. However, experts should not withdraw without first discussing the position fully with their mangers and then with those who instruct them. If the expert withdraws, he or she must give formal written notice to those instructing them.

7. Other

Government and scientific writing is almost exclusively in the third person which contrasts to writing in the first person for a witness statement. The expert is expected to write in the first person when providing opinion and when describing visits, investigations and other actions personally undertaken by the expert. Scientific evidence, facts and information not personal to the expert remain in the third person.

Conclusion

The role of the expert witness is not easy. He or she must be able to explain complex technical matters so that all can understand. He or she must put duty to the SAT above his or her natural desire to please the client and the EHD. A key to meeting his or her obligations is collaboration with the parties in the dispute; this includes the legal counsel, joint witnesses and the client. This document is intended to facilitate this collaboration and understanding as well as assist the EHD officers comply with the legal requirements of the SAT.