

# EXPERT EVIDENCE CONSULTATION RESPONSES

## OVERVIEW

- 1.1 This document provides an overview of the comments we received in response to our consultation Paper (CP). It contains a table listing the consultees to the consultation and a short summary of the consultation responses arranged according to the principal recommendations. This is followed by a more detailed overview of the points made by consultees.

## TABLE OF CONSULTEES

CONSULTEE
The Academy of Experts
Aikens, Lord Justice
Association of Forensic Science Providers
Bache, WE (Solicitor)
Berolena (Jacqui Cooper) (Online forum)
Batt, John (Consultant, Batt Broadbent Solicitors)
Bodriche (Online forum only)
British Association for Shooting and Conservation
British Medical Association
The British Psychological Society
British Standards Institution
Campbell-Tiech QC, Andrew (Barrister)
Centre for Criminal and Civil Evidence and Procedure (School of Law, University of Northumbria) <sup>1</sup>
Clayton, Dr T (Barrister and expert witness employed by Forensic Science Service Ltd)
Council of HM Circuit Judges (Criminal Sub-Committee)
Criminal Bar Association
Criminal Cases Review Commission
Crown Prosecution Service

<sup>1</sup> Response following a two-hour seminar arranged to discuss the CP, involving “academics, practising barristers and solicitors, members of the judiciary and a number of experienced expert witnesses from a variety of fields”.

Curry, M (Department of Finance and Personnel) (Online forum only)
David, Prof T (Professor, Child Health and Paediatrics, University of Manchester)
De Silva, F
Devon County Council's Trading Standards Service
Director of Service Prosecutions (Bruce Houlder QC) <sup>23</sup>
Dwyer, Dr Deirdre (Faculty of Law, Oxford; Barrister of Lincoln's inn)
Edmond, Dr Gary (Faculty of Law, University of New South Wales)
Edwards, Anthony (Solicitor, TV Edwards) <sup>4</sup>
Emery, Richard (4Keys International)
Essex, The Hon. Theodore (Admin Law Judge, US International Trade Commission)
Expert Witness Institute
Everett, R (Online forum only)
Evett, Dr Ian Webber (Scientist; Member, Forensic Science Service)
Forensic Access Ltd
The Forensic Institute <sup>5</sup>
Forensic Science Regulator (Andrew Rennison)
Forensic Science Service
Forensic Science Society
General Medical Council
Gilbart QC, HHJ Andrew (Honorary Recorder of Manchester)
Gilson, C (Visiting Fellow, Dept of Advanced Legal Studies, University of Westminster)
Gross, Mr Justice Peter
Hand, Prof David (Professor of Statistics, Imperial College London and President of the Royal Statistical Society, writing in a personal capacity)
Hemming, John A

<sup>2</sup> Response submitted at the request of the Ministry of Defence and on behalf of the independent Service Prosecuting Authority.

<sup>3</sup> Mr Houlder QC also provided a response in response to the mini-consultation on court-appointed expert evidence.

<sup>4</sup> Mr Edwards also provided a response in response to the mini-consultation on court-appointed expert evidence.

<sup>5</sup> A private firm in Glasgow with a staff of four and an international network of experts, "normally instructed by the defence".

Hoyano, L (Fellow & Tutor in Law, Oxford)
Innis, M (Scientist)
Justices' Clerks' Society
Law Reform Committee of the Bar Council
Law Society
Legal Services Commission
London Criminal Courts Solicitors' Association
LGC Forensics
Lucy, Dr David (Department of Mathematics & Statistics, Lancaster University)
Malone, C (Stephensons Solicitors)
Margot, P (Professor of Forensic Science in the School of Criminal Justice; Vice-Dean of the Faculty of Law and Criminal Justice, University of Lausanne, Switzerland)
Medical Defence Union
Mellor, Penny (Campaigner – Dare to Care)
Moles, Dr Bob (Networked Knowledge)
Morrison, Dr Geoffrey (Research Associate, School of Language Studies, Australian National University; Visiting Fellow, University of New South Wales)
Murray, Dr David (Professionals Against Child Abuse [PACA])
O'Brian, W Jr (Association Professor of Law, University of Warwick)
Office of Criminal Justice Reform (Better Trials Unit)
Old Bailey Judges
Park, M (Centre for Spatial Data Infrastructures and Land Administration, University of Melbourne)
Phillips, Simon (Barrister, Park Court Chambers)
Police Superintendents' Association
Pugh, G (Director of Forensic Services, Metropolitan Police)
Ranson, D (Deputy Director, Victorian Institute of Forensic Medicine; Honorary Clin. Assoc. Professor, Department of Forensic Medicine, Monash University, Australia)
Redhead, S (Partner, R&M Chartered Accountants – Forensic Experts)

Redmayne, Prof M (London School of Economics)
Rees QC, Edward <sup>6</sup>
Rose Committee – Senior Judiciary
Rix, Dr Keith JB (Consultant Forensic Psychiatrist)
Roberts, Associate Prof Andrew (University of Warwick)
Roberts QC, HHJ Jeremy <sup>7</sup>
Roberts, Prof Paul (Professor of Criminal Jurisprudence, University of Nottingham)
Rose, Dr Phil (Associate Professor in Phonetics and Chinese Linguistics; Forensic Phonetics Consultant, Australian National University)
Royal College of Paediatrics and Child Health
Royal College of Psychiatrists
Royal College of Veterinary Surgeons
Royal Society for the Prevention of Cruelty to Animals (RSPCA)
Royal Statistical Society (Prepared by Prof C Aitken, Chairman, Statistics and Law Working Group)
Sallavaci, O (Part-time lecturer, Middlesex University)
Samuels, Alec (Barrister)
Society of Expert Witnesses
Skills for Justice
Thursfield, Geoffrey
Treacy, HHJ
UK Accreditation Service
UK Forensic Speech Science Community
UK Register of Expert Witnesses <sup>8</sup>
Walters, Dr G (Consultant Chemical Pathologist – retired)
Ward, T (Reader in Law, University of Hull) (Online forum only)

<sup>6</sup> Mr Rees QC provided a response in response to the mini-consultation on court-appointed expert evidence.

<sup>7</sup> Judge Roberts QC provided a response in response to the mini-consultation on court-appointed expert evidence.

<sup>8</sup> Their response is based on contributions from expert witnesses in the Register, following an internal consultation. The Register holds details on (vetted) experts from a wide range of disciplines.

Weiat, Dr Matthew (Reader in Socio-Legal Studies, Birkbeck College, University of London)
Weston, Susan (Mother-in-law of a woman she said was wrongly convicted of shaking and killing a baby)
Wilson, A (Senior Lecturer in Law, Sheffield Hallam University)
Wilson, Dr Ian
Vernon, Prof Wesley
One consultee wished to remain anonymous

# SHORT SUMMARY OF RESPONSES

## **A statutory reliability test**

- 1.2 The first question posed in the CP was whether or not there should be a statutory reliability test for the admissibility of expert evidence along the lines set out in paragraph 6.10 of the CP.
- 1.3 There was broad support for a reliability test amongst our consultees, including bodies such as the Rose Committee of the Senior Judiciary, the Criminal Bar Association, the Law Society, the Bar Law Reform Committee, the Crown Prosecution Service, the Criminal Cases Review Commission and the General Medical Council.
- 1.4 It was generally felt that a statutory test of this sort would encourage a more considered approach to expert evidence therefore bringing a measure of quality control to proceedings, although it's fair to say that concerns were also raised as to the potential costs and time implications of any such reform. And, despite the broad support for our proposed test, some consultees queried whether it would have prevented the recent miscarriages of justice had it been in force.
- 1.5 Some consultees were also concerned about the possibility of an admissibility investigation being conducted whenever expert evidence was proffered for admission (and some did not support our proposal for this reason).
- 1.6 However, the main reason given by consultees who did not support the proposed reform was that the current rules are adequate, so long as they are properly enforced. Some bodies connected with forensic science favoured a more "grass roots" approach, with better quality control in forensic laboratories. For example, LCG Forensics suggested greater involvement from scientists within existing or developing structures. In addition, the Forensic Science Service expressed concern that a fundamentally sound technique could be ruled inadmissible under our proposed test.

## **Guidelines for trial judges – scientific evidence**

- 1.7 The second question we posed was whether trial judges should be provided with guidelines for determining the evidentiary reliability of scientific (or purportedly scientific) expert evidence. Responses to this question were also broadly supportive, although a number of consultees were opposed to our suggestion that there should be different guidelines for scientific and experience-based evidence.
- 1.8 A recurring view was that the guidelines must be flexible and not too prescriptive; and the feedback we received from the judiciary was that there should be an element of judicial discretion built into the guidelines (and, indeed, into the application of the test itself). There were mixed views as to where the guidelines should be set out. The view of the Better Trials Unit (Ministry of Justice) was that general guidelines of the sort we proposed could be set out in primary legislation and, indeed, that it would be unusual to set out such matters in secondary legislation.

- 1.9 There were mixed views on some of the factors included within our guidelines (for example, on the value of peer-reviewed publications and specialised literature without reference to the quality of such publications). Understandably, several consultees opposed any reference to subjective matters relating to the expert witness him or herself (such as qualifications, experience and standing).

#### **Guidelines for trial judges – experience-based evidence**

- 1.10 In our CP we also asked whether there should be guidelines for experience-based (non-scientific) expert evidence.
- 1.11 There was general agreement in favour of testing expert evidence of this sort and guidelines. However, as mentioned above, a number of consultees favoured a single set of guidelines. The principal reasons given were, first, the desirability of reducing the potential for argument as to the nature of the expert evidence in question and, secondly, the desirability of simplicity, given that the two sets of proposed guidelines were broadly similar. That said, some consultees favoured the dichotomy.

#### **Demonstrating reliability**

- 1.12 In our CP we asked for comments on whether the party proposing to adduce expert evidence, whether the prosecution or the accused, should have to demonstrate that it is sufficiently reliable to be placed before the jury.
- 1.13 There was very broad support for this proposition and the desirability of having the same test for the prosecution and the defence. Nevertheless, some consultees noted, quite rightly, that the party's purpose in tendering the evidence will determine the necessary standard of reliability; and concern was also expressed about the disparity in resources as between the prosecution and the defence.

#### **Other factors governing admissibility**

- 1.14 In our CP we also asked whether the other aspects of the common law admissibility test for expert evidence were satisfactory and, if so, whether or not the test should be codified. There was very broad agreement with our view that the rest of the common law test is satisfactory. Some consultees recognised, in line with our view in the CP, that, while the test itself is satisfactory, there may be problems in its application.
- 1.15 There was also broad support for codification, the suggestion being that codification would bring certainty, stability, and uniformity. The Criminal Bar Association, the Forensic Science Society, the Justices' Clerks' Society, the Bar Law Reform Committee, the Crown Prosecution Service, the Criminal Cases Review Commission and the Police Superintendents' Association are some of the bodies who felt that the common law test as a whole should also be set out in primary legislation. Although the Rose Committee of the Senior Judiciary felt that codification was not necessary, they agree that it "might help to codify all rules in primary legislation so as to provide the trial judge with a framework, or reference point, for his [or her] determination of the issue of admissibility." However, the Criminal Sub-Committee of the Council of HM Circuit Judges could see no reason for supporting codification.

### **Independent assessor**

- 1.16 We also sought views on whether or not trial judges should (in exceptional cases) be entitled to call upon an independent expert “assessor” to help him or her apply the proposed reliability test for expert scientific evidence.
- 1.17 There was broad agreement in favour of this idea although there was some opposition to this on the ground that an expert witness should be capable of explaining his or her techniques in a way that can be understood by judges and laypersons.
- 1.18 Other consultees made reference to problems such as selection, cost, transparency and the danger that the assessor (rather than the judge) might determine the question of admissibility. With regard to selection, the Criminal Bar Association suggested setting up an appointments panel with representatives from the Law Society and Bar Council. Some consultees emphasised the need to ensure that parties would be able to challenge the assessor’s opinion.

# DETAILED OVERVIEW

## General points made by consultees

- 1.19 **Andrew Campbell-Tiech QC** criticises the present test on the ground that expert evidence is admissible unless “manifestly bogus” and therefore its reliability is a question of fact for the jury. Suggests that in many cases medical or scientific evidence is treated as evidence of the offence and that there is a culture of acceptance of medical expert evidence that must change. He suggests we need judges who approach expert evidence with engaged enquiry (including in the Family Division where inadequately challenged medical evidence can be tendered<sup>1</sup>). He stresses that the less prescriptive the rules, the better the chance of the exercise of proper judgment in their application.
- 1.20 **Dr Gary Edmond** submitted a number of academic articles, but no response as such.
- 1.21 **HHJ Peter Gross QC** explains that his usual practice is to refuse leave to call expert evidence (where there is a clash) until the experts have met and summarised their principal points of disagreement in a Note for the Court, an approach which he finds “most helpful” in reducing the issues disputed between experts.
- 1.22 **HHJ Andrew Gilbert QC** supports the proposals. He says that he is often struck at the quality of some scientific evidence in criminal trials and how ill-equipped advocates can be to challenge it when they have no experts of their own to advise them.

<sup>1</sup> John Hemming MP also wrote in to express concern that we do not address the reliability of expert evidence in the Family Division. And, according to consultee John Batt (consultant, Batt Broadbent Solicitors) “maybe thousands of children’s lives [have been] damaged by being taken into care from loving families who never harmed them”. The same issue was mentioned by the Bar Law Reform Committee, asking us to consider this dichotomy, and by Northumbria University School of Law’s Centre for Criminal and Civil Evidence and Procedure, suggesting that any proposed reforms should apply to criminal and civil proceedings. Similarly, the Expert Witness Institute said they would like to see these changes also introduced in the civil and family courts in due course.

- 1.23 **John Batt** suggests that a case should not go to the jury if it simply comprises the “uncorroborated evidence of experts”;<sup>2</sup> suggests that if there is doubt as to whether an injury was caused deliberately, the judge should always warn the jury that any expert opinion may be “right but it may be completely wrong”. He proposes that a judge should, when directing the jury, explain amongst other things that medical science is an evolving process and should give examples of discredited theories which have resulted in miscarriages of justice (such as the rule of three, Shaken Baby Syndrome, and Munchausen’s by Proxy), and should explain that the absence of a defence expert to contradict the prosecution’s expert should not be taken as proof that the prosecution’s expert is right; and that the jury should not assume that the last person holding a deceased child caused the child’s death.<sup>3</sup> He suggests that if the prosecution case depends on medical evidence, the prosecution should have to employ an independent medical researcher to review the medical evidence.<sup>4</sup>
- 1.24 **Hon Theodore R Essex** points out that it should have been obvious that the statistical evidence was outside Roy Meadow’s expertise as an expert paediatrician. He suggests that areas of expertise should be carefully specified to ensure the expert’s proper remit is known.
- 1.25 **Susan Weston** suggests a tribunal of 3 or more judges who are highly trained in scientific methodology, and having read all relevant literature and research findings, should be appointed to investigate assumptions that underlie expert opinions which are frequently relied on in certain types of trial, but without ruling on specific cases. She suggests that someone other than the jury should determine whether the basis of an expert opinion is reliable, lightening the burden for individual judges, in order that they could focus on the case-specific aspects of reliability. She supports a *Daubert*-type approach over *Frye*-type approach to ensure objectivity, on the basis that experts in favour or against a particular proposition (like Shaken Baby Syndrome) tend to become partial, although she thinks the *Daubert* approach is too onerous a burden for trial judges considering the workload of the judiciary generally and their trial and other commitments.

<sup>2</sup> The same point is made by Frank De Silva.

<sup>3</sup> Similar point made by Susan Weston (mother-in-law of a woman she says was wrongly convicted of shaking and killing a baby).

<sup>4</sup> A similar point is made by Penny Mellor who describes herself as “a campaigner against false allegations”. She said “all attendant medical personnel must only ever be called as witnesses of fact and ‘experts’ must be drawn from health authorities other than those where the child died”.

- 1.26 **Andrew Roberts** suggests the case for reform is more compelling than is made out in the CP. He believes our proposals are a welcome attempt to resolve some inadequacies in the law relating to the admissibility of expert evidence. He suggests our proposals would mean heavy cost implications for training judges in scientific methodology because it would mean a loss of court time. He criticises our proposals for not including a definition of scientific evidence which would direct the judge to the relevant guidelines in our proposals. He argues that there is a degree of circularity in asking the judge to determine whether proffered evidence is scientific and then to apply guidelines to determine whether it is in fact scientifically valid. He suggests a consolidated list of criteria for expert evidence to avoid definitional and categorisation problems and to leave trial judges to apply the criteria relevant to evaluating the expert evidence in the specific case. He concludes by saying that in order to provide a “satisfactory attempt” at addressing the risk of miscarriages of justice caused by unreliable expert evidence, it may be necessary to look beyond admissibility. He suggests that the factors referred to in the guidelines could be incorporated into experts reports so that, following mutual disclosure, it could be required that each expert comments in writing upon the methodology and reasoning of other experts and for these comments to be given to the judge.
- 1.27 **Steve Redhead** supports a *Daubert*-approach for scientific evidence, although he does not think the requirement to disclose the report pre-trial is good. This is based on previous experience: he has previously not had to disclose his report and it has on a number of occasions been used during cross-examination and this has “destroyed the prosecution case”. He believes that we should not accept majority verdicts based on expert evidence.
- 1.28 **Laura Hoyano** “fully endorses” our proposals. She believes a more systematic and analytical approach should be taken to the admissibility of expert evidence and she feels it would be better to have the test and guidelines in a statutory instrument or practice direction in order to make it easier to amend them after experience. She recommends the Goudge Report (Ontario) and cites eight points that this report thought trial judges should particularly bear in mind: (1) whether the substance of the opinion and the language in which it is expressed are susceptible to varied meanings; (2) whether the level of confidence expressed by the expert is accurately expressed; (3) whether the opinion addresses other explanations; (4) whether the opinion is an area of controversy within the expert community; (5) whether the opinion falls inside the expert’s area of expertise; (6) the extent to which the expert’s opinion is based on other information from outside expert’s sphere of expertise; (7) the extent to which the expert’s opinion is based on other expert opinions; and (8) whether the expert’s opinion includes the facts and reasoning process relied on to form the opinion.

- 1.29 **Alec Samuels** believes that the CP “is not very persuasive”, that “ad hoc piecemeal reform or change is an unsatisfactory approach”. He believes that in the miscarriage of justice cases, it is “unhelpful and unconstructive simply to blame the experts” because a number of failings can contribute to a miscarriage of justice (including failings by the police, lawyers, judges, and possibly the juries along with inadequate public funding for defence experts and the fact that good experts may be reluctant to become witnesses in criminal proceedings). He feels there may be a case for arguing that in serious complicated cases, which turn on expert evidence, the judge should be able to require a minimum educational attainment for membership of the jury. He thinks the risk associated with our proposals is that it would favour the traditional conventional majority view of methodology and reasoning, and this would mean the expert professing a new or innovative minority view would be rejected and rendered inadmissible.
- 1.30 **Dr Ian Webber Evett** stresses the importance of a logical framework when assessing probative value (if any) of expert’s evidence.
- 1.31 **Simon Phillips** thinks Option 4 is the best way forward.
- 1.32 **Richard Emery** gives “broad support” for proposals subject to two points (addressed below).
- 1.33 **Dr David Murray** is critical of our criticism of Professor Meadow and asks the Law Commission instead to focus on the cases of experts providing “imaginative diagnoses” to obtain an acquittal.
- 1.34 **Dr Malcolm Park** makes the point that quality and standing of the journal are important in peer review where a paper has been published. He also expresses concern about the inability of (some) expert witnesses to concede the possibility of error; and the desirability of being accredited by a relevant professional body rather than a general society of expert witnesses.

1.35 **Professor Paul Roberts** broadly endorses the underlying proposal for reform – a validity-based test for determining admissibility of expert evidence – as “fundamentally sound”. He is critical of the detail, preferring rule 702 of the US Federal Rules of Evidence. He feels we need to justify the Law Commission’s assertion that expert evidence should be inadmissible if it is insufficiently reliable to be considered.<sup>5</sup> He also queries the Law Commission’s reliance on *Platt* (1981) because an expert’s conclusions only have to be proved beyond reasonable doubt where the expert provides the only item of evidence capable of providing some essential element in the prosecution’s case.<sup>6</sup> Professor Roberts is critical of two sets of guidelines as incoherent and warns that it would create disputes as to the meaning of science. He describes the distinction between parts of the proposed admissibility ruling being subject to appeal reversal and other parts governed by the *Wednesbury* test as “undiscriminating, unnecessarily elaborate and lacking in transparency”. He thinks all we need is a generic criterion of validity specified in primary legislation, which would be reinforced by detailed, non-statutory guidance in judicial bench books and training programmes. He thinks this could be modified in the light of experience and updated to keep pace with scientific and technical developments.

1.36 **Dr Robert Moles** agrees that there should be a pre-trial investigation of relevance and reliability by the court, which preferably should be *inquisitorial* in nature. He thinks the focus should be the adequacy of the scientific principles involved and whether they are capable of producing reliable conclusions. He suggests that the report produced from the hearing should be published on-line before trial for comments. He adds, however, that there may need to be better compliance with existing rules before new rules are introduced. He is concerned about peer-review as a factor showing reliability because “seniority within any jurisdictional setting can bring with it demands for conformity and deference” but he points out that seniority and standing is no guarantee of reliability, citing Meadows and Smith (Ontario). According to his research, Dr Moles says courts are admitting unreliable expert evidence in many jurisdictions and that the unreliability has not been demonstrated by peer-review.

<sup>5</sup> He says “the essential point is that there are certain types of evidence ... which are deemed so inherently evidentially weak that the jury should not even be invited to” consider it: “the fear is that a jury might convict the accused even where, professionally and objectively considered, the evidence is too weak to sustain the *legitimacy* of such a verdict” (emphasis added).

<sup>6</sup> Hon Mr Justice Treacy also disagrees with our mention of *Platt* [1981] *Criminal Law Review* 332 as authority for the proposition in our paragraph 6.62. Professor Mike Redmayne (LSE) says *Platt* is “plain wrong”

- 1.37 **Northumbria University School of Law's Centre for Criminal and Civil Evidence and Procedure** agree that there is a need for a statutory test to determine the admissibility of expert evidence although they feel that what would really assist the reliability of such evidence (and would be more cost-effective) is better training and/or an appropriate system of expert accreditation and/or determining the competence of expert witnesses. They suggest such developments should be instead of or in tandem with our proposals. In addition, the Centre notes that the efficacy of our proposals would still depend to some extent upon the ability of counsel opposing the admission of expert evidence and the experts who are advising them to identify flaws in expert evidence tendered by the opposing party. They suggest that any reforms should also apply to civil proceedings. They suggest including an obligations in the Criminal Procedure Rules on all experts to include in their reports adverse findings concerning their competence or credibility (in line with the Crown Prosecution Service booklet disclosure: Experts' Evidence and Unused Material at p 18.)<sup>7</sup> The Centre suggests the reports should be served in time to allow opposing parties to investigate the reliability of expert evidence. They are concerned that some aspects of our guidelines merge issues of competence with reliability and hope that pre-trial hearings on admissibility would be the exception rather than the norm in order to avoid delay, expense and inconvenience; and suggest that the test should be restricted to cases in which reliability is contested.
- 1.38 **Dr David Lucy** finds it odd that we do not address "statistically based evidence evaluation methods" and suggests, as an alternative to our proposals, "a more formal framework for the inclusion of modern statistical evidence evaluation methods" such as "likelihood ration methods in cases where such a measure of evidential strength may be calculated".
- 1.39 **Dr Keith JB Rix** supports the preferred option arguing that the medical profession and, particularly, the psychiatric profession, should rise to the challenge and ensure that the evidence given by practitioners satisfies the same test as required for other scientific evidence. He emphasises the importance of psychiatrists being able to demonstrate *how* they came to their opinion. He also points out that the technique that is so often the basis of an expert psychiatrist's evidence is diagnosis, an age-old tradition of a doctor listening to his or her patients, examining them, perhaps with investigations, and then making a diagnosis (rather than because there is a body of research that has established the validity of the technique. He explains that it would be challenging to set out the "known or potential rate of error" when determining the likelihood of a particular eventuality (eg that D will re-offend) but that evidence that the witness has been trained and attended refresher courses might reassure the court to some extent. He accepts that some areas of psychology may be held not to be scientific.

<sup>7</sup> This asks the expert to disclose if he or she is aware of "any adverse by a judge, magistrate or coroner about [his / her] professional competence or credibility as a witness". The expert also has to disclose convictions / cautions, ongoing proceedings / investigations, adverse findings by a professional or regulatory body.

- 1.40 **Professor Tim David** takes issue with paragraphs 2.24 and footnote 31 of the CP on the basis that the Dr Donohoe we refer to is a GP and not a specialist. Professor David explains that the basis for the diagnosis of child abuse in non-accidental head injuries cases is based on weighing up the explanation provided by the accused against the observed injuries and that it is therefore not right to say the prosecution were unable (until *Harris*) to rely on nothing more than an expert diagnosis based on the triad to secure convictions: it is the implausibility of the account offered by the carer that is the key ingredient.
- 1.41 **Professor David Hand** says we must distinguish between “a body of knowledge” and a “body of empirical data on which the knowledge is based” and stresses the need for a proper body of empirical data for the life sciences, social sciences, behavioural sciences and natural sciences.
- 1.42 **Dr Geoffrey Morrison** agrees generally with the proposals but says there must be reference to the “measurement of the reliability of forensic analysis systems which compare the quantifiable properties of samples of known and questioned origin”, particularly the “likelihood-ratio framework”.
- 1.43 **Dr Cedric Gilson** would prefer guidelines solely in the form of training for the judiciary on the philosophy and sociology of science, on the basis that it would be unduly arduous for judges to have to learn science. Nevertheless, he accepts that examination of expert evidence against our guidelines would be beneficial if it were possible. He suggests that gatekeeper functions and rules of evidence would decrease pragmatism, flexibility and judicial discretion even though it could protect the jury from misleading evidence in certain cases but he also suggests that flexibility and pragmatism and judicial discretion “frequently are effective in eliciting the truth” and argues that the laissez-faire approach is not necessarily bad provided that the court is not misled and provided the judge is capable of distinguishing reliable from unreliable evidence. He also accepts that where evidence is dubious, the law should act cautiously by tending to resort to inaction where irrevocable harm might result from an incorrect decision. He supports a revised Option 3 – a panel of experts to advise the judge with the decision on admissibility being for the judge alone. Dr Gilson believes there is a need to remind witnesses of their duty to the court.
- 1.44 **Forensic Access Ltd** are fully supportive of the aims of the Law Commission and in tangent those of the Forensic Regulator’s vision for expert evidence. They wish to prevent the “hired gun” expert from giving evidence because they can cloud issues and confuse the jury. They do not believe our proposals address this area.

- 1.45 **The British Psychological Society** accept the “value” of a number of the Law Commission’s proposals but do not agree that they will necessarily address all the issues. They suggest that the proposals, if law, would not have prevented the miscarriages of justice referred to in the CP. They emphasise the need during trial to ensure that experts stay within their field of expertise when testifying but do not think our proposals would have prevented experts from doing this in the cases we mention. They say that the Law Commission’s preferred opinion of a gate-keeping role for judges is commendable in principle but they suggest may be difficult to achieve in practice on the basis that the Law Commission has underestimated the time and learning involved for judges and court personnel to acquire the knowledge to make informed decisions on the evidential value of the diverse range of reports provided by experts.
- 1.46 **Andrew Rennison (Forensic Science Regulator):** agrees with the proposals and impact assessment (subject to some points). He thinks the key point is that the test for the admissibility of expert evidence should include both the validity of the science behind the field and an assessment of whether the witness is an expert in the field and therefore qualified to give an opinion. Mr Rennison would like the Law Commission to stress that his remit encompasses forensic science only, and that his proposed accreditation model will not cover other expert witnesses. He adds that medicine and the “soft sciences” (which he says includes psychology) are not currently within the FSR’s remit and will not be within his proposed quality standards framework. With regard to ensuring the validity of forensic science techniques, the FSR explains that his proposed “standards framework ... will include third party assessment of the validation of methods”.
- 1.47 **The Medical Defence Union** accept the need for high quality expert evidence in criminal proceedings although they argue that the CP has not been able to substantiate the case for reform with any “hard data”. They therefore argue that it is premature to make the assumption that the benefits of the proposed changes outweigh the sizeable costs of introducing such changes. They say there needs to be “a more robust argument ... for making changes that would incur such cost increases, and that such an argument needs to be backed by hard data”.
- 1.48 **Association of Forensic Science Providers** believe the proposals effectively complement their own Standards for Expert Evidence based upon the principles of balance, logic, robustness and transparency. They recognise that cross-examination is not necessarily an effective tool for presenting forensic expert opinion evidence to juries and that scientific expert evidence can have a disproportionate effect on jurors. They also believe that forensic experts must provide evidence that is balanced in that they consider the prosecution and the defence propositions; they suggest that the alternative propositions should be made apparent to the expert to give the expert sufficient notice of the alternative propositions for proper consideration and evaluation.
- 1.49 **UK Forensic Speech Science Community (a collective response)** are broadly in agreement with the proposals save that they think dichotomy between scientific and experience-based expert evidence is a false one.

- 1.50 **Hon Mr Justice Treacy** believes the current proposal is worthwhile in terms of encouraging the judiciary, practitioners and experts in their scrutiny of expert evidence. He also believes it will encourage a uniform approach which should lead to greater focus on the underlying merit of expert evidence to be tendered, as opposed to the current practice which tends towards leaving it to the trial process to sort out, particularly leaving the jury to sort out good evidence from bad evidence. He is firmly opposed to option 3 believing that it would take the decision-making power away from the judge and ossify the law's acceptance of advances in techniques or hard science. He supports option 4 but does not think there should be separate guidelines because it is foreseeable that it would lead to argument about which category certain evidence would fall into, particularly as witnesses might give evidence that could be analysed as falling into both categories. On this basis, he suggests a single body of guidelines with all factors listed from which the judge would select the relevant factors plus any other relevant factors. He also suggests an express power reserved to the judge to raise the issue of reliability if it is not raised by a party when it should be raised.
- 1.51 **Adam Wilson** is not supportive of the proposals. He believes the argument made in the CP in support of the *Daubert*-type test do not have enough evidence to be persuasive and he does not believe there is enough evidence as to the workability of the proposals. He believes there should be a more prescriptive approach. He says the Law Commission's proposals are modest and there is no guidance as to when the guidelines will need to be applied and when they might be disregarded; and it is not feasible to apportion weight to each criterion in the guidelines meaning that the exercise in considering the guidelines becomes "artificial".
- 1.52 He believes there are theoretical and practical limitations to the proposals which make them "superfluous". He believes the rationale of falsifiability is theoretically difficult and lacks sufficient evidence for it to be justified at the practical level. He suggests that the trial judge may make an instinctive decision in favour of admissibility (for example, because the expert is a professor at a reputable university) and then interpret and weigh the various criteria "in such manner as to justify admission", so that the criteria "do not become safeguards against admission but, rather, simply become an intellectual exercise a judge must perform to justify the decision they have made".
- 1.53 Mr Wilson refers to the assumption that fingerprints are unique and suggests that the court would simply start with the premise that such evidence should be admitted and then "reverse engineer the reasons for admission", thereby there being little scrutiny of such evidence. He expresses concerns as to the size of an appropriate database to justify admissibility for different types of evidence and believes that clearer guidance is needed on such matters to ensure a consistent approach across the judiciary.

- 1.54 Moreover, he believes that the degree of objectivity required, and subjectivity tolerated, needs to be clarified to be helpful and wonders if, because much expert evidence is insufficiently based in objectivity and because the courts will not want to exclude expert evidence in large amounts, the criteria in the guidelines will become diluted. He also expresses concern that we provide no evidence to suggest that judges would perform the task of assessing the question of peer review well and that, given the vast range of different medical disciplines which could be called upon in a particular case, it is unlikely that a trial judge would be able to assess in any detail the reliability of the various types of scientific evidence and the question of peer review in relation to each. He fears that the courts may be more willing to take judicial notice of the reliability of evidence presented by large laboratories (eg Home Office pathologists) whereas less well known experts may bear the brunt of sustained analysis of methodology. He suggests that written submissions should be produced in support of methodology to reduce the financial drain of senior scientists having repeatedly to testify as to methodology.
- 1.55 He doubts whether judges will be able to apply the sort of test we propose in practice and that training would be ineffective given the sheer complexity of science and the range of disciplines, arguing that our opinion that training would allow judges to apply the test is not supported by any evidence. His alternative is that there should be a “working party, with cross-discipline membership” which could analyse forensic scientific disciplines to determine both admissibility and codes of good practice. He feels that such specialist working parties may prove to be far more useful than the judges and cheaper too in the long term (citing the FSR as an example). He hopes “that, if the Commission’s proposals are implemented, recourse is not simply made to these guidelines but, rather, specialist bodies continue to review forensic testimony and propose improvements and good practice”. He also favours: (1) improving methods of presenting expert testimony; (2) training experts to identify articles which support / undermine their propositions; (3) a facility for checking qualifications to exclude charlatans; and (4) audits of laboratories by a team of independent specialists (above).
- 1.56 **Gary Pugh (Director of Forensic Services, Metropolitan Police)** stresses that the provision of valid, reliable expert opinion in criminal cases is the product of “competence, culture and process”. He says it is a significant strength of expert opinion evidence in the UK, particular in relation to fingerprints and DNA profiling, that the organisation as well as the individual is critical to delivering valid and reliable expert evidence. He suggests that the proposals do not seem to recognise the importance of organisational structures as well as individual contribution.
- 1.57 **Forensic Science Service:** do not support the proposed new approach.
- 1.58 **Director of Service Prosecutions (Bruce Houlder QC)** gives broad support to the proposals and supports option 4. He can see no reason why the proposals should not also deal with the Court Martial. He thinks consideration should be given to the judge having a more active interventionist role when experts give evidence, given their overriding duty is to the court. He supports guidelines but not statutory guidelines because he believes legislators will become too prescriptive and because the courts are best placed to set criteria and guidelines. He also suggested security clearance for some experts, in advance of need, so that they can be permitted to have access to military databases for the defence.

- 1.59 **BASC (British Association for Shooting and Conservation)** opine that anything that encourages courts to test the reliability of any proposed expert evidence is greatly welcomed. They also say that courts can be undiscerning when accepting policy support staff as experts on firearms, proving a number of cases to support this opinion. They add that RSPB and RSPCA staff are often accepted as experts simply by virtue of their status within these high profile organisations.
- 1.60 **Dr Tim Clayton** focused on the issue of drafting the statutory guidance and set out his own draft legislation.
- 1.61 **The Royal Statistical Society** generally agree with the Law Commission and support option 4 but they suggest that the Law Commission also needs to address hypotheses regarding the interpretation of evidence. The RSS say that at least two propositions need to be considered when evaluating evidence and in the absence of a defence proposition, an alternative could be provided by the evaluator. They also say that the role of probabilistic reasoning in the law is to enhance the procedure for the evaluation of evidence under each of two propositions, that of the prosecution and that of the defence.
- 1.62 The RSS thinks that a vital consideration in the assessment of reliability is that the validation should go to more than just technique: the court (and the scientist before the court) should also assess whether there is sufficient data, knowledge and understanding to assign robust likelihoods to the evidence on the basis of assuming the competing propositions presented. The Society believes that if our proposals lead to more careful review of the scientific foundations and typical error rates of identification evidence, this will be a major benefit the public. The Society agrees with our criticism of the US approach in *GE v Joiner* (fn 21 on p 28 of the CP).
- 1.63 **Dr Phil Rose** fully agrees with our proposals and with the need for reform<sup>8</sup> although he adds that the admissibility test and training must include reference to the “logical framework for assessing the strength of the evidence” for any case where “identification-of-the-source evidence” is proffered (see below, under guidelines for scientific evidence).
- 1.64 **UK Register of Expert Witnesses** broadly welcomes and supports the proposals, believing that they would be workable in practice and that criminal courts should exercise greater control over what expert evidence can be adduced. Indeed, they believe that the adversarial system is not particularly well suited to testing the correctness of an expert opinion. They note, in particular, the apparent unwillingness of juries to accept the uncertainty introduced by different expert opinions and the sense among their expert respondents that cross-examination barristers do not necessarily problem test or challenge expert evidence for its basis in science or experience, but instead adopt the simpler approach of not trying to undermine the expert’s credibility (83% of their respondents felt that a non-expert advocate faced with an expert who is firm in his or her opinion will often try attacking the expert in place of attacking the opinion).

<sup>8</sup> He also fully endorses the views of his research associate at the University, Dr G Morrison.

- 1.65 They think we could go further in our proposals. They accept that expert evidence is a special type of evidence because it, or much of it, is heavily based on opinion and content that it needs special handling if it is to inform rather than mislead particularly in criminal trials which are dominated by expert evidence. They also strongly believe that in cases where the complexity of the expert evidence warrants it, and/or the principle basis of the prosecution case is the expert evidence, the courts should be able to call a pre-trial hearing at which the judge, lawyers and experts would come together to appraise and probe the expert evidence in context and be given time for quiet reflection.<sup>9</sup> They believe careful analysis of complex evidence takes time and often requires the opportunity for quiet and considered reflection which cannot be done at trial.<sup>10</sup> They suggest that the trial judge should be able to stop a trial as intimated in *Cannings* if it becomes dominated overwhelmingly by serious disagreements between eminent experts. They also oppose majority verdicts in cases of this sort.
- 1.66 They believe, however, that while our proposals may have prevented the miscarriages of justice in *Harris*, and would very likely have led to the exclusion of the statistical evidence in *Clark*, they would not have prevented the miscarriages in *Dallagher* or *Cannings*, although this does not alter their support of our proposals. They say a large majority of their respondents felt that they would, with some work, be able to provide the necessary evidence of reliability of their evidence, whether that was scientific, experimental or both.
- 1.67 **Council of HM Circuit Judges (Criminal Sub—Committee)** are broadly supportive of the aim of the proposals but say that it is important not to overstate the number of cases of wrongful conviction that might be avoided by the reforms and also say they would like to see rules in the Criminal Procedure Rules and guidelines set out in a judicial Practice Direction. They agree that the present law requires that the jury “be sure of the reliability of evidence and the conclusions it supports before that is acted upon.”
- 1.68 **The Forensic Institute** provide a positive response, but point out that while there is wide agreement as to the purpose of scientific validation (determining the reliability of results) there is little agreement as to how that reliability is to be measured. They query whether a single test can be applied to all forensic expertise. They “wholeheartedly” agree with our comment (CP paragraph 1.20) that orthodoxy which cannot be shown to be trustworthy should not be admissible and believe that there will be a number of serious challenges to the reliability of much of the orthodoxy such as marks and impression evidence, but they assert that these challenges are unlikely to come from the relevant scientific community but from the wider scientific community. They believe it is only necessary that a challenger has “knowledge of science”, although a knowledge of the specific discipline is advantageous.

<sup>9</sup> The need for time to reflect was also made by an individual respondent on the on-line forum, (apparently Geoffrey Thursfield). Dr Robert Moles (Networked Knowledge) also supports a pre-trial investigation which would be inquisitorial rather than adversarial.

<sup>10</sup> They suggest that the additional costs could be offset by savings which come from a narrowing of the issues, the removal of unreliable evidence and the consequential reduction in appeals and miscarriages.

- 1.69 **Dr Glyn Walters** does not address the specific proposals but seeks to bring the Law Commission's attention to some aspects of his experience dealing with expert medical evidence, although he does state that the proposition that expert evidence should be screened in some way for bias and unreliability is a helpful measure. Also comments that conjecture is important to diagnostic medicine, but it is often the case that pathologists present speculative ideas as though they are established facts. He also suggests that the principle that the onus of proof is on the prosecution is not always rigorously applied because there may be a medical view, adduced by the prosecution, that if it has not been conclusively established that a particular phenomenon may be the result of natural events, then it must be unnatural. He says the defendant will need to find an alternative cause of death, which may be disputed or rejected on the ground that it is nothing more than speculation.
- 1.70 **RSPCA** are broadly in favour of the proposals on judicial assessment of evidentiary reliability and agree that there should be required standards of credibility and reliability. The RSPCA express particular concern about defence experts called in RSPCA prosecutions on the ground that some such expert have, amongst other things, acted outside their specialisation, claimed expertise in widely diverse areas, lacked objectivity, selectively interpreted scientific evidence, and failed to substantiate conclusions. The RSPCA say, however, that a court should only consider the admissibility of an expert's evidence where issues arise as to the quality of that evidence and mechanisms should be in place to prevent applications seeking to challenge admissibility being made which are without merit. They believe that in magistrates' courts the question should be referred to a district judge.
- 1.71 **Criminal Bar Association (CBA)** agree that the way expert evidence in criminal proceedings is currently dealt with has contributed to a number of miscarriages of justice and risks continuing to do so and therefore requires urgent reform. They add that there should be special rules for the admissibility of expert evidence given that it can further or harm the interests of justice.
- 1.72 The CBA supports option 4 and agrees with the Law Commission's answers to the broad categories of criticism of the *Daubert* approach. They say it must be interests of justice to ensure that only expert evidence which has been properly scrutinised and which has confirmed validity goes before the jury and add that there should be specialist training for practitioners, the judiciary and experts and enhanced JSB directions for expert evidence in order to provide additional safeguards by explaining the limits and potential for error. They think this should be the case because, by analogy with the position for visual identification evidence, there are factors which impede an effective and critical examination by jurors of much expert evidence (such as excessive deference towards the witness and a misunderstanding of the limits of science) and because the Court of Appeal has already suggested a particular warning for lip-reading expert evidence. They also believe the Criminal Procedure Rules would need to be amended (in particular, rules as to obtaining "test case" rulings in the Crown Court for new and emerging scientific techniques, to prevent forum shopping by commercial enterprises to gain a momentum of credibility). The CBA suggests that the new reliability test should operate in tandem with existing rules and discretions (eg section 78 of the Police and Criminal Evidence Act 1984 need to be retained in the legislation.)

- 1.73 They add, however, that they do not agree with our comment at paragraph 2.5 about jury deference not necessarily being a bad thing: deference is a negation of the jury's task and inherently dangerous; the jury must be able to reach their own independent judgment on the evidence; it is in the interests of the lawyers and justice to ensure that jurors understand and can assess the merits of the expert evidence; we should avoid complacency in this regard; the collective nature of the jury should overcome problems of individual deference.
- 1.74 The CBA also take issue with the reference to *Platt* [1981] Crim LR 332 arguing that it was said in the context of the specific facts of the case and that "a jury does not have to be sure about anything other than the ultimate issue", accepting of course that the direction is necessary if the prosecution case comprises nothing other than the expert evidence. The CBA also suggest that in sentencing cases the test and guidelines should apply (for example) to probation officers giving a dangerousness assessment.
- 1.75 **Campbell Malone** doubts the reforms suggested, if implemented, would have solved the problems we identify in the case law and suggests that the best approach would be for discretionary exclusion with guidance in the form of judicial training. He believes, however, that our proposed guidelines are helpful and that any decision to exclude or admit expert evidence should be a legal ruling with a right of appeal. He also suggests that there should be a real commitment to equality of arms, with experts for the defence and prosecution being paid a proper market rate.
- 1.76 **Professor Pierre Margot** supports many of the views and proposals in the CP except that he thinks the legal system in England and Wales may be a problem. He says most forensic scientific evidence that is adduced in criminal proceedings is based on trace evidence tendered to further the prosecution case. He feels the problem with forensic scientific evidence is not methodology as such but the "object of the study" and the fact that interpretation is not based on "well-designed experiments". He says the trace in trace evidence is "usually the result of an action and an interaction between an author and a victim ... and its value is based on 2 assumptions: (a) Locard's exchange principle and (b) Kirk's individuality principle". Key questions are whether the trace actually identifies a person or action (rather than being part of pre- or post-event contamination) and whether the trace actually carries information of sufficient quality to give an indication of source or activity. For this reason, he believes a forensic scientist, as a trace specialist, should be involved as part of the investigation at the scene of crime, co-ordinating with traditional investigators to decide what needs to be analysed and how and then undertake the interpretative function. He says a fundamental flaw in the UK is that a scientist does not collect the traces but the evidence is simply delivered to the scientist who is then asked to interpret evidence with "minimal information" (as to context). He suggests that, because the present approach compels an expert to provide an opinion based on partial knowledge, court-appointed experts involved in the investigation should be used.
- 1.77 **Oriola Sallavacia** welcomes our work and agrees that there should be a new statutory test and statutory guidelines, but suggests that we ought also to look at the other admissibility conditions, such as necessity and competence on the ground that they "are not satisfactorily settled" and they "present problems when applied in practice" but also raised concerns about the potential that application of the test in practice would make trials longer and more disruptive.

- 1.78 **Dr Dwyer** does not believe there should be any special rule for ad hoc expert evidence over and above the rules for evidence generally, adding that a *Daubert*-type screening process would usurp the jury's role, particularly as judges might be no better than juries when it comes to evaluating reliability. Also refers to the problems the judiciary have experienced in the US in trying to apply *Daubert*, suggesting there is broad academic consensus [in the US] that *Daubert* poorly serves the needs of the US criminal justice system. Dr Dwyer also feels that the Law Commission needs to unpack what is meant by unreliability. She suggests there are no clear English cases where a miscarriage would have been avoided if our proposed approach had been in place but nevertheless feels that if the Law Commission were to go forward with our approach, we should have as flexible as possible an approach, leaving as much as possible to the discretion and common sense of the judge. She believes this should be complemented by training of the judiciary and counsel to identify potentially weak expert evidence. She thinks that if the Law Commission were to continue with the favoured option, the test (paragraph 6.10) is "well thought out, and a marked improvement on the wording in *Daubert*". She also believes the guidelines in CP paragraphs 6.26 and 6.35 are "similarly well thought out" but they may unduly prescriptive and suggests that the distinction between scientific and experience-based evidence may not be clear cut.
- 1.79 **Professor Redmayne** opines that the present position is unsatisfactory and thinks the Law Commission is heading in the right direction. He supports something similar to a *Daubert* test but acknowledges that the difficulty is putting it into legislation. He thinks the Law Commission has made a good attempt. He thinks, however, that the Law Commission has over-played the extent to which the *Bonython* test is part of the law and he is not keen on the comment regarding sufficient reliability as it suggests that a reasonable degree of reliability is needed. He thinks the key issue is not falsification but whether the evidence has been tested. He thinks CP paragraph 6.49 should be in the legislation, that is, the judge should exclude expert evidence of questionable validity if demonstrably valid evidence (through testing) could reasonably have been tendered instead.
- 1.80 **The London Criminal Court Solicitors' Association** accept that the present system sometimes allows unreliable expert evidence to be adduced, even though it has an effect on the fact-finding tribunal like no other evidence. The Association states that it is the interests of justice that only expert evidence that has been properly scrutinised and validated goes before the jury and they accept that there should be some sort of statutory admissibility test but are concerned by the fact that a hearing on admissibility could be lengthy and complex and a change in plea after such a hearing might mean the defendant receives less credit for it. They also think the hearings will require extra work and believe that consideration should be given to providing extra funding under the graduated fee scheme. They think the Law Commission should express in its report a commitment to equality of arms and that defence experts should be paid a proper market rate.
- 1.81 **LGC Forensics** believe that the courts would benefit from more general help from the scientific community as to competence and as to whether techniques are reliable, and if so, to what extent, and whether they have been properly applied and the conclusions drawn are justifiable and balanced. They say this is the focus of the FSR. They do not think lawyers and judges are likely to attain the necessary depth of understanding and knowledge to be able to appreciate all the subtleties in science.

- 1.82 They say the best way forward might be a mixture of some of the new proposals and the existing structures to accredit and validate scientists and their work and that the best approach to ensure the reliability and validity of scientific expert evidence would be to incorporate the requirements of a number of existing individual quality standards. They say there is a perception that where a jury is faced with disputing experts, the jury will tend to ignore the disputed scientific evidence and decide the case on the basis of other evidence, suggesting that strong prosecution scientific evidence may be thrown into doubt and then disregarded by the defence being able to adduce expert evidence which is not mainstream.
- 1.83 **Justices' Clerks' Society** agrees with the case stated for change, agrees with the proposals made and supports them. Notes our point that the issues will arise most often in relation to jury trials.
- 1.84 **Forensic Science Society** supports the view that expert evidence ought to be screened and if it is found to be unreliable, should not be put before a jury. They support option 4.
- 1.85 **Dr Weait** brings to our attention problems with phylogenetic analysis evidence used in cases where D is charged with intentionally or recklessly transmitting an infectious sexual disease to another. His particular concern is that people may be charged with and plead guilty to allegations based on such evidence when the evidence cannot and does not prove the *actus reus* of the offence charged but they were misled into believing that it can (and does). He also says that in cases where scientific evidence is used to prove D committed the *actus reus* of the offence, the court should not be able to accept a guilty plea without cross-examining the prosecution expert and the judge should in all cases direct the jury on the "generally accepted limitations of the probative value of the expert evidence."
- 1.86 **General Medical Council** support the greater transparency the proposed statutory test would bring. They believe this test and the statutory guidelines, the risk of unreliable evidence being placed before the jury would less because the proposed test would tighten the criteria for admissibility and clarify the powers of the court. They also welcome the suggestion that judge should have a more proactive role in scrutinising and assessing the reliability of expert medical evidence, saying that the scientific basis of medical opinion should not render it immune to challenge. They say it is because expert evidence tends to be given a special status that there should be a robust assessment of its admissibility. They also say the more significant the evidence is to the issues, the greater the scrutiny should be.
- 1.87 **Society of Expert Witnesses** agree that reform is needed; approve our proposed test and guidelines and agree that it would be wrong to adopt a *Frye*-type test.
- 1.88 **Royal College of Veterinary Surgeons** raise the issue that when vets are called as professional witnesses, they are sometimes asked questions which should be asked of expert witnesses. They ask whether there should be some guard against expert witnesses being drawn into giving expert evidence in order to reduce the risk of procedural impropriety.

- 1.89 **Law Society Criminal Law Committee** share the view that there should be clear guidelines to help the judge determine whether expert evidence is sufficiently reliable to be considered by the jury and prefer judicial assessment to a system in which the courts simply defer to the general view of experts. They believe there should be two sets of guidelines, as proposed and say the non-scientific guidelines would apply to experts including lip-readers, handwriting experts, forensic accountants, literary critics and other ad hoc expert witnesses. They also say that it is important to remember that scientific and experience-based expert evidence are continually developing and it would be necessary to bear this in mind when drafting legislation and guidelines. The Committee also thinks it is important to ensure that an accused on trial for a serious offence is not caught in the midst of a dispute between competing experts in relation to a new form of expertise and that if the prosecution adduces evidence based on a new theory, the defendant should be permitted to adduce contrary evidence in rebuttal.
- 1.90 **Criminal Cases Review Commission (CCRC)** say that allegations based on unreliable expert evidence feature regularly in applications to the CCRC and a number of convictions have been quashed as a result, which brings home the importance of assessing this area of law. They agree in principle that there should be a statutory test for admissibility with clear guidelines but emphasise that the assessment of expert evidence must be an ongoing process and not limited to an assessment of reliability before the jury is sworn. They believe that advocates and judges must be encouraged to scrutinise expert evidence throughout the entire trial in order to ensure the problems associated with expert evidence can be identified and addressed during a case. They CCRC are of the opinion that improved training of those involved (solicitors, counsel and judges) could, by itself, go some way towards reducing the risk of miscarriages of justice as a result of misleading or inaccurate miscarriages of justice. They wonder whether there could be a JSC specimen direction to ensure juries are given appropriate warnings for developing areas of expertise.
- 1.91 **The Law Reform Committee of the Bar** say the present common law approach is “deeply unsatisfactory” and, accordingly, that our consultation exercise is “long overdue”. They agree that there should be an explicit gate-keeping role for the trial judge with a clearly-defined test for determining whether proffered evidence is sufficiently reliable (trustworthy) to be admitted and that the same test should apply to both D and P. They also think that the Law Commission should consider “statutory regulation of the verification or validation of the expert’s qualification to appear as an expert”. They argue that the “narrow issue of admissibility needs to be complemented by: appropriate amendment to the Criminal Procedure Rules; adequate training of legal practitioners; appropriate Judicial Studies Board training for members of the judiciary; [and] awareness of any new legal regime within the forensic expert witness community”.
- 1.92 They also believe that “research into the manner in which jurors deal with expert opinion evidence would usefully inform the development of law reform in this area”, arguing that assumptions about jurors’ abilities to understand statistical evidence are dangerous. They suggest this research should be done by the Law Commission as it is, they say, “uniquely placed” to undertake research to ascertain the extent to which jurors rely on expert evidence and how jurors deal with such evidence.

- 1.93 The Committee suggests that the miscarriage in *Clark* was not because of the reliability of the subject matter of the expert's opinion but the manner in which it was delivered. They believe reforms should apply equally in the magistrates' court, albeit possibly with different procedural provisions and consideration may have to be given as to how the scheme would operate in terms of the particular regime for the admissibility of evidence in the proof of road traffic offences. They also suggest listing the case before a district judge if it is anticipated that there will be contested expert evidence.
- 1.94 **Office for Criminal Justice Reform (Better Trials Unit)** agree that the unreliability of some expert evidence has given rise to public concern and they are broadly supportive of the proposal to strengthen the legal framework for expert evidence. They say the appointment of the FSR and the "new and more effective system for the regulation of [prosecution] forensic science personnel" will go some way towards addressing the problem, but acknowledge that there are many fields of expertise in which experts are not, and possibly cannot realistically be, regulated, so they welcome our approach to the problem from a different perspective. Their guiding principles for legislation on this area include the concentration of evidence on the real issues in the cases; the need for flexibility to ensure the variety of expertise is encompassed; to avoid unnecessary cost; and to avoid questionable technical information and opinion which might confuse the jury.
- 1.95 **Rose Committee of the Senior Judiciary** endorse the proposals subject to one exception, that being that there should be a statutory power for the court of its own motion, or following successful application by one of the parties, to require the party seeking to adduce the evidence to demonstrate that the test is satisfied in order that the parties would not need to satisfy the test in every case. They think this should be the case because only a minority of cases would benefit from such enquiry and so they feel it would be "burdensome and unnecessary" to require parties to show the evidence meets the admissibility threshold in each and every case. The Committee believes, however, that it may be difficult to formulate the criteria for determining whether or not to require the tendering party to show that the admissibility test is satisfied.
- 1.96 **Lord Justice Aikens** is glad the Law Commission is looking at this area because he believes the way expert evidence is dealt with in jury trials is a weaker part of the system and believes that expert evidence might also be important in summary trials. He believes there must be some check to ensure that expert evidence is based on principles of research and evaluation, whether the subject is scientific or not. He is in favour of the proposals, "as far as they go". Particularly, he is in favour of procedural rules which ensure that judges in criminal trials can control what expert evidence goes before the jury and believes that guidance should be available to judges regarding how they should decide what expert evidence is necessary and what is sufficiently rigorous. He does not, however, support a mechanistic set of rules because he believes the judge's flexibility to deal with the unexpected must be preserved.

- 1.97 Lord Justice Aikens believes, however, that something more radical is needed because of the increasing technicality of expert evidence, scientific or otherwise, the length of time needed to present it to the jury and the difficulty for the jury in being able to cope with some expert evidence or being able to assess it rationally. He suggests that the judge should be able to take the fact-finding role away from the jury for certain types of expert evidence and direct them on what they should accept, referring to section 43 of the Criminal Justice Act 2003 which will permit non-jury trials for serious fraud allegations.
- 1.98 He accepts that the jury should be sure that a prosecution expert's hypothesis and therefore the opinion based on it is correct and suggests that expert evidence should only be given once all the factual evidence in the case has been adduced (adding that this is now standard practice in civil proceedings). He expressed concern about the current way in which expert evidence is presented, particularly the fact that the jury is not given expert reports or a written summary of the areas of agreement / disagreement to read before the experts' oral evidence.
- 1.99 **David Ranson** refers to the Goudge Report and points out that "law reform without reform of the systems for the provision of forensic expert evidence will only go some of the way to addressing the very real risks in this area".
- 1.100 **Tony Ward** supports the proposals but believes there should be a single set of guidelines only. He dislikes, however, the idea of judges being able to rely on judicial notice as could mean some forms of expertise will continue to be relied upon because they have always been relied upon. He believes that by requiring that all fields of expertise must establish their validity, there would be an incentive to ensure that their reliability could be proven. He also says the doctrine of precedent would prevent unnecessary duplication of effort, suggesting that *Buckley* has settled the law on fingerprint analysis and this would continue until new evidence casting doubt on the reliability of the procedure is presented.
- 1.101 **Academy of Experts** expressed some reservations but support measures designed to improve the quality of expert evidence. Their concern is that had the proposals been in force, they would not have prevented the miscarriages of justice referred to in the CP. They believe that higher professional standards are key and that many problems could be solved by proper enforcement of existing rules. They are strongly in favour of rule 33 of the Criminal Procedure Rules regarding experts meeting and would like to see this more widely used. They also worry that a party might be able to object to admissibility after experts have met, thereby setting aside the meeting of experts. They are concerned about who will pay for experts to attend pre-trial hearings.
- 1.102 **Old Bailey Judges** thought there should be more flexibility for judges when determining admissibility of defence evidence, particularly given imbalance in resources, and perhaps as to whether the test should be applied to the evidence in the case before the judges, so it is not always necessary to run through the guidelines whenever expert evidence is tendered. They thought there should be less rigidity within the test set out at paragraph 6.10 of the CP so that a judge could jump straight to (c), for example, without going through (a) and (b), if the judge believes the evidence ought not to be admitted.

**Do consultees agree with our provisional proposal that there should be a statutory test for the admissibility of expert evidence in criminal proceedings, as set out in CP paragraph 6.10?**

- 1.103 **Andrew Campbell-Tiech QC:** yes but doubts the test will succeed in its aims unless accompanied by a change in culture, whereby the judges adopt an approach of engaged scepticism or enquiry. The test we propose is “clearly a necessary first step in achieving that change”.
- 1.104 **Anthony Edwards:** yes, it is right in principle, and there must be a judgment independent of professional consensus.
- 1.105 **Hon Theodore R Essex:** yes.
- 1.106 **Susan Weston:** yes, but queries paragraph 6.10(3) on onus of persuasion on D.
- 1.107 **Professor Wesley Vernon:** yes, except that it is more appropriate for “new” forms of evidence and/or “new” experts. He also suggests that new evidence could be tested against pre-existing established theories and either remain strong, be found wanting or demonstrate uncertainties, and this might reveal flaws in the expert’s evidence.
- 1.108 **Dr Ian Webber Evett** stresses the importance of paragraph 6.10(2).
- 1.109 **Devon County Council’s Trading Standards Service** believes the test could have far-reaching consequences for local authorities who submit evidence based on experience, qualifications and skills, so the test should be broad enough to include a wide range of professional qualifications.
- 1.110 **Dr Malcolm Park:** yes.
- 1.111 **Professor Paul Roberts** believes the test should apply to all expert evidence not just expert opinion because the latter invites argument on whether the expert’s evidence is opinion or factual, when it might in fact be a mixture of the two and in any case it is impossible to differentiate between opinion and fact. He also points out that existing legislation does not limit the experts’ evidence to opinion (eg section 30 of the Criminal Justice Act 1988) and feels that paragraph 6.10(2)(a) should include a reference to data, and that rather than say the evidence in (c) we should say the “expert’s material conclusions”.

- 1.112 **Northumbria University School of Law's Centre for Criminal and Civil Evidence and Procedure** agree there is a clear need for a statutory admissibility in terms of reliability but believe that what would really assist and be more cost-effective would be better training of experts on their duties and responsibilities and/or an appropriate system of expert accreditation and/or determining the competence of expert witnesses. The response also suggested whether CP paragraph 6.10(2)(b) would compel a judge to choose between competing views, or whether the judge could admit opposing views. Some of their members also queried whether this condition should be included, as it involves a question of weight for the jury. They refer to the recently published report *Strengthening Forensic Science in the United States* which suggests (albeit on somewhat flimsy evidence) that the *Daubert* test has not been applied sufficiently rigorously in criminal proceedings, because the judge has wide discretion as to the application of the guidelines or aspects of them and the judges' rulings are subject only to the "abuse of discretion" standard on appeal; judges and lawyers lack scientific expertise; trial judges sitting alone must decide the issue without the benefit of judicial colleagues and with little time for extensive research and reflection; the US report makes the point that what is required in the US are improvements in the forensic science community.
- 1.113 **Dr Keith JB Rix** adds that putting experts on notice will be a good thing resulting in higher standards. He also states that if the new test shows that an expert's opinion can be nothing more than tentative it will be no bad thing for such opinion evidence to be excluded.
- 1.114 **Professor David Hand:** yes.
- 1.115 **Legal Services Commission** "broadly welcomes the proposals for improving admissibility and understanding of expert evidence in criminal proceedings" but has concerns about potential cost implications.
- 1.116 **Forensic Access Ltd** agree with a gate-keeping role for the judge and a validity-based admissibility test.
- 1.117 **Dr Cedric Gilson** favours a non-deference version of Option 3 with training, but also says in response to this specific question: "on balance, yes".
- 1.118 **Andrew Rennison (Forensic Science Regulator)** believes there must be a system of precedent to prevent the same questions being considered again and again in different trials; and this system must allow reconsideration of the question when the nature of the science changes.
- 1.119 **Association of Forensic Science Providers** is "in complete agreement" with proposal relating to statutory gate-keeping role for judge and agrees with paragraph 6.10 "in its entirety". It also sees no reason why the complementary guidelines should not also be in legislation.
- 1.120 **UK Forensic Speech Science Community** is broadly in agreement with a statutory test and cautiously welcomes the proposal, so long as it is sufficiently flexible not to preclude new, but reliable, developments in rapidly developing fields and takes into account the specificities of particular areas of forensic science.

- 1.121 **Crown Prosecution Service:** yes (and it would usefully complement the role of the FSR). It notes, however, that judicial assessment of expert evidence depends on information provided by experts themselves, which limits the judicial role.
- 1.122 **Hon Mr Justice Treacy** supports option 4.
- 1.123 **Adam Wilson:** no.
- 1.124 **Gary Pugh (Director of Forensic Services, Metropolitan Police):** using DNA profiling as an example, he says that the proposal gives no recognition to the underpinning structures and scientific standards that ensure reliable provision of DNA profiling evidence and that, given the absence of such recognition, there are significant risks that (1) individual courts will take individual decisions on the reliability of expert evidence that could render redundant the current structures and standards and (2) inconsistent decisions will be taken by individual courts thereby undermining confidence and lead to confusion as to what is reliable.
- 1.125 **Forensic Science Service** do not support the test because (1) there could be a repeated challenge on a case by case basis with cost implications and possibility that, with time, a fundamentally sound technique or process may be ruled inadmissible; and (2) it is not practical to provide the judiciary with sufficient scientific knowledge
- 1.126 **Director of Service Prosecutions (Bruce Houlder QC):** yes.
- 1.127 **Royal Statistical Society** is “in general agreement with the Commission and supports its case for the fourth option for reform put forward”.
- 1.128 **Dr Phil Rose:** yes.
- 1.129 **Council of HM Circuit Judges (Criminal Sub—Committee)** agrees with the idea of an admissibility test for expert evidence in criminal proceedings and thinks the proposed test appears sound, except that paragraph 6.10(1) may need to be reviewed so the issue does not need to be addressed in every case where expert evidence is tendered. The Committee thinks the “better course would be to require a party to give notice with the opposing party serving counter notice if admissibility is in issue”. They would prefer the test to be set out in the Criminal Procedure Rules as a “speedier and more flexible approach”.<sup>11</sup>
- 1.130 **The Forensic Institute:** yes.
- 1.131 **RSPCA:** yes.
- 1.132 **Criminal Bar Association** “agree that there should be a statutory admissibility test as set out” but that the test should also incorporate “all steps to admissibility ... as well as the ‘gate-keeping’ provision” and “should also expressly retain other exclusionary rules” (eg section 78 of the Police and Criminal Evidence Act 1984).

<sup>11</sup> In this context, they recognise that section 69 of the Courts Act 2003 might need to be amended (eg by using the power in section 73) to provide the Criminal Procedure Rules Committee with the *vires* to do this. They add that the Criminal Procedure Rules might need to be revised to cover disclosure and time tabling.

- 1.133 **Associate Professor William O'Brian Jr** thinks a statutory test would be an improvement largely for the reasons given by the Law Commission. Citing US case law, he believes the solution the Law Commission provisionally proposes if in place would have prevented the miscarriages of justice identified in the CP. He does, however, caution against being too optimistic pointing out that in the US the *Daubert* approach has been applied rigorously in civil cases but "is only rarely invoked to exclude prosecution evidence in criminal cases". He notes that US courts frequently avoid rigorous application of the *Daubert* test to evidence that had regularly been admitted prior to *Daubert* and that "evidence received without serious scrutiny has included extremely dubious types of forensic 'science' evidence". He says the Law Commission should robustly in its drafting to prevent such evasion by the courts and that the Commission should reject the suggestion that the courts should take judicial notice of the validity of some techniques because this could create a loophole in the statute. He agrees that we should not have a *Wednesbury* approach to the appraisal of the judge's ruling on appeal.
- 1.134 **Professor Margot** supports a court-appointed-expert approach; agrees with CP paragraph 6.10(1) and (2) (but not (3)).
- 1.135 **Royal College of Paediatrics and Child Health**: yes.
- 1.136 **Royal College of Psychiatrists** provide support "in principle" but are concerned that the system may become "overly complex and time-consuming".
- 1.137 **Expert Witness Institute**: yes.
- 1.138 **Dr Dwyer** thinks that if the Law Commission is to go forward with its approach, it should have as flexible an approach as possible at leave as much to the discretion of the judge as possible and to have training of the judiciary and counsel to identify potentially weak expert evidence. She thinks that if the Commission does continue down the route proposed in the CP, the paragraph 6.10 test is "well thought out, and a marked improvement on the wording in *Daubert*".
- 1.139 **UK Accreditation Service**: yes.
- 1.140 **Professor Redmayne** thinks the Commission should refer to expert evidence rather than expert opinion evidence, to avoid debate in court about the difference. He thinks 6.10(2)(b) may raise problems in relation to "social framework evidence" (which the expert does not apply to the facts of the case as such). He thinks "the evidence" in 6.10(2)(c) is too vague and should be replaced by, for example, "the specific conclusions are supported by those principles, techniques ...". He also points out that the Commission needs a reference to the purpose for which the evidence is tendered because a technique may be valid for some but not other purposes (eg, ear-prints valid to exculpate rather than inculpate D)
- 1.141 Professor Redmayne does not like paragraph 6.12 where it is suggested that expert evidence currently admitted would continue to be admitted, referring to paragraph 2.26 (questioning the validity of much forensic science). He wants to ensure judges apply the test seriously.

- 1.142 **London Criminal Court Solicitors' Association** believe that there should be a statutory admissibility test, but suggest that any test will have practical difficulties and suggests that the Commission's test would probably have made no difference if it had been in force at the time of the recent miscarriages of justice. The Association also believes that a new statutory test is desirable but it should not be applied to exclude evidence which challenges established opinions.
- 1.143 **LGC Forensics** believe the reliability of expert evidence should be properly tested before it is adduced in evidence, but are not convinced the proposals in the CP offer the most efficient or effective way to achieve this.
- 1.144 **Justices' Clerks' Society**: yes.
- 1.145 **British Medical Association**: yes.
- 1.146 **Forensic Science Society**: yes.
- 1.147 **General Medical Council** believe that the proposed test together with statutory guidelines would tighten criteria and clarify the powers of the court and therefore would reduce the risk of unreliable evidence being placed before a jury.
- 1.148 **Society of Expert Witnesses**: yes for paragraph 6.10(1) and (2)(a)–(c). Regarding paragraph 6.10(3), the Society sounds a cautionary note as to the need to guard against a battle of experts developing.
- 1.149 **Law Society**: yes.
- 1.150 **Criminal Cases Review Commission** agree in principle that there should be a statutory test for admissibility with clear guidelines, believing there would be three potential benefits: (1) the parties seeking to adduce expert evidence would have the statutory criteria in mind from the outset, and this would encourage a more considered approach and so bring a measure of quality control; (2) quality control would be encouraged amongst experts themselves as they would need to prepare their opinions in the knowledge that they would be scrutinised with reference to a statutory test; and (3) a consistent approach would be taken by the judiciary and magistrates' courts.
- 1.151 They add, however, that an over-rigorous approach could lead to judges erring on the side of caution and that pre-trial rulings on admissibility will increase the potential for appeals. They agree on the point at paragraph 6.46 that the Court of Appeal should look at the question in the round. They query whether our test would have benefited the appellants in the cases cited as examples.
- 1.152 **The Law Reform Committee of the Bar** consider option 4 to be more attractive than Option 3 and the other options, save that the Committee has concerns about the pressure on judges to evaluate the science because they feel the test requires a degree of scientific knowledge that many trial judges are unlikely to possess or to feel comfortable in exercising and also because judges are trained to think as lawyers not scientists.

- 1.153 They also note that the *Frye* test has a place in our guidelines for scientific evidence (under option 4). They support our position that a *Wednesbury* approach would not be an appropriate tool on appeal for assessing the trial judge's determination of reliability. They support our proposal in CP paragraph 6.10 but fear that notwithstanding our assurances to the contrary, the language of this test would require an admissibility investigation in every case, which would be undesirable (particularly if the evidence is unchallenged). They also point out that the test should apply to experts who do not give an "opinion" as such, but give expert evidence on a scientific field (such as blood groupings) and wonder how easy proof of reliability will be in relation to non-scientific expert evidence (eg, trade practices, house prices and foreign law) They wonder whether the distinction between scientific and non-scientific expert evidence will be "workable in practice"
- 1.154 **Office for Criminal Justice Reform (Better Trials Unit)** recognise that, in principle, this approach could be applied by a conscientious court acting under the common law, but they also recognise the value of a statutory test. They feel, however, that we should include a worked example in the report to show how the statutory procedure would be better than a "conscientious court acting under the common law". They express concern about paragraph 6.10(2)(c) on the ground that this part of the test encroaches on matters that should properly be left to the jury. Their other concern relates to the potential for delay and disruption to trials, and the possibility that evidence which has previously been admitted "trouble free" would have to have to be reviewed from scratch if the new test comes into force. They are unsure of the scope of judicial notice and whether it would solve the problem.
- 1.155 **Rose Committee of the Senior Judiciary** believe it is important to have an explicit gate-keeping role for the trial judge, save that there should be a discretionary power for the judge to determine whether to require the party proffering the evidence to demonstrate that the test is satisfied. If the judge rules that the test should be applied, it should be for the party wishing to adduce the evidence to show that the admissibility test is satisfied. They suggest that the discretionary power given to the trial judge could draw on the factors listed in paragraphs 6.10 and 6.11. They also believe that an admissibility hearing, when required by the judge, could in some circumstances be very valuable because the judge would have a "dry run" and, if he or she rules in favour of admitting the evidence, he or she could ensure that the significance of any disagreements between experts is explained and that the experts articulate their evidence in a form understandable to the layman. The judge would be able to direct that only part of the expert's evidence was admissible, "thus narrowing the issues and ensuring that only reliable, sound, and understandable expert evidence went before the jury".
- 1.156 **Police Superintendents' Association of England and Wales** agree. They believe there should be a "transparently robust approach in relation to determining the admissibility of expert evidence" and they think the test would lead to a consistency of approach and uniformity in judicial decision making and would usefully complement the role of the FSR.
- 1.157 **Michael Curry** agrees.
- 1.158 **Tony Ward** agrees and suggests we incorporate "[outside] common knowledge" rule.

1.159 **Academy of Experts** do not welcome any further statutory rules; they think the present rules should simply be properly enforced. They endorse what is set out in CP paragraph 6.10 as guidance to the jury but don't think it should be part of an admissibility test as this might lead to the jury's role being usurped. They wish to see greater judicial inquiry but believe this could be done within the present law.

**Do consultees agree with our provisional proposal that trial judges should be provided with guidelines for determining the evidentiary reliability of scientific (or purportedly scientific) expert evidence, as set out in paragraph 6.26?**

- 1.160 **Andrew Campbell-Tiech QC** suggests that to omit guidelines would probably be an error, but they could perhaps be accompanied by a “health warning” so that they would not be construed too restrictively.
- 1.161 **Hon Theodore R Essex:** yes; but says it is important to be cautious so as not to exclude new tools that can assist (so there should be a system in place to assess the reliability of new science). He also said it is important not just to consider whether there is literature, but also to consider whether there have been *studies*. He makes a similar point regarding peer review stating that there have been similar problems in the US regarding child sex abuse cases, where a number of medical professionals developed their own special interest in the field and absorbed theories as to the physical indicia of abuse not underpinned by research corroboration and then repeated them to other professionals. As trainees returned to their communities and in turn became trainers, these uncorroborated theories became the conventional wisdom of a school of “expertise”.
- 1.162 As to criterion (e), he thinks this should be expanded to include standards in the community and studies. As to criterion (g), he thinks the expert should provide a list of publications and cases they have been involved in as a consultant or witness (and for which side); and there should be concern if an expert only ever provides evidence for the defence or prosecution.
- 1.163 **Anthony Edwards:** yes - guidance is essential at Crown Court level.
- 1.164 **Andrew Roberts** criticises the absence of a definition of scientific evidence which would direct the judge to the relevant guidelines in the proposals (arguing that there is a degree of circularity in asking the judge to determine whether proffered evidence is scientific and then to apply guidelines to determine whether it is in fact scientifically valid) and suggests that the “definitional problems that are likely to beset attempts to categorise expert evidence could be avoided by providing a consolidated list of criteria and leaving trial judges to apply those that are relevant to evaluation of the evidence in the case”.
- 1.165 **Professor Wesley Vernon:** yes and makes the point that the standards and processes of the institution within which the work has been undertaken is an important factor, in addition to the credibility of the expert and the validity of the evidence that expert s presenting.
- 1.166 **Devon County Council’s Trading Standards Service:** yes.

- 1.167 **Dr Malcolm Park:** yes, save for two comments: (1) the quality of peer review must be assessed critically; and (2) the question of standing in the community must be the expert's standing in the particular field (rather than his or her standing in the community of experts generally). The consultee also suggests that the judge should direct the jury on whether the expert witness is a professional expert or an expert professional. Regarding peer review, the consultee questions its value because it depends on editorial honesty in the selection of peer reviewers; he suggests that it would be better to ascertain the number of subsequent authors who have cited the expert's work with approval.
- 1.168 **Professor Paul Roberts** feels that "some guidance is better than none" but is strongly critical of two sets of guidelines, given the similarity between them, the fact that scientific evidence is based on experience to the extent that it requires testing hypotheses under controlled conditions and that forensic sciences are "typically disciplinary hybrids applied to practical problem-solving" bearing the hallmarks of classical sciences but also incorporating other matters. The distinction between scientific and experience-based evidence involves "exactly the sorts of taxonomic issues that courts should avoid if at all possible" and "criminal adjudication is not well-designed for debating the meaning of "science" He prefers USFRE rule 702 (scientific, technical or other specialized knowledge) leaving it to the courts to work out on a case-by-case basis which methodological protocols are suitable for assessing the validity of a particular type of expert evidence.
- 1.169 **Northumbria University School of Law's Centre for Criminal and Civil Evidence and Procedure** agree that there should be guidelines (and they reject *Frye*) but query whether our guidelines are satisfactory, particularly criterion (e) on qualifications, standing and the like and criterion (g) on impartiality, which overlaps with the separate question of competence. Some of their members felt that the guidelines were too prescriptive, in effect asking the judge to determine whether the evidence is correct.
- 1.170 **Dr Keith JB Rix** welcomes the list of guidelines, however, more generally suggests that instead of secondary legislation, which will take time to change, the JSB should co-ordinate the production of an authoritative compendium of guidelines published in a format (eg electronic) that allows different guidelines to be updated as often as necessary. He also questions the reference in paragraph 6.26(1)(e) to "standing in the community" on the ground that it is difficult to determine and he is aware of some expert psychiatrists who have a poor reputation amongst their peers even though they may have senior positions and are members of reputable bodies.
- 1.171 **Professor David Hand** yes: "Given the necessarily limited expertise of most trial judges in scientific matters, guidelines to which they can work can only be beneficial"

- 1.172 **Dr Geoffrey Morrison** believes that paragraph 6.26(1)(a) (demonstrable reliability) should take precedence over all other considerations, and much more weight than the sum of (c)–(f). He says: “forensic analyses which are more objective and whose reliability can be quantitatively demonstrated should be preferred over more subjective analyses for which it is harder to quantify reliability ... [so] ... in determining admissibility, demonstrable reliability of forensic analyses should take precedence over their degree of acceptance in the field, publication in refereed journals, or the reputation of the scientist presenting the evidence”. He also suggests that where a branch of expert evidence encompasses scientific and experienced-based schools (eg forensic voice comparisons) the experience-based evidence should be inadmissible in favour of the scientific.
- 1.173 **Dr Cedric Gilson** supports guidelines, but in the form of training in the philosophy of science.
- 1.174 **The British Psychological Society** say the list in paragraph 6.26 is helpful, but not sufficient. They say psychologists dealing with “case study” evidence on an individual client (as opposed to social framework evidence) have to exercise their clinical skill in (1) the choice of which technique should be used to assess a particular factor and (2) the interpretation of the results and they believe that “unaided, judges may be hard pressed to make informed decisions on such matters”. They also emphasise that “any clinical opinion should not simply be supported by the literature, but also be based upon current practice and knowledge” which means taking into consideration the “choices and interpretations which would reasonably be made by the majority of experts working in the speciality at that moment in time”. For “social framework” evidence (that is, more general background information on a topic), the choice of technique or approach and the interpretation of results may be the major issues at stake, rather than the basic soundness of the experimental design. They suggest that an assessor may assist the judge in such cases. They also suggest a scheme similar to the Criminal Procedure Rules Practice Direction for Experts, including the expert’s obligation to summarise the range of opinions and the reasons for the expert’s own opinion.
- 1.175 **Andrew Rennison (Forensic Science Regulator)** thinks the guidelines seem reasonable (as does application to facts and reasoning by the expert), but regarding error rates, he believes that most forms of forensic science are based on a number of techniques, so “it is the error in the combined process that matters” for the trial process. He suggests that a phrase such as “uncertainty” or “limitation” or “range of result” should be used in court instead of “error” with appropriate guidance from the judge (who might need training). With regard to peer review and publication, peer review has been shown to be fallible on many occasions so, by itself, it provides no assurance of quality. The guidance should include reference to what are *useful* publications (eg, homeopaths publish in journals which already accept the legitimacy of homeopathy). Perhaps a reference to the need for “sufficient available data and a suitable interpretation model to allow the sensible use of the data” and the need to ensure no “double counting” of evidence. Queries how the system will address unpublished data (eg, commercially sensitive reports). Experts could be required to disclose whether their evidence has previously been excluded; this should not be a bar to acting as an expert but it would trigger the court to seek an explanation.
- 1.176 **Association of Forensic Science Providers** agree with having guidelines.

- 1.177 **UK Forensic Speech Science Community (collective response)** agree with the general principle that there should be guidelines, but do not accept the dichotomy. They say:

We consider there to be a continuum between experience-based evidence and narrowly scientific evidence. ... For example, in our own field certain methods for analysing speech samples derive from the physics of sound and are clearly very much at the narrowly scientific end of the continuum. However, the conclusion one arrives at does not arise algorithmically or automatically from applying these methods. Rather, it relies on experience and bringing to bear knowledge of the likely effects of factors such as the speaking situation (in terms [of] physical and social parameters), the range of variation encountered in a particular dialect, the speaking style used, the state of the speaker and the recording characteristics (e.g. direct conversation or telephone). In view of this, it must be recognised that evidence arising from the analysis of speech samples will, inevitably, involve both narrow scientific and experience-based elements. [Similarly], a forensic pathologist in carrying out an autopsy will draw on scientific principles and tests derived from such fields as histology, physiology and biochemistry in attempting to determine cause of death. But ultimately the outcome of the autopsy will involve interpretation of the results of these specific tests, and this judgment will be crucially dependent on the experience of the pathologist.

- 1.178 **The Crown Prosecution Service** agree with guidelines and consider that the suggested factors in paragraph 6.26 “provide helpful guidance” and appear to be “sufficiently flexible to be applied to a wide range of current and future areas”.
- 1.179 **Hon Mr Justice Treacy** supports option 4 and believes the matters set out in paragraphs 6.26 and 6.35 “do in general terms target the right areas of enquiry”. He also believes that it is essential that the guidelines “make plain that they include matters for consideration and do not exclude any other relevant factors so as to maintain the flexibility of the necessary enquiry.” He doubts, however, the wisdom of separate guidelines because he thinks this would lead to argument as to which category some witnesses fall into and many witnesses could give evidence that falls into both categories. He therefore suggests a single body of guidelines with all factors listed, from which the judge would select the relevant factors plus any other relevant factors.
- 1.180 **Adam Wilson** thinks the Law Commission has provided “as clear a set of generic guidelines as are possible [but] it feels as if the Commission are forcing multi-armed Shiva into a two armed suit, albeit of the finest cut and fabric”.
- 1.181 **Gary Pugh (Director of Forensic Services, Metropolitan Police)** does not think subjective assessments of the professional standing in the scientific community have any place in the assessment of the reliability of science and points out that the reliability of scientific evidence relies on organisations structures, peer review and international standards (presumably suggesting that these factors need to be reflected in the guidelines).

- 1.182 **Forensic Science Service** support guidelines but believe that these should reflect that forensic science operates within a particular framework which makes it different from mainstream science and that the key question should be whether the opinion evidence is “logical, transparent, balanced and robust”. They suggest that the information provided in Appendix D of the CP (on statistics) exemplifies their concern: “There is no doubt that classical statistics has a role to play in forensic science, particularly in the validation / assurance of individual methods. However ... they are less helpful in converting a set of analytical results and observations into an interpretation that addresses the question posed by the court”.
- 1.183 **Director of Service Prosecutions (Bruce Houlder QC)**: believes the guidelines are necessary, but does not believe they should be statutory because flexibility may disappear and the “cohesion of the proposals may evaporate in legislative amendment”. He thinks a further important consideration should be whether the expert witness has had access to and considered all relevant material in arriving at his or her conclusion, including the material considered by experts who reached a different conclusion.
- 1.184 **BASC (British Association for Shooting and Conservation)**: yes, adding that membership of a relevant professional body should be a factor in determining the reliability of any proffered expert evidence as part of a broader test.
- 1.185 **Royal Statistical Society** is in “general agreement with the Commission and supports its case for the fourth option for reform put forward”, save that they think the guidelines would be difficult to implement. On paragraph 6.26(1)(b), they said “It is essential that the existence of error is recognised ... [and] that errors are distinguished from mistakes”; on paragraph 6.26(1)(e), they said someone has to be able to recognise when an expert strays outside his or her area of expertise, particularly if he or she strays into the field of statistical expertise; and on paragraph 6.26(1)(f) they thought it may be difficult for a judge to apply this test.
- 1.186 **Dr Phil Rose**: yes, although he thinks the admissibility test must include reference to the “logical framework for assessing the strength of the evidence” for any case where “identification-of-the-source evidence” is proffered. He says, in relation to determining admissibility, the expert should be able to say how probable the evidence is under both the prosecution and defence hypotheses, for if only one probability is given under one hypothesis renders the opinion evidence “no use”. Further, being obligated to give both probabilities guarantees impartiality and the expert’s duty to the court. His second principle is that the expert should not estimate the probability of a particular hypothesis being true in the light of the evidence (they cannot do this unless they know the prior odds and, in any event, this is the question for the jury).

- 1.187 **UK Register of Expert Witnesses** said the guidelines drew broad support from the expert witnesses who responded to their survey. Over 90% of their respondents believe that scientific evidence based upon “properly tested principles, techniques and assumptions that have been properly applied to the facts in the case, and that have established error rates” is likely to be reliable. In addition, 80% believe that a “peer-reviewed body of specialist literature” is important to the determination of reliability. 63% of the respondents who believed they would be covered by the guidelines felt that they would work well in practice. They point out, however, that there is not always a clear divide between expert evidence that is scientific and that which is experiential, particularly in the context of forensic science (eg fingerprints). One of the respondents noted that behavioural sciences, though rigorous in their analytical techniques, are dependent on observational evidence because humans do not easily lend themselves to controlled experimental tests. The respondents, however, largely felt that the separation between scientific and experiential evidence would *not* be a problem in practice, with 65% thinking it would be easy and 24.5% thinking it would be a bit tricky.
- 1.188 **Council of HM Circuit Judges (Criminal Sub—Committee)** agree that would be desirable and it would ensure consistency of approach. They suggest guidance should be contained in a Code of Practice prepared pursuant to a statutory provision or in a Practice Direction supplementing a provision in the Criminal Procedure Rules, because of the added flexibility this would bring and the greater ease with which the guidelines could be revised. They also suggest that the Law Commission should also use a phrase such as that used in section 114(2) of the Criminal Procedure Rules 2003 (“must have regard to”).
- 1.189 **The Forensic Institute** think the guidelines are superficially attractive, but think there will be controversy over terms such as “properly tested” and “margin of error”. They explain that while there is wide agreement as to the purpose of scientific validation (ie determining the reliability of results) there is little agreement as to how that reliability is to be measured. They don’t like the “specialised literature” criterion.
- 1.190 **RSPCA**: yes but think experts should also be required to make a declaration if interest (ie any connection with any of the parties or any commercial or scientific advantage there may be to the expert in proffering their views). Experts who fail the test in paragraph 6.26(g) should have to make a declaration of such in any future assertions of the reliability of their evidence in that field and not be allowed to give evidence in the case in question.

- 1.191 **The Criminal Bar Association** agree that judges should be given guidelines as set out. They also emphasize the importance of peer review and publication because it provides a long term, objective opportunity to test and refute the theory and practice of the technique and it also provides evidence of the willingness of its proponents to subject the evidence to scrutiny and criticism. The CBA does not believe, however, that the esteem in which the scientist is held should outweigh the deficiencies of the science and, just because an opinion is a minority one, if the science is sound, it should not fail because the expert is relatively unknown. They also believe there should be a requirement that an expert has adhered to the standards and guidelines as set down by the relevant regulatory body (if any) and that the guidelines should strongly reinforce the proper role of the expert, which is to assist the jury to reach its conclusion on the ultimate issue. They believe there should also be a requirement that, where possible, experts should rely on the best practicable record of any observations or findings.
- 1.192 **Associate Professor William O'Brian Jr** feels our proposed guidelines "appear to be appropriate" but suggests that we might add a further criterion: whether the expert's evidence is based on research conducted independently of litigation.
- 1.193 **Professor Pierre Margot:** yes, but would add "whether the data on which the opinion is based [are] limited or large (such as a population database) and [the extent to which] the statistical significance and limitations have been properly discussed". He would also remove (g).
- 1.194 **Royal College of Paediatrics and Child Health:** yes, guidelines are essential.
- 1.195 **Expert Witness Institute:** yes, but (e) should go further and ask judges to consider professional membership, professional development (training) as an expert in the relevant field and as an expert witness and membership of a reputable expert witness organisation.
- 1.196 **Dr D Dwyer** believes the guidelines in paragraphs 6.26 and 6.35 are "well thought out" but they may be "unduly prescriptive" and suggests that the distinction between scientific and experience-based evidence may not be clear cut.
- 1.197 **UK Accreditation Service** agree with the proposal and also feel that judges should take account of fact that the witness works within the context of an accredited *organisation*, which is regularly assessed by an independent, impartial national accreditation body when considering the reliability of their evidence. They note that cutting-edge science may not have a body of specialised literature or peer-review (save the peer review by UKAS assessors will have been undertaken for expert evidence from organisations that are accredited for such techniques or methods).
- 1.198 **Professor Mike Redmayne** feels that "less is more" in this context and we should focus on *scientific validity*, so, with regard to our factors:
- (1) He does not think that (c) specialised literature counts on the ground that Horoscope magazines "Homeopathy and astrology ... have their magazines, perhaps even qualifications, history etc, but that does not stop them being complete rubbish".
  - (2) He thinks (e) qualifications are irrelevant to scientific validity. He says, "look at Meadows"

- (3) He thinks that (f) opposing views will be taken into account under (d) and qualifications, again, are irrelevant.
  - (4) He thinks that (g) is ok, but thinks it might be best pit in a scientific reliability test, or might be best as a more general requirement for any expert evidence.
- 1.199 Professor Redmayne in some respects supports our scientific / experience-based split on the ground that the more the evidence is experience-based the more cautious he thinks the conclusions have to be. He “quite likes” our approach because “the danger with *Daubert* is that it just becomes too flexible so there is some value in trying to say what sort of standards the more experience-based methods should reach”. (He does, however, concede the need for some flexibility because of the enormous variety of subjects that might be the subject of expertise.) He thinks it may be best to have one list with emphasis on “whether the extent of validation supports the specific conclusions drawn particularly as regards their strength” to ensure that the big claims don’t dodge strict scrutiny by arguing that the evidence is experience-based.
- 1.200 **Skills for Justice** think the factors in paragraph 6.26(1)(e) are relevant but argue that “the ongoing assessment of competence in the workplace of the expert witness is more important than any of [these] criteria” and that “ongoing assessment of any individual’s competence against relevant [National Occupational Standards] is the best way to satisfy the court that the individual is in a position to give expert evidence”.
- 1.201 **LGC Forensics** accept that the guidelines are generally sensible (but might not be required to the same extent if reliance was placed on existing / emerging structures). Factor (a) refers to validation which is already ingrained in ISO 17025<sup>12</sup> and the Forensic Science Regulator’s (FSR) new standard; factor (b) requires knowledge and disclosure of uncertainties (and, again, this is already required by the ISO and FSR). Factor (c) can’t be shown for novel techniques; and factor (d) assumes that mere publication is of itself an indication of acceptance, which is not the case. Factors (e) and (f) are subjective and should be dropped. They feel there should be a requirement for techniques wherever possible to be fully validated and accredited (or at least be shown to comply with ISO 17025 requirements) before being applied to criminal casework.<sup>13</sup>
- 1.202 **Justices’ Clerks’ Society:** yes.
- 1.203 **British Medical Association:** yes.

<sup>12</sup> The International Organisation for Standardisation. ISO 17025 ensures that methods used have been properly validated and applied.

<sup>13</sup> It seems the accreditation agency for ISO 17025 is UKAS, so perhaps accreditation by UKAS in this respect could be taken into consideration as a relevant factor (for scientific evidence).

- 1.204 **Forensic Science Society** impliedly agree, but point out that not all experts will have their own publications and emphasis the importance of ensuring that experts known their subject and testify within it and do not answer questions outside it. They also state that it is important that experts know if their methodology has been validated and peer reviewed. They recognise that some evidence which has not been peer reviewed ought nevertheless to be admissible, but that this might be subject to special considerations.
- 1.205 **General Medical Council** believes that “together with statutory guidelines, the [proposed] test would tighten the criteria for and clarify the powers of the court, thereby reducing the risk of unreliable evidence being placed before a jury”.
- 1.206 **Society of Expert Witnesses** agrees with paragraphs 6.26(1) (a), (b), (c) and (d); but are less comfortable with paragraphs (e), (f) and (g). They argue that it is unclear who would be called to provide the relevant information here. They express particular concern about (g) because “significant numbers” of experts feel they have “experienced, witnessed or come to know of criticisms of experts on the grounds of partiality, which they feel have been unjust and probably founded on a misunderstanding on the part of the court”. The Society suggests “consideration be given to some form of procedural protection to experts lest they be dissuaded from offering their services to courts”.
- 1.207 **Law Society:** yes.
- 1.208 **Criminal Cases Review Commission** agree in principle with a statutory test, but add that “judges will need to guard against complacency” and “judges must ensure that they are prepared to question and probe” assertions made by expert witnesses which may sound impressive at face value.<sup>14</sup> They hope that a failure to meet all the guidelines would not result in automatic finding of inadmissibility
- 1.209 **The Law Reform Committee of the Bar** wonder whether the distinction between scientific and non-scientific expert evidence will be “workable in practice”, referring in particular to statistical evidence where, in some cases, it will not be the discipline that is in dispute, but the use of statistical data (eg it will not be the nature of a bleed in a baby’s head as a matter of paediatrics or anatomy but the use of statistics about the occurrence of such circumstances. They ask whether this would be assessed in accordance with the scientific guidelines or the experience guidelines. They also suggest that the guidelines could incorporate a reference to the fact that the witness has previously “given evidence on a particular subject matter and his credentials as an expert are found to be sufficient and the subject matter is found to be a reliable discipline”. In such a case the witness could be “accredited on that topic on an official register” so that the court would not have to re-visit the issue in the future. The Committee “see great benefit in a catalogue of guidelines being set down in the statute rather than appended in Criminal Procedure Rules, or a Protocol” but acknowledge the greater difficulty of amending guidelines in primary legislation. They suggest that the criteria in the guidelines should be considered if the opposing expert’s report (if any) has been served, because this may reduce the scope for any disagreement; and the expert should indicate the source material on which he relies.

<sup>14</sup> The CCRC give examples of phrases such as “extremely accurate” or a “99 per cent success rate” being given by an expert, but say that further probing reveals that the sample on which the opinion is based is very small.

- 1.210 Specific suggestions for the various factors:
- (1) CP 6.26(1)(e): “professional standing” is perhaps too subjective
  - (2) CP 6.26(1)(f): the expert should address opposing views in his report and add references to it in his list of source material;
  - (3) CP 6.26(1)(g): the expert should list the cases in which he has given expert evidence and, in particular, a full list of cases in which his evidence has been ruled inadmissible.
- 1.211 **Office for Criminal Justice Reform (Better Trials Unit)**: yes – the principles are general and as such could be set out in primary legislation, noting that it would be unusual to set out evidential matters in secondary legislation.
- 1.212 **Rose Committee of the Senior Judiciary**: “Yes. Guidelines contained in statute would be helpful as long as they remain guidelines rather than a mandatory scheme. For example, in certain circumstances, some of the identified factors may not be applicable and flexibility may be required.”
- 1.213 **Police Superintendents’ Association of England and Wales** agree and say the suggested criteria provide helpful guidance. The guidelines should be sufficiently flexible to be applied to a wide range of potential areas.
- 1.214 **Tony Ward** feels they are sensible guidelines, but that it is unnecessarily complex to distinguish between scientific and experience-based evidence as the two sets of guidelines are quite similar.
- 1.215 **Academy of Experts** feel that there is no definite line distinguishing between scientific and experience-based expertise. They believe that guidelines are a valuable tool so long as they are just guidelines and point out that not all areas of science have a body of specialised literature. They accept that an expert should assess the margin of error (but point out that this may depend on the technique used or the circumstances) just as an expert should identify where there is a range of opinion and show where in that range his or her own opinion lies and why he or she believes it is correct.

**Do consultees agree with our provisional proposed guidelines for experience-based (non-scientific) expert evidence, as set out in CP paragraph 6.35?**

- 1.216 **Andrew Campbell-Tiech QC** suggests that to omit guidelines would probably be an error, but they could perhaps be accompanied by a “health warning” so that they would not be construed too restrictively. With specific reference to paragraph 6.35, he suggests we should also have “desirability of establishing replication”, referring to the lip-reader who claims to be the world-leader in her field.
- 1.217 **Hon Theodore R Essex** queries whether guidelines are relevant to experience based evidence. He states that the expert’s training, experience, trials, publications, protocols followed should all be provided to the court. With regard to (b)(iv), he suggests we should also consider how well the methodology is applied, and whether it is consistently applied and if the methods used can yield the proposed result.
- 1.218 **Anthony Edwards** yes.
- 1.219 **Susan Weston**: yes.
- 1.220 **Professor Wesley Vernon**: yes.
- 1.221 **Dr Ian Webber Evett** doubts whether it is reasonable to distinguish between scientific and experience-based evidence, but this may be because he focuses on the importance of paragraph 6.10(2) which does not draw a distinction between the various types of evidence.
- 1.222 **Richard Emery** says scientific evidence needs to be governed by the test set out in CP paragraph 6.10 but there should be an alternative test for non-scientific expertise. Rather than testing principles, techniques and assumptions, the focus should be a careful look at the relevant knowledge and experience of the expert.
- 1.223 **Dr Malcolm Park**: yes, save for two comments: (1) the quality of peer review must be assessed critically; and (2) the question of standing in the community must be the standing in the particular field (rather than his standing in the community of experts generally).
- 1.224 **Devon County Council’s Trading Standards Service**: the guidelines seem adequate; however, they would probably restrict the range of persons who can give expert evidence particularly in relation to novel goods such as opinion on safety of consumer or nursery goods “which may be based on the anticipated behaviour of consumers or groups of consumers or children”. Queries whether a lecturer in woodwork would be able to testify on the meaning of woodworking terms.
- 1.225 **Northumbria University School of Law’s Centre for Criminal and Civil Evidence and Procedure**: query (a) and (d) on the ground that they overlap with the issue of competence.
- 1.226 **Dr Keith JB Rix**: Yes. In particular, supports 6.35 if applied to non-scientific types of medical / psychiatric evidence.

- 1.227 **Professor David Hand** is “very uneasy” about the very notion of “experience-based (non-scientific) expert evidence” because, almost by definition, such evidence “is at risk of subjectivity and arbitrary opinion”. He suggests that it should be possible to create a body of empirical evidence for disciplines such as lip-reading and handwriting analysis; and refers to *Dallagher* as an illustration of the danger of relying on “expert evidence” which does not have a solid support base of empirical data. Professor Hand goes on to say that, if in principle, a body of empirical evidence could be collected for the type of expertise in question, then the lack of such a body suggests that the non-scientific expert evidence might be something which the proponents were averse to having tested.
- 1.228 **Dr Cedric Gilson**: “yes, if subjected to cross-examination”.
- 1.229 **British Psychological Society** say that the “instructional materials for judges will need to highlight [the] differences between experience-based and science based testimony”.
- 1.230 **Andrew Rennison (Forensic Science Regulator)** think experts could be required to disclose whether their evidence has previously been excluded; this should not be a bar to acting as an expert but it would trigger the court to seek an explanation.
- 1.231 **Association of Forensic Science Providers** agree with CP paragraph 6.35, but suggest there should be *more* detail.
- 1.232 **The Crown Prosecution Service** agree in principle for reasons already given in relation to CP paragraph 6.26 (above).
- 1.233 **Hon Mr Justice Treacy** supports option 4 and believes the matters set out in CP paragraphs 6.26 and 6.35 “do in general terms target the right areas of enquiry” and it is “essential that the guidelines or considerations make plain that they include matters for consideration and do not exclude any other relevant factors so as to maintain the flexibility of the necessary enquiry”. However, he doubts the wisdom of separate guidelines: “I foresee it leading to argument as to which category some witnesses fall into. ... Many witnesses may give evidence which could be analysed as falling into both camps”. He therefore suggests a single body of guidelines with all factors listed, from which the judge would select the relevant factors plus any other relevant factors (see above)
- 1.234 **Gary Pugh (Director of Forensic Services, Metropolitan Police)** says non-scientific experts should be subject to the same rigour in terms of scrutiny and demonstrating the validity of their opinions as scientific experts.
- 1.235 **The Forensic Science Service** are not sure about the separate guidelines, pointing out that opinions provided by forensic scientists “will, by definition, rely on an element of experience acquired by that scientist”.

- 1.236 **Director of Service Prosecutions (Bruce Houlder QC)** says guidelines are necessary, but should not be statutory “otherwise flexibility may disappear and the cohesion of the proposals may evaporate in legislative amendment” He thinks a further important consideration should be whether the expert witness has had access to and considered all relevant material in arriving at his or her conclusion, including the material considered by experts who reached a different conclusion. He gives an example where HHJ Rivlin QC, the Recorder of Westminster, excluded an accountant’s evidence because of the way that that expert had been selective in the material relied on.
- 1.237 **BASC (British Association for Shooting and Conservation):** yes and add that membership of a relevant professional body should be a factor in determining the reliability of any proffered expert evidence, as part of a broader test.
- 1.238 **Dr Phil Rose:** yes.
- 1.239 **UK Register of Expert Witnesses** say the guidelines drew “broad support” from their respondents and about 66% who would be covered felt they would work well in practice.
- 1.240 **Council of HM Circuit Judges (Criminal Sub—Committee)** agree.
- 1.241 **The Forensic Institute** opine that the separation between scientific and experience-based expertise will be difficult to maintain given “the propensity of experts primarily grounded in scientific disciplines ... to recite ‘casework experience’ (i.e. non-empirical and experimentation-based [experience]) as support for their opinion”. Nevertheless, they seem to feel that the distinction should be maintained, and explained to the jury.
- 1.242 **RSPCA:** yes. (They give examples in the context of their own prosecutions of experts on “dog fighting” and the “identification of wild birds”). But experts should also be required to make a declaration of interest (ie any connection with any of the parties or any commercial or scientific advantage there may be to the expert in proffering their views). Expert who fails the test in 6.35(d) should have to make a declaration of such in any future assertions of the reliability of their evidence in that field and not be allowed to give evidence in the case in question.
- 1.243 **Criminal Bar Association** “agree with the proposed guidelines”.

- 1.244 **Associate Professor William O'Brian Jr** is concerned about *breadth* of the proposal for separate guidelines for experience-based evidence because of the danger that evidence which should be scrutinised as purportedly scientific may be able to slip through to admissibility via these guideline – “including such ‘experts’ as lip-readers and handwriting examiners suggests a potential loophole that could be exploited by numerous branches of ‘forensic science’ in an effort to save areas of expert evidence that could not be admitted under paragraph 6.26.” He adds that this is significant because “virtually all of the areas of ‘forensic science’, with the exception of DNA evidence, have quite dubious scientific pedigrees”, referring to the NAS’s recent publication *Forensic Science in the United States*. He opines that we should not provide an escape from proper review of forensic scientific evidence, even evidence such as fingerprint evidence, by “invoking the long history of the practice or by allowing a lower standard for experience-based evidence”. We should disavow our suggestion that a long-standing technique should be sufficient to allow judicial notice to be taken of its reliability. Instead we should emphasis our CP paragraph 1.20 that “orthodoxy which cannot be shown to be trustworthy should not be admissible”.
- 1.245 He adds that there is no need for a separate category of guidelines for evidence such as handwriting analysis and lip-reading since both “are methods that could be subjected to empirical testing ... Evidence that can be empirically tested should be subjected to such tests before it is used as a basis for criminal convictions”. The lower standard for experience-based evidence should be explicitly reserved for areas of expertise that cannot be tested empirically (eg, drug jargon and standard practices). He suggests that ad hoc experts should be governed by the general approach: if the evidence can be tested it should be tested before it forms the basis of a criminal conviction.
- 1.246 **Professor Pierre Margot:** yes, but would add “whether the data on which the opinion is based [are] limited or large (such as a population database) and [the extent to which] the statistical significance and limitations have been properly discussed”. He would also remove (d).
- 1.247 **Royal College of Paediatrics and Child Health:** yes.
- 1.248 **Royal College of Psychiatrists** are concerned that the system may become “overly complex and time-consuming” and caution against too much detail in the statutory provisions.
- 1.249 **Expert Witness Institute:** yes, but suggest a further condition (e) referring to professional membership, professional development (training) as an expert in the relevant field and as an expert witness and membership of a reputable expert witness organisation.
- 1.250 **UK Accreditation Service** feel that judges should also take account of fact that the witness works within the context of an accredited `organisation
- 1.251 **Professor Mike Redmayne** commented on specific criteria:
- (1) He accepts that focus on the expert rather than the technique is more appropriate in this context, especially if there is no technique as such (citing evidence on the street value of drugs and experts on whether a knife is of a type that a martial arts enthusiast would use).

- (2) He suggests (iv) is ambiguous because the expert may say he or she has never made a mistake, but the methodology relied on may have given rise to error.
  - (3) Suggests we take out literature ( criterion (c)).
  - (4) Suggests (g) should go elsewhere.
- 1.252 He feels that the criteria for experience-based experts should be tougher, and that we should have references to testing and error rate. He likes our test where the trial judge would also determine whether the expert's conclusions are logically in keeping (CP paragraph 6.43) and that this should be made explicit in the test
- 1.253 **Skills for Justice** think the factors in CP paragraph 6.35(1)(a) are relevant (qualifications, experience, publications, standing) but argue that "the ongoing assessment of competence in the workplace of the expert witness is more important than any of [these] criteria" and that "ongoing assessment of any individual's competence against relevant [National Occupational Standards] is the best way to satisfy the court that the individual is in a position to give expert evidence".
- 1.254 **London Criminal Court Solicitors' Association** think the guidelines are "worthy of consideration".
- 1.255 **LGC Forensics** see no reason why all procedures and process should not be accredited to the ISO 17025 standard or at least comply with the same requirements
- 1.256 **Justices' Clerks' Society:** yes.
- 1.257 **Forensic Science Society:** yes.
- 1.258 **British Medical Association:** yes.
- 1.259 **General Medical Council** "believes that, together with statutory guidelines, the [proposed] test would tighten the criteria for and clarify the powers of the court, thereby reducing the risk of unreliable evidence being placed before a jury".
- 1.260 **Society of Expert Witnesses:** yes: generally sound but some reservations re CP paragraph 6.35(1)(b)(iv): an "expert's *performance* in terms of giving the correct opinion can, and perhaps should, periodically be tested against predetermined standards. ... The expert gives his or her opinion in a simulated, blinded setting where the correct results are known and, by comparison, the reliability of that expert's opinion can be assessed in terms of such measurements as the incidence of false positive and false negative results. Predetermined standards of reliability can be set and, if appropriate, periods of retraining and retesting can be arranged".
- 1.261 **Law Society:** yes.
- 1.262 **Criminal Cases Review Commission** "agrees that the proposed guidelines ... would be useful, provided they are applied with sufficient thought and care".

- 1.263 **The Law Reform Committee of the Bar** wonder whether the distinction between scientific and non-scientific expert evidence will be “workable in practice” (or necessary). They wonder whether ear-print evidence is really scientific rather than experience-based. They provide the following specific suggestions for the various factors:
- (1) There should be something relating to “wealth of experience” where no formal qualifications etc are possible (they give an example of an expert on sado-masochistic relationships). They also refer to police officers with experience of drugs pricing and methodology, where there is no body of specialised literature and no expert community as such.
  - (2) Do not think the guidelines address *ad hoc* expertise (eg police officer reviewing CCTV footage against his special knowledge of D’s appearance, gait and build which the jury don’t have) so we may need something in the guidelines for these experts or a separate test for them as a special category of witness but not a “true expert”, particularly as they are likely to be biased, consciously or sub-consciously
- 1.264 **Office for Criminal Justice Reform (Better Trials Unit)**: yes in principle – the proposed considerations appear reasonable. However, they opine that there may be a problem if there is only one expert in the field and so no professional expert community.
- 1.265 **Rose Committee of the Senior Judiciary**: “yes. Guidelines contained in statute would be helpful as long as they remain guidelines rather than a mandatory scheme. For example, in certain circumstances, some of the identified factors may not be applicable and flexibility may be required.” They agree with our comment at CP paragraph 6.37 that for some areas of professional non-scientific disciplines (eg, forensic accountancy), where there are well-accepted practices, there would be no need for a minute consideration of many of the factors set out in CP paragraph 6.35(1) (b) and (c).
- 1.266 **Police Superintendents’ Association of England and Wales** agree; the suggested criteria provide helpful guidance. The guidelines should be sufficiently flexible to be applied to a wide range of potential areas.
- 1.267 **Tony Ward**: yes, but thinks it is unnecessarily complex to distinguish between scientific and experience-based evidence as the two sets of guidelines are quite similar.
- 1.268 **Academy of Experts** feel that there is no definite line distinguishing between scientific and experience-based expertise. They do not feel that these guidelines should be a criterion of admissibility: the witness should be allowed to testify and cross-examined on his views to allow for an assessment of weight. The key point, they suggest, is to require proof that the expert is in fact an expert in his area and the jury’s role should not be usurped. Specifically, they do not like the reference to publications as because it is not uncommon to find that those who produce publications are not “at the sharp end of expert work” dominated by particular schools of thought; and they are concerned about professional standard as a criterion.

**Do consultees agree with our provisional proposal in CP paragraph 6.57 that, where necessary, the party proposing to adduce expert evidence, whether the prosecution or a defendant, should have to demonstrate that it is sufficiently reliable to be placed before the jury?**

- 1.269 **Andrew Campbell-Tiech QC:** yes: no sensible or principled basis for distinguishing expert evidence called by the defence.
- 1.270 **Anthony Edwards:** yes.
- 1.271 **Susan Weston:** is uncomfortable with this as it might shift the burden of proof to D.
- 1.272 **Professor Wesley Vernon:** Yes.
- 1.273 **Laura Hoyano:** yes.
- 1.274 **Alec Samuels** believes the exclusion of defence expert evidence “because of alleged inadequacy of methodology and reasoning seems difficult to justify”.
- 1.275 **Dr Malcolm Park:** yes.
- 1.276 **Devon County Council’s Trading Standards Service:** yes.
- 1.277 **Professor Paul Roberts** is critical of this proposal and the underlying analysis. He accepts that “only valid expert evidence is capable of raising a *reasonable* doubt about the accused’s guilt” and that there can be no objection to the exclusion of defence evidence which is “so flawed as to be (almost) literally irrelevant” but then posits a view that defence expert evidence may have “validity ... demonstrated to a 0.49 level of probability” (that is, that the evidence is probably not valid) but that the adduction of the evidence may prevent the prosecution reaching a level higher than 0.8 probability (assuming that proof beyond reasonable doubt may be quantified as something above 0.8). His view is that “it should not be assumed, without argument, that the appropriate validity threshold for accepting prosecution evidence ... will necessarily be the same threshold test of validity that should be applied to potentially exculpatory evidence tendered by the defence”.
- 1.278 He adds that it “might be possible to construct a principled argument, rooted in the presumption of innocence, for affording the methodological credentials of expert evidence tendered by the accused a somewhat more generous benefit of the doubt”. Roberts admits that he “will not attempt to say what the probative threshold for excluding defence expert evidence on grounds of invalidity should be”. On a separate point he takes issue with our comment that the party tendering the evidence “would have to adduce the evidence necessary to demonstrate that his or her expert’s evidence is sufficiently reliable to be admitted” on the ground that we must have meant “provide the information and make the arguments necessary to persuade the judge to admit the evidence” and that the “party seeking to adduce the expert evidence would certainly be well-advised to come to court prepared to explain and defend the expert’s theories, methodology and conclusions, but it does not promote clarity of thought or expression to say that the tendering party bears any onus of persuasion on these issues”.

- 1.279 **Northumbria University School of Law's Centre for Criminal and Civil Evidence and Procedure** agree that the party tendering the evidence should have to show reliability, but do not agree with our view that the trial has a "truth-seeking function".
- 1.280 **Dr Keith JB Rix:** yes.
- 1.281 **Professor David Hand:** yes.
- 1.282 **Dr Cedric Gilson:** yes, but wonders what would happen if competing theories pass the reliability test.
- 1.283 **Forensic Access Ltd:** yes: "balance should be applied to all opinions".
- 1.284 **British Psychological Society:** yes.
- 1.285 **Andrew Rennison (Forensic Science Regulator)** says this is a reasonable proposal, and believes the same test should apply to D and P, but the test must be set at a sensible level "or the CJS will be flooded with applications to exclude evidence and may be disadvantaged".
- 1.286 **Association of Forensic Science Providers** agree and welcome the proposal.
- 1.287 **UK Forensic Speech Science Community:** yes.
- 1.288 **Crown Prosecution Service** agree and say "it is imperative that defence experts are subjected to the same scrutiny as those experts relied upon by the prosecution".
- 1.289 **Gary Pugh (Director of Forensic Services, Metropolitan Police)** says it is "difficult to disagree but surely reliability is an absolute not a matter of sufficiency".
- 1.290 **Forensic Science Service** agree with CP paragraph 6.57 but not the suggestion in paragraph 6.63 that defence evidence should be viewed less critically: there should be no compromise on the requirement for the scientist, when providing evaluative opinion, "to demonstrate balance, logic, transparency and robustness".
- 1.291 **Director of Service Prosecutions (Bruce Houlder QC):** yes, but the opposing party should be able to concede the question so as to make judicial investigation only appropriate in rare cases.
- 1.292 **BASC (British Association for Shooting and Conservation):** Yes.
- 1.293 **The Royal Statistical Society** think it is a "good idea" so long as the lawyers and judge are aware of methods by which reliability may be assessed.
- 1.294 **Dr Phil Rose:** yes.
- 1.295 **UK Register of Expert Witnesses:** 63.4% of their respondents support this.
- 1.296 **Council of HM Circuit Judges (Criminal Sub—Committee)** agree and also agree that a defined standard of proof would be inappropriate in this context.
- 1.297 **The Forensic Institute** think it is vital that the onus should lie with the proponent to demonstrate reliability.

- 1.298 **RSPCA:** yes. They point out (in the context of RSPCA prosecutions) that D need only instil sufficient doubt in the mind of the bench to ensure an acquittal, and there is a risk if this doubt arises from unsound principles or methodology, the guilty may be acquitted: “not good for the criminal justice system and the public’s confidence in it” The RSPCA would not welcome a proposal that defence evidence should be viewed less critically than prosecution evidence (bearing in mind their concerns about defence expert evidence in RSPCA prosecutions).
- 1.299 **Criminal Bar Association** “agree that the task of establishing sufficient reliability ... should rest upon the party intending to adduce the evidence”. They agree that judges can properly take judicial notice of evidentiary reliability, but this should not prevent a party challenging expert evidence which is unreliable for another reason (eg where an expert in an established field has mistaken the factual basis upon which his conclusion is reached or made some other fundamental error). They agree that there should be no difference whether the evidence is being proffered by the defence or the prosecution.
- 1.300 **Associate Professor William O’Brian Jr** does not think the defence should be permitted to adduce pseudo-science, but thinks it would be inappropriate to require the same showing of reliability for defence expert evidence as is required for prosecution evidence. First, the evidence might be insufficiently reliable to found a conviction but sufficiently reliable to establish a reasonable doubt as to D’s guilt. Secondly, it is right that the prosecution with its resources should be required to test its evidence before relying on it. In many cases D will not be able to conduct the empirical studies that might be needed to validate his expert evidence. Thirdly, some expert evidence may be insufficiently validated to inculpate D but would be sufficiently validated to exculpate D (eg there may be sufficient differences in ear-prints to show that the print was not left by D).
- 1.301 **Professor Pierre Margot:** no. Any doubts as to reliability should be “assessed externally”.
- 1.302 **Royal College of Paediatrics and Child Health:** yes.
- 1.303 **Oriola Sallavacia:** yes.
- 1.304 **Expert Witness Institute:** yes.
- 1.305 **UK Accreditation Service:** yes.
- 1.306 **Professor Mike Redmayne** feels prosecution and defence should both satisfy a “balance of probabilities” test. In any event, he cautiously suggests that it is right to demand the same standard for defence and prosecution. He also makes the point that we need to consider the purpose in tendering the evidence.
- 1.307 **London Criminal Court Solicitors’ Association** believes the prosecution should have to establish reliability for their evidence, but wonder whether D should have to establish reliability for defence evidence.
- 1.308 **LGC Forensics:** yes.
- 1.309 **Justices’ Clerks’ Society:** yes.

- 1.310 **British Medical Association:** yes; and they particularly agree with the distinction between reasonable doubts and unwarranted doubts.
- 1.311 **Forensic Science Society:** yes: same for P and D.
- 1.312 **Society of Expert Witnesses** think a matter for the legal rather than the expert community to consider, but “is content to agree”.
- 1.313 **Law Society:** yes, the same test should apply to prosecution and defence.
- 1.314 **Criminal Cases Review Commission:** “The CCRC agrees that the party proposing to adduce the expert evidence should be required to demonstrate its reliability” and there “would appear to be no reason to differentiate between prosecution and defence”. (They then go on to suggest a balance of probabilities standard of proof.)
- 1.315 **The Law Reform Committee of the Bar** say the “need for reliability would appear to be self-evident” They would like confirmation as to whether the rules of admissibility should apply in determining the question.
- 1.316 **Office for Criminal Justice Reform (Better Trials Unit):** yes.
- 1.317 **Rose Committee of the Senior Judiciary:** yes: this needs to be stated expressly (in the legislation).
- 1.318 **Police Superintendents’ Association of England and Wales:** yes; it is “imperative”.
- 1.319 **Tony Ward** thinks the test should be “whether there is a rational basis on which a reasonable jury could rely on the evidence to the degree that is required for the evidence to support the case of the party [tendering] it”. So, if it’s evidence on which P rely, and it is essential for their case, the test must be whether a reasonable jury could be sure the evidence was accurate; but if the evidence is only one part of an evidential mosaic relied on by P, or relied on by D, then lower standards should apply, although the criteria would be the same.
- 1.320 **Academy of Experts** don’t understand why we refer to the party when it is for the expert to demonstrate reliability.

**Do consultees agree with that the other aspects of the common law test governing admissibility are satisfactory? (CP Paragraph 1.2(1) and (3) and paragraph 1.3.) If so, do consultees believe that these rules should be codified?**

- 1.321 **Andrew Campbell-Tiech QC:** “nothing wrong with other aspects of the common law test governing the admissibility of expert evidence, save but in their implementation”.
- 1.322 **Hon Theodore R Essex** has no problem with the test per se, it’s the application.
- 1.323 **Anthony Edwards:** yes plus codification.
- 1.324 **Professor Wesley Vernon:** yes.
- 1.325 **Dr Malcolm Park:** yes to the first; not necessarily to second.
- 1.326 **Devon County Council’s Trading Standards Service:** yes (codification useful but not essential).
- 1.327 **Northumbria University School of Law’s Centre for Criminal and Civil Evidence and Procedure** state that it would be illogical to have a statutory reliability test in tandem with an existing common law test (presumably meaning that they accept that the common law tests are okay and should be codified). They also suggest a statutory version of s 3 Civil Evidence Act 1972.
- 1.328 **Dr Keith JB Rix:** yes.
- 1.329 **Dr Cedric Gilson** is not certain how CP paragraph 1.2(1) and (3) could be codified. He adds that it could be advisable to codify CP paragraph 1.3.
- 1.330 **British Psychological Society:** yes (“*Bonython* criteria appear to provide a satisfactory summary of the requirements”) and yes. They also emphasise the need during the trial to ensure that experts stay within their field of expertise when testifying
- 1.331 **Association of Forensic Science Providers** accept the need to show relevance and substantial assistance. They comment in particular on question of competence and believe that there is a difference between an expert and a forensic expert, on the ground that the latter should be governed by the principles of balance, logic, robustness and transparency.
- 1.332 **UK Forensic Speech Science Community** agree with rules (but no view on codification).
- 1.333 **Crown Prosecution Service:** yes, and they suggest (it seems) that codification would serve to encourage certainty and uniformity.

- 1.334 **Hon Mr Justice Treacy** says the common law rules are “well-established and accepted” and it would be “desirable” to incorporate common law rules into new legislation so that “all relevant tests and materials are in a single place and carry equal authority”, save that the factor in Consultation Paper paragraph 1.3 may not need to be repeated separately (given the proposed guidelines). He suggests that there should also be a provision that “an expert should only give evidence upon a matter properly within his/her expertise” as an essential principle.
- 1.335 **Forensic Science Service** agree that the present common law rules are satisfactory.
- 1.336 **Director of Service Prosecutions (Bruce Houlder QC)** agrees with other aspects of the common law test, with “sufficient flexibility for occasional cutting edge opinion”, but no need for codification.
- 1.337 **BASC (British Association for Shooting and Conservation)** believe that membership of a relevant professional body should be a factor in determining the reliability of any proffered expert evidence, as part of a broader test.
- 1.338 **Council of HM Circuit Judges (Criminal Sub—Committee)** are “entirely happy with the existing common law rules” and “no reason for these to be the subject of any legislative code”. The rules are “workable and flexible” and “should remain so”.
- 1.339 **RSPCA** think other common law rules are satisfactory, but there would be benefit if all aspects of admissibility were brought together in a single statute.
- 1.340 **Criminal Bar Association** agree that the other aspects of the common-law admissibility test are satisfactory: and they should be codified in primary legislation: there should be a statutory admissibility test as set out” but that the test should also incorporate “all steps to admissibility ... as well as the ‘gate-keeping’ provision” and “should also expressly retain other exclusionary rules” (eg section 78 of the Police and Criminal Evidence Act 1984).
- 1.341 **Associate Professor William O’Brian Jr** does not think *Turner* should be codified as some aspects of it are “deeply troubling”.
- 1.342 **Professor Pierre Margot** agrees with law, no comment on codification.
- 1.343 **Expert Witness Institute** feel the other tests are satisfactory, but does not think it is necessary to codify them.
- 1.344 **Professor Mike Redmayne** feels that the *Turner* rule should not be incorporated into legislation as it’s too vague, although he concedes that the test has its supporters. Notes (with apparent approval) that if we emphasise the duty of impartiality, many experts will have to rethink the way they present their conclusions.
- 1.345 **London Criminal Court Solicitors’ Association** agree that the other aspects of the common law test are satisfactory.
- 1.346 **LGC Forensics** think the other aspects of the law seem to be satisfactory.
- 1.347 **Justices’ Clerks’ Society**: yes and yes.

- 1.348 **Forensic Science Society** agree with the factors which make up the rest of the common law test; they add that they consider the factor regarding impartiality to be “paramount” They also add that “experience is not necessarily expertise” so the court should base any decisions on more than simply experience”. They emphasise the importance of ensuring that experts know their subject and testify within it and do not answer questions outside it. They agree with codification.
- 1.349 **Society of Expert Witnesses** agree with CP paragraph 1.2(3) and 1.2, but no view on codification. They express some concern over CP paragraph 1.2(1), but it’s unclear why.
- 1.350 **Law Society:** yes and yes.
- 1.351 **Criminal Cases Review Commission** believe that the common law rules are “fairly simple” and that they permit a “discretionary, commonsense approach” to the question of admissibility. They believe it is doubtful the present test could be improved and that there is a strong argument for incorporating all the common law rules relating to the issue in a single code, as part of a unified statutory test.
- 1.352 **The Law Reform Committee of the Bar** say that if there is to be primary legislation in relation to this area (and they say there should be), it should include clarification of the admissibility test for experts more generally; indeed there should be “comprehensive codification of the law relating to expert witnesses in the criminal trial to be contained in primary legislation”. They suggest “that there is no reason why statutory reform in this area ought not also to provide for more rigorous examination of the sufficiency of an individual’s suitability to appear as an expert witness” (referring in particular to “ad hoc experts” and the concerns voiced by the CA in *Flynn* (2007)). They suggest “a formal statutory requirement for the party to prove expertise” as this would inevitably “lead to a clear statement of what subject matter the individual is qualified to testify about” and “assist the court in policing whether the expert has strayed beyond his field of expertise”.
- 1.353 **Office for Criminal Justice Reform (Better Trials Unit):** yes, subject to their opening comment (above) as to the principles to be applied when formulating legislation.
- 1.354 **Rose Committee of the Senior Judiciary** agree that other aspects of the present common law test are satisfactory. Although codification is not necessary, it might be of assistance to codify all the rules in primary legislation so as to “provide the trial judge with a framework, or reference point, for his determination of the issue of admissibility”.
- 1.355 **Police Superintendents’ Association of England and Wales** agree, and believe that codification “would add certainty and stability”.
- 1.356 **Tony Ward** suggests we codify the “[outside] common knowledge” rule and incorporate it into the reliability test as a further criterion.
- 1.357 **Academy of Experts** agree that the other aspects of the law are satisfactory, but suggest that the courts are not properly applying the present rules uniformly or correctly. They are not in favour of “piecemeal legislation”.

**We would also welcome views on: whether the trial judge should, in exceptional cases, be entitled to call upon an independent assessor to help him or her apply our proposed test for determining the reliability of expert evidence (CP paragraph 6.67).**

- 1.358 **Andrew Campbell-Tiech QC** sees little value in an expert assessor and, “in any event, no one will pay for her”.
- 1.359 **Hon Theodore R Essex:** yes, so long as the hearing is open and the parties can challenge the assessor’s view.
- 1.360 **Anthony Edwards:** yes, exceptionally with the opinion being given openly and tested by the advocates. It would not bind but it would inform the judge.
- 1.361 **Susan Weston** feels judges need assistance, but it would be necessary to find an impartial assessor, which may be difficult for some of the contentious theories, such as Shaken Baby Syndrome.
- 1.362 **Professor Wesley Vernon** “very much” agrees. He suggests that a court-appointed assessor could assist if the peer review process is unreliable, particularly if other factors are brought in (registration / QA assessment / admissibility test).
- 1.363 **Laura Hoyano:** yes (albeit with some hesitation), so long as the parties do have an opportunity to question the assessor and the basis of his or her views (see CP paragraph 6.68)
- 1.364 **Alec Samuels** thinks that if the proposals were to become law, “there might in principle be a case for giving the judge the power to seek the assistance of an assessor to assist him in deciding admissibility” but suggests that the benefits might be outweighed by the costs and difficulties.
- 1.365 **Dr Malcolm Park:** yes, but feels that paragraph 6.67(3) is unduly restrictive.
- 1.366 **Professor Paul Roberts** asks: (1) how will the judge be able to select an appropriate expert? Who is going to pay, and where is the money coming from? And (3) what, if any, say will the parties have in these arrangements? He criticises our comment that the assessor would not be able to give his opinion on whether an expert witness’s evidence is in fact correct. He criticises this as revived incarnation of the ultimate issue rule and states that “so long as the trial judge knows his or her job, there is no danger of an expert assessor usurping the judge’s normative function” in deciding whether evidence is fit to go before a jury.
- 1.367 **Northumbria University School of Law’s Centre for Criminal and Civil Evidence and Procedure** are against this because (1) there are a number of fields in which the most reputable or highly-regarded experts seem to work predominantly for the prosecution, with access to better support in terms of training, and this might create the impression of unfairness; and (2) in developing fields it would be difficult for the courts to be able to identify an appropriate adviser (one may not even exist).
- 1.368 **Dr Keith JB Rix:** yes and opines that it would be an important power at the outset, but the power would not be relied on so often once professional bodies’ guidelines are developed (as he suggests).

- 1.369 **Professor David Hand** says this is “an excellent proposal” because it is unrealistic to expect most trial judges to be able to judge scientific evidential reliability.
- 1.370 **Dr Geoffrey Morrison:** yes.
- 1.371 **Dr Cedric Gilson:** yes, but queries how a suitable expert would be obtained.
- 1.372 **Forensic Access Ltd** “welcomes this proposal” but selection will be critical: “keeping the list of assessors up to date with new techniques and ensuring impartiality to the expert in question will need careful monitoring.” They suggest that the FSR, AFSP and Forensic Access could all contribute towards putting together a list and argue that the assessor should be a forensic expert (one who has practised) rather than an academic expert.
- 1.373 **British Psychological Society:** yes: “for many psychological matters, it may be necessary for judges to call upon an independent assessor”. Professional bodies (eg the British Psychological Society) would be capable of identifying leaders in particular areas of study. They mention, as a possible model selection process for expert assessors, the Research Selectivity Exercise (2009), but go on to emphasise that intellectual leadership alone is insufficient; the expert would need to be able to exercise independent judgment (and, for psychology, to be aware of the issues around the application of theories to practical issues, matters of “ecological validity”). They would also need to have some knowledge of the relevant law and the rules of evidence.
- 1.374 **Andrew Rennison (Forensic Science Regulator)** feels this is a sensible proposal, but raises practical issues. It may be possible for the FSR to be able to provide the court, on request, with a list of respected experts in a particular field, but it would be more difficult to maintain a list of experts more generally. And the FSR’s remit extends only to forensic science. (They point out problems with retaining a list of this sort, such as a judicial review challenge for adding / removing a name; complaints procedure in relation to those on the list; and resource limitations given the small size of the FSR’s team.)
- 1.375 **Association of Forensic Science Providers** agree and offer to help the Commission and the FSR in setting up a register of highly competent individuals (highly competent in their particular speciality and in general forensic interpretation).
- 1.376 **UK Forensic Speech Science Community** agree that this may be of benefit to the court.
- 1.377 **Crown Prosecution Service** agree in principle for exceptional cases and, while there will be cost implications, the potential value of bringing in an assessor in areas of particular complexity could be significant. But the assessors would also need to be subject to a reliability test and further clarification is needed on the issue of appointment (and who is responsible for appointing them) Some exceptional cases in the magistrates’ courts could also benefit from the appointment of an independent assessor, for cases reserved to district judge.
- 1.378 **Hon Mr Justice Treacy** thinks on balance, yes; but there must be absolute clarity that the decision as to whether or not to have an assessor is for the trial judge alone, and that the decision as to admissibility is also for the trial judge alone.

- 1.379 **Gary Pugh (Director of Forensic Services, Metropolitan Police)** says that if the proposals are adopted then there “will inevitably be areas where the trial judge will need advice”
- 1.380 **Forensic Science Service** have concerns about this proposal and would prefer that the involvement of the FSR “is explored”.
- 1.381 **Director of Service Prosecutions (Bruce Houlder QC)** does not think there is a need for assessor (judges can be trusted to make these judgments without such assistance) – but “would not wish to say that it should never be done ... if it would genuinely assist”.
- 1.382 **BASC (British Association for Shooting and Conservation):** Yes.
- 1.383 **Royal Statistical Society:** implicitly yes, because they say the Consultation Paper “could be more supportive of a trial judge obtaining an independent expert to assist [him or her] when dealing with new issues.”
- 1.384 **Dr Phil Rose:** yes.
- 1.385 **Council of HM Circuit Judges (Criminal Sub—Committee)** see an argument for assistance in a limited class of case, for example where the outcome of a case might hinge upon the interpretation of statistical evidence; but for other expert evidence, such as “cutting edge” science, an assessor would not necessarily assist. They also express concern on how an assessor would be chosen and guaranteed not to have a partisan view of his or her own (particularly in cutting edge areas). On balance they conclude that the difficulties that flow from the consideration and appointment of an assessor result in the step being disproportionate to the benefit that might be obtained (save in relation to a few cases dependent upon the interpretation of statistics).
- 1.386 **The Forensic Institute** make the point that a competent scientific expert for the defence will review the processes, procedures and conclusions of the prosecution’s experts, so they consider *their* main role as being analogous to the sort of independent assessor we suggest in the Consultation Paper. Nevertheless, they say that, on balance, there should be this facility.<sup>15</sup>
- 1.387 **RSPCA:** yes, but only in exceptional cases. They also say that an accredited assessor should be chosen by the court without interference from either party (so they disagree with 6.67(2)).

<sup>15</sup> As an alternative, they suggest that the judge should be able to ask a series of factual questions which the parties’ experts would have to answer in a joint statement.

- 1.388 **Criminal Bar Association** agree that the trial judge “should have a discretion to call upon the assistance of an independent *expert* (as opposed to the term ‘assessor’) to decide upon admissibility in exceptionally difficult cases”. They make the point that if the expert is to be cross-examined as we propose, the assessor is more like a “court-appointed independent witness” (which is what the expert should be, to dispel the implication that he or she might be a “private adviser”) even though the expert’s primary function would be to clarify difficult scientific areas for the judge. The CBA do not expect that the parties should have to agree or have the right to agree on an appointment; they suggest an appointments panel containing representatives of the Law Society and Bar Council and a set of agreed criteria, to ensure a measure of professional agreement that persons on the list were in fact suitable and leaders in their field.
- 1.389 **Associate Professor William O’Brian Jr** feels it is “absolutely vital” that trial courts should be allowed to avail themselves of the services of assessors.
- 1.390 **Professor Pierre Margot** believes that *whenever* forensic scientific evidence is fundamental to the issue of a case the judge should use a court appointed assessor. The court-appointed expert would not be partisan (a problem which creeps into party-called experts, consciously or otherwise), would explain the alternative possible explanations of a phenomenon (and the likelihoods) – particularly in the context of trace evidence – and this would mean that we would not need to have criteria against which impartiality can be tested.
- 1.391 **Royal College of Psychiatrists**: yes: the judge may particularly need help from “expert statisticians and those in scientific methodology as applied to mental health”
- 1.392 **Royal College of Paediatrics and Child Health**: yes.
- 1.393 **Expert Witness Institute**: yes (and they offer help in formulating a list of independent assessors).
- 1.394 **Dr D Dwyer** believes this proposal does not sit comfortably with current views in the civil courts on the role of an assessor as an expert witness.
- 1.395 **UK Accreditation Service**: yes, so long as there is an acceptable mechanism for determining the competence of such individuals prior to their being called upon. They offer their advice on the requirements for demonstrating competence.
- 1.396 **London Criminal Court Solicitors’ Association**: on balance do not agree: they think there is a danger that the assessor would in effect decide admissibility; and they also express concerns as to how the assessor would be selected and funded and whether it would be possible to object to an appointment.
- 1.397 **LGC Forensics** think yes “in principle”, but only if there is agreement between P and D about the independence and expert status of the proposed assessor, which might be difficult to achieve in practice. They also point out that no one expert assessor can hope to cover several different scientific and technical disciplines involved in a single case.
- 1.398 **Justices’ Clerks’ Society**: say that this “seems rational, though not without practical difficulty”.

- 1.399 **British Medical Association:** yes.
- 1.400 **Forensic Science Society:** yes: the assessor / advisor must be accountable to the court “and have the highest integrity with no affiliation to either prosecution or defence”
- 1.401 **Society of Expert Witnesses:** yes.
- 1.402 **Law Society:** yes, in exceptional cases so long as the assessor’s evidence is limited to admissibility and he does not become a third expert in the trial. There must be transparency and the parties must have the opportunity to make oral and written representations. The assessor should not be a joint expert.
- 1.403 **Criminal Cases Review Commission** is opposed to this. They believe an expert should be able to explain his or her techniques in a way that can be understood not only by the judge but also by a layperson and the judge is sufficiently well-equipped to make an independent assessment without help. Furthermore, there could be practical difficulties associated with devising criteria for being included on the list and regulation of it. They also feel that the views of an assessor could lead to entrenchment of a preliminary view that a technique is reliable, stifling the need for further development, or lead to a view that a technique is unreliable and stifling further progress of that technique for that reason. Rather than calling on an assessor, the judge himself should be proactive by, for example, calling for further information from the expert under examination or even call for evidence from a further expert.
- 1.404 **The Law Reform Committee of the Bar** have “serious reservations”, not least because they are concerned with how the judge would make his choice and the danger that the judge will be seen as less impartial by becoming involved in evidential issues. At a practical level, they also wonder about funding from the Legal Services Commission if there is a possibility of a hearing of this sort. They think that having an assessor might be unnecessary if the other proposals, appropriately refined, are implemented.
- 1.405 **Office for Criminal Justice Reform (Better Trials Unit)** see value in this proposal, but query whether the party’s expert is competent to testify if he or she cannot explain the basis of their expertise to the judge in straightforward terms and, as with some other consultees, they note the difficulties associated with appointing assessors. They are also concerned about the possibility of assessors being called on a routine basis, notwithstanding the inclusion of the “exceptional” requirement in the proposed test and the potentially significant cost implications this would bring.
- 1.406 **Rose Committee of the Senior Judiciary** believe it would be useful for the judge to have this power in exceptional cases (subject to the limitations set out in paragraphs 6.68 to 6.71). For procedure, they refer us to *The Bow Spring* [2005] 1 Lloyd’s LR 1 (paragraphs 57 to 65)
- 1.407 **Police Superintendents’ Association of England and Wales:** agree in principle, for exceptional cases.
- 1.408 **Michael Curry:** agrees (tacitly) adding that the assessor might also have a useful role in the way the evidence is shaped for the trial.

1.409 **Academy of Experts:** have a feeling of “considerable unease”; they are concerned about a loss of transparency, selection, the parties’ involvement and right to object and the issue of cost.

## RESPONSES TO THE MINI-CONSULTATION ON COURT-APPOINTED EXPERTS

- 1.410 **Antony Edwards** provided a positive response, although he favoured a simpler appointments system fearing the proposed system would be too complex and slow to be desirable. He suggested that the expert adviser could be used only for a “limited ... group of very serious offences.” He also suggested that there would be some expense and delay in bringing together a Circuit judge and appointments committee on the ground that, even if members are prepared to meet *pro bono* the committee would nevertheless “have to be serviced and records maintained.” The process we propose would be “unnecessarily complex for [such] a small number of cases”.
- 1.411 Mr Edwards suggested that the trial judge should order the parties to agree on an expert or to provide “a list of three experts with the relevant qualifications and curriculum vitae who would be willing to assist”.
- 1.412 Mr Edwards also suggests that the court-appointed expert should provide a written report.
- 1.413 **Judge Roberts QC** provided a positive response, supporting the proposed selection panel. He likes the idea of an independent appointments panel whose function would be to liaise with the relevant academic and professional bodies to provide the names of suitable individuals, a shortlist of which would then be passed on to the judge with a summary of their experience, skills and qualifications.
- 1.414 He agrees with the policy on a new admissibility test and a new statutory mechanism for allowing the judge to appoint an expert. He agreed that it should be possible to set up a system which will protect the judge’s position and ensure transparency and impartiality; and considers there is “no doubt that the judge (who will by this time be thoroughly familiar with the issues) is likely to be much better placed to make the selection than the court manager or list officer.
- 1.415 Judge Roberts QC suggests that transparency could be achieved by enabling the parties some input into the selection process, such as for them to be shown the short-list and invited to agree a candidate or, if agreement is not reached, to make submissions for and against any particular candidate(s). Or the judge could inform parties of the candidate (s)he is minded to appoint but would welcome the parties’ comments or suggestions.
- 1.416 He did, however, suggest: (1) that a court-appointed experts should not be known as someone providing advice or assistance but that he or she should simply be regarded and treated as a court-appointed *witness* providing additional evidence for the judge to consider; and as such, the court-appointed witness should be susceptible to cross-examination as any other witness; and (2) that the court appointed expert should provide a report. Judge Roberts suggests the report would (1) give all parties prior notice in writing of any additional material which the independent expert feels should be brought to the attention of the judge, so as to enable the parties to consider that material and respond to it; and (2) would underline the fact that the independent expert, though called at the request of the court, is at the end of the day an expert like any other witness.
- 1.417 He proposes proceedings at the hearing being conducted along the following lines:

- 1.418 Counsel for the party seeking to introduce the questioned evidence will make his or her opening submissions to introduce the issues and then will call his or her expert, who will then be cross-examined by counsel for the other party or parties. The judge can also question at any stage.
- 1.419 Counsel for the other party or parties will then call their expert(s), who will likewise be cross-examined and asked questions by the judge.
- 1.420 Judge Roberts QC has reservations about the idea of the independent expert being allowed to ask questions of the other experts. This goes back to the fact that his or her role is that of a witness, and in our system witnesses are not allowed to question other witnesses. Counsel or the judge will normally have to put to the other experts questions based on the independent expert's written report.
- 1.421 The independent expert will be called by the judge after the other experts have given their evidence. The judge will ask the independent expert to confirm the contents of his or her written report, and may ask supplementary questions. The witness will then be cross-examined by counsel for each of the parties. Judge Roberts sees no reason why the judge should not ask the witness, while he or she is in the witness box, whether there are any further points which he or she would like to make, or any further questions which he or she feels should be asked of the other experts.
- 1.422 If necessary, the other experts could be recalled so that the judge can put any such points or questions to them. Counsel would have to be given the opportunity to ask further questions about these points or questions.
- 1.423 Counsel will then make their closing submissions, the last word going to the party seeking to introduce the questioned evidence.
- 1.424 The judge will then give or reserve his or her ruling.
- 1.425 Judge Roberts thinks the procedure he outlines would confirm to normal procedures in criminal proceedings while accommodating the new feature of an independent expert being called by the court.
- 1.426 **Edward Rees QC** set out objections to the policy based on what he considered to be matters of principle, although explained some practical objections when pressed for a further response on practicalities. He thinks there would be time consuming contests over issues such as partiality and appointment (although he does not explain why, or why these would be issues at all, given our proposal that there should be an independent selection panel). He opined that the potential drawbacks associated with this possible reform measure would outweigh the benefits.
- 1.427 Mr Rees QC sees the central problem as being the likely perception that, as a result of selection from an approved list, the court-appointed expert would come with a judicial presumption of correctness. He also thinks the judge would be slow to disagree with the court-appointed expert's view that, for this reason, he or she would be perceived to be a "significant adversary by one of the parties and an ally by the other". Mr Rees QC is also concerned that there would be "root and branch challenges [to the court-appointed expert] in cross-examination with the spectacle of [him or her] defending him/herself."

- 1.428 Mr Rees QC also suggests that in some cases there may be a challenge to the appointments process itself.
- 1.429 **Bruce Houlder QC** strongly supports the proposal and the suggested safeguards (including the selection process). He thinks it would be “an important advance” which would: save money in the long term; bring more credibility to the criminal justice process; drive up expert standards and isolate those who are not true experts, resulting in a reduction in poor and unreliable expert evidence being given in criminal trials. He opines that the measure would be in keeping with the laudable aims of good trial management.
- 1.430 He did, however, query the condition that a party’s case must depend solely or critically on disputed expert opinion evidence given that, as the law stands, a criminal judge “has [the] power to seek assistance without such restriction if it would help the jury”, and because “there may be cases where, albeit that the evidence of the expert is not critical, it nonetheless may in practice prove determinative of the case, when set alongside other factual findings.”
- 1.431 Mr Houlder QC emphasised the importance of the “primacy of the trial judge” and his or her being able to reject a particular expert proposed by the selection panel and indeed any advice proffered by a court-appointed expert. He disagrees with the cautious approach of the Bar Law Reform Committee and indeed he envisages “dangers for the criminal justice process in judges *not* receiving such help”. He opines that the mere existence of the power to appoint an expert adviser, even if rarely used, would act as a deterrent against casual science, and might reduce costs in the long run, as the “market” in dubious expertise falls.
- 1.432 Mr Houlder QC supports the way in which an expert adviser would be appointed. He also agrees with our approach on the parties’ involvement and what we say about objections. He agrees that objections are unlikely to be upheld given the transparency of the selection process. He adds that court-appointed experts should be paid at the same rate as the legal aid rate for the parties’ experts.

**We would welcome views on whether the question of evidentiary reliability should always be decided before the jury is sworn, with the possibility of an interlocutory appeal to the Court of Appeal (paragraph 6.3).**

- 1.433 **Andrew Campbell-Tiech QC** does not see a case for an evidentiary rule which requires the question always to be decided at a given stage in the trial process. (He argues against being too prescriptive.)
- 1.434 **Hon Theodore R Essex** feels that until evidence is deemed reliable it ought not to go to the jury.
- 1.435 **Anthony Edwards** suggests that an absolute rule may be unnecessarily expensive.
- 1.436 **Susan Weston** believes this is “an outstanding idea that would save time and money”.
- 1.437 **Laura Hoyano**: yes, “as a matter of practice” (but with the possibility of a *voir dire* during the trial to reconsider the question of admissibility, if necessary). Also supports the availability of an interlocutory appeal, “so that a trial is not held unnecessarily where the prosecution’s case depends upon an expert’s evidence which prima facie is unreliable”.
- 1.438 **Richard Emery**: yes. He thinks a hearing would be beneficial to jury’s understanding of the case (ie by not having to be directed to ignore expert testimony they have heard); and it would provide the judge with the opportunity to ask the experts questions to assist understanding, which he / she might be reluctant to do while the expert is being questioned during the trial. He does, however, express concern that this could be a rehearsal of expert opinions prior to the trial, although he also recognises that this could help the issues to become focused.
- 1.439 **Dr Malcolm Park**: yes, subject to an exception if a response is needed during the trial which could not have been foreseen.
- 1.440 **Dr Robert Moles** thinks there should be a pre-trial investigation of relevance and reliability issues by the court, before the jury is sworn.
- 1.441 **Northumbria University School of Law’s Centre for Criminal and Civil Evidence and Procedure** say that, in general, the issue should be determined at the outset, but this should not be an absolute rule as the trial process may discredit an expert’s evidence and the judge should be able to withdraw that evidence from the jury. They suggest provisions such as sections 107 and 125 of the Criminal Justice Act 2003 might be a useful addition to the scheme.
- 1.442 **Dr Keith JB Rix**: yes.
- 1.443 **Dr Cedric Gilson**: yes, if the procedure is adopted.
- 1.444 **British Psychological Society** think a pre-trial hearing is always *preferable*.

- 1.445 **Crown Prosecution Service** say the hearing should, ideally, be before jury empanelled, but existing rights of appeal (Criminal Procedure and Investigations Act 1996 and the Criminal Justice Act 2003) provide appropriate methods to challenge rulings. But provision is needed to cater for possibility that additional experts will become available and/or be called during the trial, or new developments coming to light during a lengthy trial.
- 1.446 **Hon Mr Justice Treacy**: no. A degree of flexibility is desirable and the proliferation of rulings capable of interlocutory appeal needs to be curbed (because they distort the trial process and over-burden the resources of Court of Appeal Criminal Division). Further, there is already sufficient machinery in place to enable judges to make a pre-trial ruling capable of interlocutory appeal in an appropriate case.
- 1.447 **Forensic Science Service** believe that if the proposals are taken forward there should be the right to an interlocutory appeal.
- 1.448 **Director of Service Prosecutions (Bruce Houlder QC)**: not always because the relevant facts may materialise during the course of the trial. There should be the possibility of an interlocutory appeal limited to legal submissions only.
- 1.449 **The BASC (British Association for Shooting and Conservation)**: yes: always before jury is sworn.
- 1.450 **Council of HM Circuit Judges (Criminal Sub—Committee)** think the question of admissibility must be dealt with at the earliest possible stage in the proceedings. The Criminal Procedure Rules would need to provide time tabling. There should *not* be a right of interlocutory appeal because of its potential to disrupt proceedings.
- 1.451 **The Forensic Institute**: yes, but the trial judge should have a written ruling to enable the Court of Appeal Criminal Division to assess it on appeal.
- 1.452 **RSPCA**: no
- 1.453 **Criminal Bar Association**: no; the issue should not always be decided before the jury are sworn. There may be circumstances where there has been a late exchange of information, which will need to be explored by both sides, and there is no prejudice to anyone if, while this is done, the trial starts and deals with other issues. That said, generally they expect that issues about experts would be raised at an early stage and dealt with by directions and agreement (pursuant to amendments in the Criminal Procedure Rules). Consideration should be given to permitting an interlocutory appeal if the expert evidence is “unusual” but may nevertheless be reliable.
- 1.454 **Associate Professor William O’Brian Jr** thinks the issues of expert evidence admissibility should normally be resolved in advance of trial, but the legislation need not be directive on the matter.
- 1.455 **Expert Witness Institute**: yes.

- 1.456 **London Criminal Court Solicitors' Association** do not think the matter should always have to be decided before the jury are sworn, but they note the advantages of a pre-trial ruling. If there is a pre-trial hearing, there should be a right of appeal against the judge's ruling (although they add that the hearings will put unwelcome pressure on the Court of Appeal Criminal Division).
- 1.457 **LGC Forensics** feel that the best way to pre-evaluate scientific evidence is via a pre-trial conference with scientific experts, judge and counsel present.
- 1.458 **Justices' Clerks' Society**: yes.
- 1.459 **British Medical Association**: yes.
- 1.460 **Forensic Science Society** think the matter should generally be assessed in advance, but there may be occasions when additional information / circumstances arise which would alter the court's view on admissibility.
- 1.461 **Law Society** think it is desirable, with the possibility of an interlocutory appeal, although there should be a degree of flexibility to allow for exceptional cases.
- 1.462 **Criminal Cases Review Commission** think the issues of evidentiary reliability should be assessed before the jury is sworn; but hearings could result in further costs and allow the expert the tactical advantage of a "dry run".
- 1.463 **The Law Reform Committee of the Bar** strongly support the *opportunity* for evidentiary reliability to be addressed before the jury is sworn (and the "important safeguard" which an interlocutory appeal procedure would provide); but they also accept the need for flexibility to cover, for example, the situation where the factual basis for an expert's opinion emerges after the trial has commenced. Notice requirements in the Criminal Procedure Rules will be desirable.
- 1.464 **Office for Criminal Justice Reform (Better Trials Unit)** think it is desirable for admissibility to be determined before the jury are empanelled, but this should not always be the case because relevant expertise may not come to light until the trial has started.
- 1.465 **Rose Committee of the Senior Judiciary** think that in the majority of cases the issue should be decided before the jury is sworn. However, in some cases whether or not expert evidence will be relevant at all and, if so, to what particular factual issue it will relate, will be very fact sensitive, and it may in such a case only be at the conclusion of the prosecution case (or later for defence evidence) that the judge is in a position to determine the issue of admissibility. They also seem to suggest that the present interlocutory appeals framework is sufficient.
- 1.466 **Police Superintendents' Association of England and Wales** agree that it would be desirable if reliability could be determined before the jury is empanelled, but there needs to be a mechanism to allow for the possibility of determining the issue during the trial (for example, where a further expert becomes available or is required during the trial, or new developments come to light during the course of a lengthy trial).

## IMPACT ASSESSMENT: ADDITIONAL QUESTIONS FOR CONSULTATION

### General comments

- 1.467 **Professor Paul Roberts** notes that we predict that challenges to expert evidence will be the exception rather than the rule, but argues that this assumption is predicated on being able to sustain a robust distinction between background theories and principles and their application to the instant case, which he doubts on the ground that it is always potentially an open question whether settled scientific principles can validly be applied in the particular circumstances presented in the instant case. He opines that if “judges are going to start initiating possibly protracted and quite probably arcane arguments contesting the admissibility of expert evidence, public funding must be made available to enable the prosecutor and defence counsel to provide the court with the assistance it will require to make a properly informed ruling”.
- 1.468 **Professor David Hand** thinks it could be an expensive process for an expert to show the sorts of things proposed in CP paragraphs 6.28 and 6.29.
- 1.469 **Legal Services Commission** are concerned that the proposals may have a significant cost impact on the legal aid budget because of the possible need for more information to be provided in expert reports and the possible increase in time spent in court proceedings and therefore increased lawyers’ costs and costs for expert witnesses. However, they also recognise that if unreliable evidence is rendered inadmissible at an early stage in the proceedings, there would be savings in court time and therefore a positive effect on the legal aid fund. They propose liaising with us to produce a full Legal Aid & Justice Impact Test before the implementation of our proposals. In addition, they believe that clear guidelines in the public domain may prevent unreliable evidence even being tendered for admission, which could mean avoiding unnecessary payments
- 1.470 **Hon Mr Justice Treacy** thinks the additional room for argument brought about by any new test will mean a consequent increase in delay and costs, but the statutory framework may limit this by deterring dubious challenges. Thinks there should be judicial training to minimise costs and delays.
- 1.471 **Gary Pugh (Director of Forensic Services, Metropolitan Police)** thinks that if reliability is tested on a case by case basis there would be risks that (1) individual courts will take individual decisions on the reliability of expert evidence that could render redundant the current structures and standards and (2) inconsistent decisions will be taken by individual courts thereby undermining confidence and lead to confusion as to what is reliable. This could involve significant resources being expended to demonstrate reliability.
- 1.472 **RSPCA** are concerned about increased court time and costs associated with hearings on the evidentiary reliability of expert evidence and also concerned about possibility that defence evidence would be viewed less critically than prosecution evidence.

**Do consultees agree with our view that the potential costs of option 4 are outweighed by the potential benefits, when compared with the cost / benefit analysis of doing nothing and of options 1, 2 and 3?**

- 1.473 **Anthony Edwards:** yes, provided full use made of judicial notice and binding decisions of the Court of Appeal Criminal Division.
- 1.474 **Hon Theodore R Essex:** yes.
- 1.475 **Professor Wesley Vernon:** yes.
- 1.476 **Association of Forensic Science Providers:** yes.
- 1.477 **Director of Service Prosecutions (Bruce Houlder QC):** yes, believes the benefit would outweigh any other consideration.
- 1.478 **RSPCA:** yes.
- 1.479 **Criminal Bar Association:** yes.
- 1.480 **Professor Pierre Margot:** agrees and thinks that any measurable improvement would be cost-effective in the long term.
- 1.481 **UK Accreditation Service:** yes.
- 1.482 **Justices' Clerks' Society:** yes.
- 1.483 **British Medical Association:** yes.
- 1.484 **The Law Reform Committee of the Bar:** yes.
- 1.485 **Office for Criminal Justice Reform (Better Trials Unit)** point out that it is no longer the case that as many as 25 applications for compensation for wrongful conviction are found eligible each year (impact assessment, paragraph C.17) as there is now a requirement that the applicant must be clearly innocent to be eligible. (So far for 2009 they say there have been just two successful applicants.)
- 1.486 **Academy of Experts** are concerned about the cost of our proposals and believe they will be higher than anticipated, particularly because of the level of judicial training they foresee and the cost of challenges on admissibility.

**Do consultees agree with our view that, in the medium to long term, the benefits of implementing option 4 would outweigh the associated financial costs?**

- 1.487 **Hon Theodore R Essex:** yes: standardising training could be developed that could be conducted by computer, with previous cases of error used to illustrate.
- 1.488 **Professor Wesley Vernon:** yes.
- 1.489 **Forensic Access Ltd:** yes.
- 1.490 **Director of Service Prosecutions (Bruce Houlder QC)** thinks this probably would be the case.
- 1.491 **RSPCA:** yes.
- 1.492 **Criminal Bar Association:** yes.
- 1.493 **Professor Pierre Margot:** yes.
- 1.494 **UK Accreditation Service:** yes.
- 1.495 **British Medical Association:** yes, the non-financial benefits would outweigh the associated financial costs.
- 1.496 **Law Society** feel that rising costs are a concern, but they agree that the benefits of the proposed scheme would outweigh the costs.
- 1.497 **The Law Reform Committee of the Bar** think it is difficult to evaluate, but “are confident that the benefits will outweigh the costs”
- 1.498 **Office for Criminal Justice Reform (Better Trials Unit)** think the impact assessment should more clearly identify the balance of economic costs within the overall cost/benefit analysis
- 1.499 **Academy of Experts:** No.

**Do consultees consider that we have captured all the potential benefits and costs associated with our proposals for reform?**

- 1.500 **Anthony Edwards** thinks the main problem for defence solicitors is identifying and obtaining funding for suitable experts.
- 1.501 **Professor Wesley Vernon:** yes.
- 1.502 **Forensic Science Service** believe there are potentially extensive costs associated with option 4.
- 1.503 **Criminal Bar Association** opine that the consultation paper “appears to capture the relevant costs and benefits”. They can envisage defence costs rising because of the need for more court attendances by experts at a preliminary hearing, meetings between solicitors and experts and further research. The Legal Services Commission would have to adjust their funding arrangements so that the defence is not prejudiced. In appropriate circumstances, the judge’s approval of the need for a defence expert report should be sufficient authorisation for reasonable funds to pay for it.
- 1.504 **Professor Pierre Margot** thinks, generally, yes.
- 1.505 **UK Accreditation Service** agree.
- 1.506 **LGC Forensics** believe that there will be “regular and robust” appeals against exclusion because judicial rulings against admissibility will jeopardise the livelihood of some experts and professional credibility. This will be costly and will cause additional delays in the judicial system.
- 1.507 **Justices’ Clerks’ Society:** yes “the costs, insofar as they are ascertainable, are both justified and likely in the longer term to be recouped by the likely savings”
- 1.508 **Forensic Science Society** think the provision of practical training and the reforms will necessitate additional costs but the money would be “well spent” when compared with the costs resulting from miscarriages of justice.
- 1.509 **The Law Reform Committee of the Bar** “question whether as a result expert witnesses might charge more for their opinions”.
- 1.510 **Rose Committee of the Senior Judiciary** think a requirement to demonstrate admissibility in every case would have considerable resource implications and a significant effect on the timely conduct of business in the Crown Court.
- 1.511 **Academy of Experts** think not: they express concern about the cost of challenging admissibility and appealing against judicial rulings plus the cost of the expert in the hearings. They are concerned about whether experts will be paid for the additional work and hearings they will need to attend.

**In addition, to enable us to assess more accurately the potential impact of our proposed reforms, we would welcome information which would allow us to estimate how many fewer convictions and acquittals there would be annually if option 4 were to be implemented.**

- 1.512 **RSPCA** think that excluding unreliable expert evidence is more likely to result in the guilty being convicted and the innocent acquitted, with significant benefit from reduced court time and costs.
- 1.513 **The Law Reform Committee of the Bar** are “unconvinced that an estimate of the likelihood of trial outcomes can be produced with any precision”. They suggest that, even with data from previous trials, it would not be possible to identify results directly attributable to / caused by expert evidence error, particularly given the “inscrutability of the [jury’s] verdict”

**We would welcome views on the training implications of our proposals.**

- 1.514 **Anthony Edwards** fears that the courses will be expensive if they involve experts.
- 1.515 **Susan Weston** suggests it would be practically impossible to educate everyone to the same level: expensive and time-consuming.
- 1.516 **Andrew Roberts** suggests that there would be heavy cost implications for training judges in scientific methodology (given that the training would eat into court time).
- 1.517 **Simon Phillips** thinks there is scope for judicial training on Criminal Procedure Rule 33.5, so there may be merit in seeking to incorporate training on judicial assessment of reliability with training on judicial case management in the context of pre-trial discussions between experts of opposing parties.
- 1.518 **Dr Cedric Gilson** points to some training seminars used in the US (for example, those provided by Brooklyn Law School) which have led to positive feedback from judges.
- 1.519 **Association of Forensic Science Providers** suggest they could provide guides to cover general interpretation of forensic evidence (similar to their concise guide to DNA evidence).
- 1.520 **UK Forensic Speech Science Community** suggest that the training will need to encompass not only scientific principles but also an understanding of the continuum between narrowly scientific and experience-based evidence. Lawyers and judges may also benefit from guidance documents concerning the various forensic disciplines.
- 1.521 **Crown Prosecution Service** feel that over 2000 prosecutors will need training but this would be cost beneficial in the long term.
- 1.522 **Hon Mr Justice Treacy** feels that training is essential to ensure appropriate judicial control (for example in relation to spurious challenges) and ensure tightly-focused hearings.
- 1.523 **Forensic Science Service** believe the potential training implications are “massive”, but recognise the real need for targeted training in forensic science for the legal profession.
- 1.524 **Director of Service Prosecutions (Bruce Houlder QC)** thinks training should extend to judges and lawyers of the Court Martial because some do not receive JSB training.
- 1.525 **UK Register of Expert Witnesses** think that because judges need only be critical consumers of science, not scientists, and given the onus on the party tendering expert evidence to show its reliability, extensive training for the judiciary (and specialist knowledge) would *not* be necessary.

- 1.526 **The Forensic Institute** think there should be enhanced training for new judges and lawyers. Their Director says, from his experience as an expert witness, that “the questions of lawyers and barristers are just not penetrating enough” and yet “they are the one group of people who get to cross-examine ... forensic experts, and ask them how they arrived at their conclusions”... “[I]t is only necessary that the challenger has a knowledge of science, although knowledge of the specific discipline is advantageous”.
- 1.527 **RSPCA** believe the benefits would justify the costs.
- 1.528 **Criminal Bar Association** endorse the importance of training. The existing regime of training could be extended and include greater emphasis on expert evidence as part of the New Practitioners Programme and general CPD.
- 1.529 **Professor Pierre Margot** suggests that law students should have to study a basic scientific course, and points out that in Switzerland judges, public prosecutors, lawyers and investigating magistrates have scientific components within their training. He suggests there should be a focus on trace-based forensic scientific evidence.
- 1.530 **Royal College of Paediatrics and Child Health** believe training is essential for the judiciary, expert witnesses and professionals.
- 1.531 **Expert Witness Institute** believe the financial impact for practitioners would be very small or negligible since it can be incorporated into CPD training. “Expert witnesses will initially spend a little extra time preparing their reports. However the proposed criteria in the guidelines would give a framework for expert witnesses to follow when writing this section of their report that addresses reliability. We do not believe that the proposed changes would increase costs in any significant way since an expert witness’s particular responses to the criteria are unlikely to change markedly from case to case.”
- 1.532 **UK Accreditation Service** say “the knowledge, skills and effort required to assess the validity and reliability of scientific expert evidence ... should not be underestimated”. They offer their advice / assistance in training and on the benefits of accreditation
- 1.533 **Skills for Justice** “would welcome the opportunity to help influence and develop the training ... for the judiciary and criminal practitioners” and recommend that any training proposed is endorsed by their “Forensic Skillsmark” assurance process.
- 1.534 **British Medical Association** believe that the additional training costs for barristers and solicitors will be higher than we suggest; and, with regard to CP paragraph C.46 that the proposals will result in increased costs for courts and clients.
- 1.535 **Criminal Cases Review Commission** feel “it is difficult to give an accurate picture of the extent to which the admission of unreliable expert evidence in criminal proceedings has resulted in wrongful convictions. Even if such a figure could be identified, it would be even more difficult to identify precisely what aspect of the expert evidence led to the wrongful conviction”. The CCRC has recently set up a Research Advisory Group to consider applications from academic researchers. They hope that “an analysis of the Commission’s references concerning expert evidence will be one of the topics under consideration”

- 1.536 **The Law Reform Committee of the Bar** believe district judges (magistrates' courts) should be trained, along with the Crown Court judges and practitioners. Training would be costly for judges, but the benefits greatly outweigh the costs, they say.
- 1.537 **Office for Criminal Justice Reform (Better Trials Unit)** feel that the number of relevant convictions may be relatively small, so the Law Commission should instead focus on the benefits which would come from the more effective and efficient conduct of criminal proceedings generally.
- 1.538 **Rose Committee of the Senior Judiciary** think that if the proposals are taken forward, the JSB will consider what training will be appropriate. If the training is delivered through sessions at the criminal continuation seminars, information in the criminal monthly electronic news or training by CD-rom, there is unlikely to be a significant cost implication. But if a different approach were to be needed, there could be significant funding implications for which provision would be required.
- 1.539 **Police Superintendents' Association of England and Wales** point out that little or no training would be required for the police.
- 1.540 **Academy of Experts** are worried about the additional burden on trial judges, the JSB budget and the cost in terms of judges being taken out of court to attend training sessions.

**We would welcome information or views on the potential effect of our proposed reforms on investigators, including the police.**

- 1.541 **Hon Theodore R Essex** thinks there would be a positive impact as they are more likely to alter their behaviour to the new requirements.
- 1.542 **Forensic Science Service** thinks there would be serious disruption to the provision of forensic science by the repeated challenge to methods and their possible suspension.
- 1.543 **Director of Service Prosecutions (Bruce Houlder QC)** says the burden will fall on the experts to understand their duty and the courts and lawyers to understand the tests to be applied
- 1.544 **RSPCA** think that improving the quality and reliability of expert evidence will assist investigators in understanding the nature of the allegation, formulating investigative and will interview plans and assist prosecutors in drafting charges. Credible and reliable expert evidence will reduce the need to pursue unnecessary lines of enquiry.
- 1.545 **The Law Reform Committee of the Bar** think ad hoc experts will be less likely to satisfy the criteria to give expert evidence under our proposals, so the Commission needs to address this area explicitly with an explanation of the status of such witnesses and the admissibility test

**We would welcome comments on the risks associated with our impact assessment.**

- 1.546 **Director of Service Prosecutions (Bruce Houlder QC)** says “the law has for some time been moving naturally towards this change and the impact will not be as great as feared”.
- 1.547 **The UK Register of Expert Witnesses’** respondents support the proposals but overwhelmingly feel they may not work if the Legal Services Commission does not come up with extra funding to cover the additional costs incurred by experts having to show reliability. The majority of their respondents feel they might have to spend more than 25% more time on their reports with ¼ of their respondents thinking they may have to double the time they spend on their reports.
- 1.548 **RSPCA** feel there is a risk of very high costs associated with *voir dire* and legal challenges (appeals) to decisions on admissibility.
- 1.549 **Justices’ Clerks’ Society** feel the “the risks have been considered and evaluated appropriately, given the difficulty in quantifying these risks/benefits and the inevitable degree of conjecture”.
- 1.550 **British Medical Association** believe our proposed reforms would increase the time taken to prepare reports and this would increase their costs.
- 1.551 **Law Society** believe additional costs could be reduced if there was a standard rate for all publically-funded expert witness fees, dependent on their specialism, regardless of the party they appear for. This is consistent with equality of arms.
- 1.552 **The Law Reform Committee of the Bar** “doubt whether the proposals will lead to a significant increase in the amount of expert evidence admitted in the criminal process” because the proposals “are not aimed at extending the ambit of the evidence but making it more reliable”. They feel, however, that more time will be taken up with expert evidence, particularly in the early years following implementation. They add that “the categories of evidence and numbers of cases which will be the subject of any litigation as to admissibility will be a tiny fraction of the whole” as “most expert evidence is well entrenched and understood” so it is only “emerging science or novel techniques which will need to be tested” and, accordingly, “these too will be limited to the extent that once either ratified or eradicated by the Court of Appeal, the argument will be over until the next development”.
- 1.553 **Office for Criminal Justice Reform (Better Trials Unit)** feel there is a risk that the new approach would lead to excessive scrutiny of experts, incurring greater costs by way of court time without commensurate benefits.

## Comments on pre-trial disclosure

- 1.554 **Andrew Rennison (Forensic Science Regulator)** suggests a pre-trial disclosure scheme which would provide the prosecution with expert reports the defendant does not rely on at the trial, as this would provide a “more level playing field” and “could help to prevent [prosecution] forensic scientists being ‘ambushed’ in court”.
- 1.555 **Crown Prosecution Service** note that section 6D of the Criminal Procedure and Investigation Act 1996 (added by section 35 of the Criminal Justice Act 2003) will set out a duty only to provide the experts’ names and addresses but would not require disclosure of any report prepared by the experts so it does not really have anything to do with reliability of expert evidence.
- 1.556 **Director of Service Prosecutions (Bruce Houlder QC)** thinks an improved disclosure regime is “not only desirable but necessary”.
- 1.557 **Criminal Bar Association** say that many new processes are developed at considerable expense by commercial companies who will wish to preserve commercial confidentiality about their processes; “They should be under no doubt that the courts expect standards or openness before they are admitted to this market”. The CBA also felt there should be amendments to the guidance as to what should be incorporated in an expert’s report: as part of their duties of neutrality and responsibility to the court, there should be disclosure of names and dates of previous cases in which the witness has given evidence and details of cases in which their evidence has been criticised and a system could be devised between the FSR and the judiciary to record adverse comments or rulings.; and there should be a disclosure of material that forms the foundation from which an expert’s conclusions are drawn (databases, photographs, recordings, etc).
- 1.558 The CBA add that experts should have to set out their methodology, follow any “best practice”, and ensure that a full and proper record of all work is undertaken. Their workings should be open and transparent.
- 1.559 **Forensic Science Society** approve a pre-trial disclosure process which would allow all parties to screen their opponents’ experts in respect of qualifications, experience, extraneous conduct and whether or not they are accredited by a reputable body.
- 1.560 **The General Medical Council** endorse the view that there should be complementary measures regarding disclosure (to assist in the effective screening of an opponent’s expert).
- 1.561 **Police Superintendents’ Association of England and Wales** welcome the requirement for pre-trial disclosure of defence witnesses (under section 6D of the Criminal Procedure and Investigation Act 1996).

## Comments on accreditation

- 1.562 **Dr Ian Wilson** argues against compulsory accreditation of experts on the ground that courts should not simply rely on a third-party assessment.
- 1.563 **Professor Wesley Vernon** supports the proposals in the CP, although he feels that many aspects could be “pre-empted by a registration/accreditation scheme in many cases”.
- 1.564 **Steve Redhead** supports accreditation for forensic accountants as it is aimed at ensuring “competence, experience and high quality”.
- 1.565 **Laura Hoyano** thinks accreditation deserves further consideration on the ground that it would be more cost-effective in the long-term (as it would lessen the costly need to conduct a case-by-case review of every expert’s qualifications and scope of expertise).
- 1.566 **Alec Samuels** believes accreditation “should be constantly and vigorously pursued” and that it would be reasonable “to insist that every expert called upon to compile a report or give evidence in a criminal trial should be appropriately accredited”.
- 1.567 **Dr Malcolm Park** expresses concern about the inability of (some) expert witnesses being willing or able to concede the possibility of error; and favours accreditation by a relevant professional body rather than a general society of expert witnesses. He criticises the [now defunct] Council for the Registration of Forensic Practitioners as being little more than a licensing body and collector of licensing fees for those wishing to be associated with it. He suggests that the judge should direct the jury on whether the expert witness is a professional expert or an expert professional.<sup>16</sup>
- 1.568 **Northumbria University School of Law’s Centre for Criminal and Civil Evidence and Procedure** feel that what would really assist (and be more cost-effective) than our proposals would be better training for experts on their duties and responsibilities (with funding for this) and/or an appropriate system of expert accreditation and/or determining the competence of expert witnesses; and they suggested such developments instead of or in tandem with our proposals.
- 1.569 **Legal Services Commission** support “a more robust approach to the accreditation and regulation of expert witnesses whether the prosecution or defence calls them” and express a “long-term aim ... to arrive at a position where all experts, who are regularly instructed in legal aid cases, are accredited”. They provide a copy of their recent response to the FSR’s consultation on the accreditation of forensic practitioners.

<sup>16</sup> A similar point is made by Penny Mellor who describes herself as “a campaigner against false allegations”. She said, “both the Crown and the defence have habitually used the “names” within certain fields of alleged child murder, these “experts” have become “experts” at being “experts”, leaving very little time for training and hands on clinical thinking.”

- 1.570 **Dr Geoffrey Morrison** expresses reservations about accreditation for forensic voice comparisons (at the present time) as there is a danger that this could entrench existing “subjective unreliable practices and inhibit the use of newer more objectively demonstrably reliable practices ... because those who have adopted the more objective demonstrably reliable approaches to forensic voice comparison are still in the minority”.
- 1.571 **Forensic Access Ltd** believe that an experts’ register may filter out a minority of bogus experts, but it would not be able to control quality to prevent miscarriages of justice.
- 1.572 **Andrew Rennison (Forensic Science Regulator)** suggests that “failed” expert witnesses should be prevented from giving evidence, but that does not require accreditation. The Criminal Procedure Rules could be amended so that experts are required to disclose whether their evidence has previously been excluded; this should not be a bar to acting as an expert but it would trigger the court to seek an explanation.
- 1.573 **Crown Prosecution Service** support further measures to ensure that appropriate accreditation becomes a criterion for determining whether the Legal Services Commission makes public funds available to pay for defence experts.
- 1.574 **Gary Pugh (Director of Forensic Services, Metropolitan Police)** thinks the absence of a professional body with appropriate discipline procedures, standards, code of conduct and continuing professional development is a significant and undermining omission from the provision of forensic expert evidence.
- 1.575 **Forensic Science Service** support the FSR’s standards and validation framework in providing assurance that processes and techniques are fit for purpose and this should be recognised by the court. A method validated to the satisfaction of the FSR should be recognised by the courts. They advocate that, as a general rule, any challenge to admissibility should face the initial task of demonstrating why the technique, as applied in an individual case, is fundamentally different from one that has already met the required standards.
- 1.576 **Director of Service Prosecutions (Bruce Houlder QC)** thinks that accreditation is “not only desirable but necessary”.
- 1.577 **BASC (British Association for Shooting and Conservation)** do not support formal accreditation schemes: the question should be for the judge rather than there being a “tick-box” system of accreditation. However, membership of a relevant professional body should be a factor in determining the reliability of any proffered expert evidence, as part of a broader test.

- 1.578 **Royal Statistical Society** say that accreditation can never be a necessary or sufficient condition for admissible expert evidence and list factors which should determine whether an expert is competent to give *statistical* evidence before a jury: (a) familiarity with the law of probability; (b) an understanding of variation; (c) some knowledge of the application of (a) and (b) in a legal context; (d) the ability to interpret the results in accordance with established scientific principles; and (e) the ability to explain ideas in a non-technical language. They add that more specialised knowledge may be needed in particular types of case (for example, knowledge of methodological aspects of criminal trials) and that underlying assumptions should always be justified and their consequences explained.
- 1.579 **The UK Register of Expert Witnesses** “utterly reject” accreditation as a means of improving the quality of expert evidence because generic accreditation would be neither meaningful nor desirable. Quality, they say, comes from each individual’s *ongoing* rigorous and error-free implementation of proper procedures, whereas accreditation looks solely at past performance.
- 1.580 **Council of HM Circuit Judges (Criminal Sub—Committee)** are concerned about the demise of the Council for the Registration of Forensic Practitioners who independently certified that experts had attained a standard of “independent professionalism which justified a court in relying on that expert” adding that “the court is ill equipped to determine whether an expert in some of the less well-known areas of expertise is indeed appropriately qualified”.
- 1.581 **The Forensic Institute** state that ISO<sup>17</sup> accreditation is primarily set by “customer requirements” not by scientific accuracy or reliability. They also point to the practical difficulties of accreditation: “forensic science is the practice of science, including the interpretation and evaluation of evidence with an occasional overlaying of legal considerations such as continuity. ‘Forensic science’ is not some self-contained discipline ...”
- 1.582 **RSPCA** would like to see a greater emphasis on accreditation to assist the court in determining reliability of proffered expert evidence. They regret the demise of the CRFP and would like to see a single statutory accreditation scheme for experts. Accreditation must be subject to peer review and strict enforceable disciplinary procedures which can disqualify experts from giving evidence. Public funding of experts should take into consideration the availability of accredited experts and rulings on admissibility. An accreditation body might provide a source of court-appointed assessors. (They opine that current accreditation schemes are in the main ineffectual in assessing the reliability of expert evidence, because there is no peer review, the determining factor is payment of the required membership fee and because no adverse consequence flows from critical judicial comment on their role as an expert witness.)

<sup>17</sup> International Organisation for Standardisation.

- 1.583 **Criminal Bar Association** say there should be a comprehensive and universal standard of mandatory accreditation (as opposed to mere registration) to encourage wider standards. Effective accreditation would establish a preliminary filter of basic standards, so that only rarely would lawyers consider approaching an unaccredited witness. They expressed concern at the possible development of a two-tier system between experts utilised by prosecuting authorities (within the remit of the FSR) and experts instructed by the defence. Accreditation, once fully functioning system is in place, could be a pre-requisite for public funding by the Legal Services Commission, save that the Legal Services Commission could have a discretion to pay for an unaccredited expert in exceptional circumstances.
- 1.584 **Royal College of Paediatrics and Child Health** already have an “agreed framework of the competences required” and are not working towards accreditation for paediatricians.
- 1.585 **Royal College of Psychiatrists** accept they have a role to play in giving guidance to psychiatrists as to whether they are competent to give evidence as an expert witness in relation to a particular field of psychiatry. Existing arrangements suffice for psychiatry (for example, the specialist register of General Medical Council and relevant qualifications in psychiatry).
- 1.586 **UK Accreditation Service** believe that a system of accreditation (third-party assessment of an organisation in accordance with agreed standards) would bring additional benefit in terms of quality assurance. They stress the difference between accreditation as they use the term (third-party attestation of an organisation in accordance with agreed standards) and registration (of an individual).
- 1.587 **London Criminal Court Solicitors’ Association** think consideration should be given to a standardised and mandatory accreditation scheme for experts.
- 1.588 **LGC Forensics** support “individual accreditation” to deal with ongoing issues of integrity and character of expert witnesses and believe that there should be a requirement for techniques wherever possible to be fully validated and accredited (or at least be shown to comply with “ISO 17025”<sup>18</sup> requirements) before being applied to criminal casework.
- 1.589 **British Medical Association** think there should not be a separate system to accredit / revalidate medical doctors before they can give evidence in criminal proceedings: being on the General Medical Council’s specialist register should suffice.
- 1.590 **Forensic Science Society** suggest that “guidance [for magistrates / trial judges] ... could be in the form of accreditation / certification of experts (forensic practitioners). The society fully supports a more robust approach to accreditation and regulation of experts.
- 1.591 **General Medical Council** endorse the view that there should be complementary measures regarding accreditation and regulation of experts.

<sup>18</sup> International Organisation for Standardisation.

- 1.592 **The Law Reform Committee of the Bar** think we should go beyond our present remit and consider “statutory regulation of the verification or validation of the expert’s qualification to appear as an expert”. They suggest a “further detailed review ... of the opportunities for accreditation and continuing professional development of expert witnesses”.
- 1.593 **Police Superintendents’ Association of England and Wales** support accreditation as a criterion for determining whether Legal Services Commission funds should be made available to defence expert witnesses.