RESPONSE OF THE CRIMINAL BAR ASSOCIATION
TO LAW COMMISSION PAPER No. 190:
'THE ADMISSIBILITY OF EXPERT EVIDENCE IN CRIMINAL PROCEEDINGS IN ENGLAND AND WALES."

Introduction

1. The Criminal Bar Association (the CBA) welcomes this consultation Paper (henceforth 'the Paper'). We endorse the important role that reliable expert evidence can play to further the interests of justice, by the safe conviction of the guilty, and the acquittal of the innocent.

2. There have been recent powerful examples of the former, where cold cases have been re-investigated with improved DNA technology, and apparently safe convictions have resulted. In 2007, cold case DNA convicted Ronald Castree of the 1976 murder of Leslie Molseed. In 2008, as a result of new DNA evidence, Ronald Napper was convicted of the murder in 1992, of Rachel Nickell.

3. By way of two examples of the latter, it was forensic document examination that triggered the quashing of the convictions of those convicted of the 'Carl Bridgewater' murder, Hickey and Robinson, [Archbold News [1997] 8 p.3 CA] and it was belated semen analysis, which proved that Stefan Kiszko could not have

murdered Leslie Molseed. Stefan Kiszko spent sixteen years in prison before his release on appeal.

4. However, we agree that the current treatment of expert evidence in criminal proceedings has contributed to a significant number of miscarriages of justice, risks continuing to do so, and requires urgent reform. The Paper examines irrefutable material demonstrating that such evidence frequently has a very powerful effect upon the tribunal of fact: and rightly or wrongly is often 'trusted' like no other category of evidence. Granted it's strong potential for furthering or harming the interests of justice, we therefore endorse the case for special rules of admissibility for this category of evidence. It must be in the interests of justice to ensure that only expert evidence which has been properly scrutinised and has confirmed validity goes before the jury. The jury can then determine whether, after cross examination and within the evidential matrix of the case, they accept it and what weight they attach to it.

Executive summary

5. *Do consultees agree with our provisional proposal that there should be a statutory test for the admissibility of expert evidence in criminal proceedings?*

The Law Commission's proposal is set out at para 6.10

> "6.10 We provisionally propose that there should be a statutory provision along the following lines:
>
> (1) The opinion evidence of an expert witness is admissible only if the court is satisfied that it is sufficiently reliable to be admitted.

(2) The opinion evidence of an expert witness is sufficiently reliable to be admitted if:-

(a) the evidence is predicated on sound principles, techniques and assumptions;

(b) those principles, techniques and assumptions have been properly applied to the facts of the case; and

(c) the evidence is supported by those principles, techniques and assumptions as applied to the facts of the case.

(3) It is for the party wishing to rely on the opinion evidence of an expert witness to show that it is sufficiently reliable to be admitted."

We agree that there should be a statutory admissibility test as set out.

6. *Do consultees agree with our provisional proposal that trial judges should be provided with guidelines for determining the evidentiary reliability of scientific (or purported scientific) expert evidence?*

The Law Commission's proposal is set out at para 6.26

"We provisionally propose a list of guidelines along the following lines for scientific (or purportedly scientific) expert evidence:

(1) In determining whether scientific (or purportedly scientific) expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors and any other factors considered to be relevant:

(a) whether the principles, techniques and assumptions relied on have been properly tested, and, if so, the extent to which the results of those tests demonstrate that they are sound;

(b) the margin of error associated with the application of, and conclusions drawn from, the principles, techniques and assumptions;

(c) whether there is a body of specialised literature relating to the field;

(d) the extent to which the principles, techniques and assumptions have been considered by other scientists – for example in peer-reviewed publications – and, if so, the extent to which they are regarded as sound in the scientific community;
(e) the expert witness' relevant qualifications, experience and publications and his or her standing in the scientific community;
(f) the scientific validity of opposing views (if any) and the relevant qualifications and experience and professional standing in the scientific community of the scientist who hold those views; and
(g) whether there is evidence to suggest that the expert witness has failed to act in accordance".

We agree that judges should be provided with guidelines for determining evidentiary reliability of scientific evidence, as set out.

7. *Do consultees agree with our provisional proposed guidelines for experience-based (non-scientific) expert evidence?*

The Law Commission's proposal is set out at para 6.35

"We provisionally propose a list of guidelines:

(1) In determining whether experience-based expert evidence is sufficiently reliable to be admitted, the court shall consider the following factors (where applicable) and any other factors considered to be relevant:
    (a) the expert's qualifications, practical experience, training and publications and his or her standing in the professional or other expert community;
    (b) the extent to which the basis and validity of the expert's opinion can be explained, with particular reference to:
        (i) the extent to which the basis of the opinion (for example, any assumptions relied upon) has been verified or discredited;

(ii) the specific instances which support the claim to experience-based expertise;

(iii) the bearing those instances have on the matter(s) in issue; and

(iv) whether the expert's methodology or reasoning has previously resulted in a demonstrably valid or erroneous opinion;

(c) whether there is a body of specialised literature relating to the field of expertise and, if so:

(i) the extent to which it supports or undermines the expert's methodology and reasoning; and

(ii) the extent to which the expert's methodology and reasoning are recognised as acceptable amongst his or her peers;

(d) whether there is evidence to suggest that the expert has failed to act in accordance with his or her overriding duty of impartiality.

We agree with the proposed guidelines for experience based (non-scientific) expert evidence.

8. *Do consultees agree with our provisional proposal in paragraph 6.57 above 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?*

We agree that the task of establishing sufficient reliability for the purposes of admissibility should rest upon the party intending to adduce the evidence.

9. *Do consultees agree with our view that the other aspects of the present common law test governing the admissibility of expert evidence in criminal proceedings are satisfactory? (Paragraph 1.2(1) and (3) and paragraph 1.3 above) If so, do consultees believe that these rules should be codified in primary legislation?*

We agree that the other aspects of the common- law admissibility test are satisfactory: but they should be codified in primary legislation.

10. Para. 6.83: *(1) Should trial judges exceptionally be entitled to call upon an independent assessor? (2) Should reliability always be decided before the jury is sworn?*

(1) 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. The decision as to admissibility would remain the sole responsibility of the trial judge.

(2) The questions of reliability and admissibility should not always be decided before the jury are sworn.

<u>Impact assessment: additional questions</u>

11. Para. 6.85. *Are the potential costs of Option 4, outweighed by the potential benefits, when compared with the cost/ benefit analysis of doing nothing or the other Options?*

We agree that the potential benefits of Option 4 outweigh the potential costs, by comparison with the other Options and doing nothing:

12. Para. 6.86. *In the medium to long term, would the benefits of Option 4 outweigh the associated financial costs?*

We agree that the potential benefits of Option 4 outweigh the potential financial costs:

13. Para. 6.87. *Has the Paper captured all the relevant costs and benefits associated with the proposed reforms?*

The Paper appears to capture the relevant costs and benefits: but we do not have access to comprehensive relevant data, we are therefore unable to confirm that the Paper has captured 'all' relevant costs.

14. Para. 6.88. *Invitation to provide further information and views.*

We make the following comments (see below for further discussion):

- a comprehensive and universal standard of mandatory accreditation is required;
- specialist training for practitioners, the judiciary and experts;
- enhanced Judicial Studies Board directions re expert evidence;

- express retention of existing exclusionary rules as to the admissibility of evidence e.g. s. 78 Police and Criminal Evidence Act 1984, and
- amendments to the Criminal Procedure Rules.

Detailed Discussion

Part 1. Introduction.

15. We agree that the introduction of a more robust admissibility test should not be seen as a panacea: but should be part of a range of complementary measures to improve the reliability of expert evidence, and the quality of justice in relevant trials. These should change the landscape, so that courts would rarely be presented with dubious or speculative pseudo- scientific evidence. This would save court time and resources within the legal system.

16. We are of the opinion that a comprehensive and universal standard of mandatory accreditation is required to encourage industry wide standards. **Effective accreditation** would establish a preliminary filter of basic standards, so that rarely would lawyers consider approaching unaccredited witnesses. We interpret a*ccreditation* as a higher requirement than *registration*.

17. We note the creation and role of the new Forensic Science Regulator [FSR], which is still in its infancy. We understand that the FSR is presently consulting on options for the accreditation of forensic practitioners. Therefore it has no power to enforce standards as yet. It has limited resources and relies on voluntary committees and sub committees. As identified in the paper [para 1.15 fn 17], the ambit of the FSR does not include independent experts instructed by the defence. The government's apparent position against *mandatory* registration for experts in the private

sector can be seen in a Parliamentary answer[1]. Mandatory registration with the Council for the Registration of Forensic Practitioners was recommended in the House of Commons Select Committee on Science and Technology Report "Forensic Science on Trial[2]. We support that recommendation and would encourage implementation of a system of accreditation.

18. We note with concern the very recent decision by the Home Office to stop funding the Council for the Registration of Forensic Practitioners, [CRFP] set up in 1999, to scrutinise the standards of over 3,000 independent experts. We understand that the problem arose over its self financing, from registration fees, and it disbanded in March, 2009. There is going to be a worrying gap, before any new regulator can introduce a new system. Accordingly, there is a real risk of a two tier approach, between experts who are utilised by the Prosecution authorities where there is the genesis of a system of accreditation, and those experts instructed by the defence, where no such system is in place.

19. Accreditation, once a fully functioning system is in place, could be a pre-requisite for public funding. For instance the Legal Services Commission [LSC] could indicate that accreditation was a requirement for the system of 'prior authority' and for payment of experts instructed by the defence. Discretion could be left with the LSC to allow payment for an unaccredited expert in

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[1] http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080421/text/80421w0033.

[2] recommendation 43 at paragraph 139), published 29 March 2005.

exceptional circumstances. This would leave sufficient scope to maintain access to appropriate expert testimony.

20. We endorse the importance of **training.** Better trained lawyers would be in a better position to recognise 'bad science' at the outset, and resist the temptation to place reliance upon it. Training is not compulsory in relation to expert evidence, rather it is a matter for the practitioner to explore when satisfying their annual continual professional development [CPD]. Training in relation to expert evidence does take place from a variety of sources including the CBA, Inns of Court, Circuit and the New Practitioners Programme [NPP]. The existing regime of training could be extended further, and include greater emphasis on expert evidence as part of the NPP and general CPD. Expert evidence training could be made mandatory under the NPP.

21. It is important that any new statutory 'reliability' test as to the admissibility of expert evidence, expressly makes clear that it does not displace other 'exclusionary' rules and discretions. For example, any failure to preserve records of original tests, especially where not repeatable, may fall just as comfortably under the S. 78 Police and Criminal Evidence Act 1984 [PACE] regime, which provides an important further safeguard.

22. Existing judicial standard directions to the jury on expert evidence should be reviewed and enhanced. This would act as an additional safeguard by way of explanation and warnings in the trial judge's summing-up to the jury.

23. We acknowledge the general approach of the common-law which is to trust to the collective common sense of juries to make judgements about nearly all kinds of disputed evidence. However, where experience has shown that 'common sense' may not be enough, because of demonstrated miscarriage of justice cases, e.g. identification evidence, special explanation by the trial judge is called for. Just as in fleeting glimpse identification cases, the paper demonstrates that there are factors, which impede an effective and critical examination by jurors of much expert evidence: e.g. excessive deference and trust towards the witness: a misunderstanding of the limits of 'science'. The existing JSB specimen direction number 33 on expert evidence could and should go further. An enhanced direction would not only sum- up the state of the evidence, but explain its limits and any potential for error.

24. Moreover a Judge can explain where appropriate that certain 'expert' evidence does not involve any science at all. Fingerprint comparison evidence exemplifies this. It is a matter of visual comparison of features which happen to have specialist names: e.g. whorls, ridge endings and bifurcations. When 'blown up' and printed out, with pointers to the characteristics relied upon for identification, the jury can see for themselves as well as anyone else. Expertise may have gone into locating the matching points, but none is actually involved in comparing them at all.

Part 2: The Problems.

25. We agree that the courts have muddled along in an *ad hoc* way, deciding issues on a case by case basis, and applying no consistent criteria to admissibility. Indeed, even with regard to the treatment of the same kind of 'expertise' in the same case, they have reached contradictory conclusions at different hearings: see the approach to ear print evidence in Kempster 2003 EWCA 3555 and Kempster (no.2) 2008 EWCA Crim 975. It emerged in the ear print appeals that the purported 'experts' Ms McGowan and Van der Lugt have not a scientific qualification between them, above a possible GCSE. They were 'enthusiastic amateurs'. There had not been a single publication by either 'expert'.

26. The inconsistencies in the approach of the Courts are exemplified as follows:

A. (i) There is Court of Appeal authority upholding 'general recognition in the scientific community' as at least part of the accepted English approach to 'a developing new brand of science or medicine': see Gilfoyle (No. 2) [2001] 2 Cr App R 57 at p. 68, per Rose LJ. That case involved proposed Defence psychiatric evidence about the state of mind of the deceased, purporting to make suicide a more likely cause of death. This was scarcely a striking development of the law, since as the Paper points out at para. 1.2, the second of the well established criteria in Bonython, is probably to the same effect. 'Sufficiently organised or recognised' could and should be read as

referring to ‘in the scientific community’, though it does not spell it out.

(ii) However, this would seem to be inconsistent with Robb (1991) 93 Cr App R 161 at 166. It has also been disapproved by a later Court of Appeal in R v Dallagher, [2002] EWCA Crim 1903, 25.7.02., at paras. 22- 29, but on a misconception of the US position. Again, in R v Luttrell [2004] EWCA Crim 1344, the same was rejected at para. 34. That test would have required that “the evidence can be seen to be reliable because the methods used are sufficiently explained to be tested in cross-examination and so to be verifiable and falsifiable.” The Court accepted at para. 35, that this could be relevant as to the exercise of the discretionary exclusion under S. 78, PACE 1984.

B. No other court seems to have followed the lead in one authority. In R v Gray [2003] EWCA Crim 1001, 27.3.03, the Crown abandoned reliance upon a facial mapping expert, who had, after trial, been discredited by established misidentifications in two other cases. There had to be a re-trial, but at para. 16, the Court went out of its way to disapprove of the content of the trial expert evidence:

“*16. We do not however wish to pass from this appeal without making general observations about the use of facial imaging and mapping expert evidence of a reliable kind. Mr Harrow, like some other facial imaging and mapping experts, said that comparison of the facial characteristics provided "strong support for the identification of the robber as the appellant". No*

evidence was led of the number of occasions on which any of the six facial characteristics identified by him as "the more unusual and thus individual" were present in the general population, nor as to the frequency of the occurrence in the general population, of combinations of these or any other facial characteristics. Mr Harrow did not suggest that there was any national database of facial characteristics or any accepted mathematical formula, as in the case of fingerprint comparison, from which conclusions as to the probability of occurrence of particular facial characteristics or combinations of facial characteristics could safely be drawn. This court is not aware of the existence of any such database or agreed formula. In their absence any estimate of probabilities and any expression of the degree of support provided by particular facial characteristics or combinations of facial characteristics must be only the subjective opinion of the facial imaging or mapping witness. There is no means of determining objectively whether or not such an opinion is justified. Consequently, unless and until a national database or agreed formula or some other such objective measure is established, this court doubts whether such opinions should ever be expressed by facial imaging or mapping witnesses. The evidence of such witnesses, including opinion evidence, is of course both admissible and frequently of value to demonstrate to a jury with, if necessary, enhancement techniques afforded by specialist equipment, particular facial characteristics or combinations of such characteristics so as to permit the jury to reach its own conclusion - see Attorney General's Reference No 2 of 2002 [2002] EWCA Crim 2373; but on the state of the evidence in this

case, and if this court's understanding of the current position is correct in other cases too, such evidence should stop there."

It seems that there can be a proper comparison by the expert between the video image and the Defendant, which the jury can consider. The expert cannot however properly give any opinion about rarity of any facial features. The insistence upon a national database or national formula is salutary and contrasts with the position in other fields of expert evidence.

C. R v Gerrard Francis Luttrell and ors, [2004] EWCA Crim 1344, involved lip reading evidence by a Ms Rees from surveillance videos in a number of trials. After a voir-dire in each case, involving expert evidence on both sides, the trial judge ruled the evidence admissible, which became the major appeal issue. The argument, furthered with fresh expert evidence on appeal, was that the evidence was too unreliable to be admissible. The Court accepted at paras. 41- 44, that this category of evidence requires a special warning to the jury "as to its limitations and the concomitant risk of error." A number of factors, depending on the individual case, are to be highlighted potentially affecting reliability. It is anomalous for this only to apply in this one field of expert evidence.

D. In Cannings [2004] EWCA Crim 01, but in no other case, the Court expressed the view at para. 178, that prosecutions should not be brought against a parent for child murder, where

there is a conflict of reputable experts about whether it was a natural death and there is no extraneous support.

27. Perhaps the single paragraph in the whole paper about which we have the greatest reservation, is para. 2.5. This appears to concede the inevitability of jury deference i.e. the inability of the jury to assess the merits of the evidence for itself. It further appears to accept that, provided the expert evidence is reliable, then deference 'is not necessarily a bad thing'. Perhaps this is simply an unfortunately phrased paragraph, which was intended merely to convey the real danger in most cases that jurors defer to the witness. Any ambiguity should be removed, for the following reasons.

28. Firstly, this is to confuse reliability, the test for admissibility, with accuracy, i.e. whether it is ultimately accepted. Expert evidence may be produced in a manner which satisfies all the 'reliability' tests for admissibility, yet be entirely wrong. The jury must be on the look out for such error. Indeed, if it failed the proposed test for reliability, the jury would never hear the evidence at all. The jury is *ex hypothesi* considering apparently 'reliable' expert evidence. 'Deference' is then a negation of the jury's task, and inherently dangerous, whether or not, by chance, the jury reach the 'correct' verdict by a route which involves such deference. Indeed, it is arguable that any verdict reached by such a route is likely to be inherently 'unsafe', and cannot on any analysis be deemed to be 'correct'. Surely,

we only decide what is the ‘correct’ verdict by means of a fair criminal trial; there is no external determinant of ‘correctness’.

29. Secondly, this is inconsistent with the common law statements of the role of expert evidence: see the citation of para. 24 from Gilfoyle No. 2, at para. 3.3 of the Paper. The witness must “furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgement by the application of these criteria to the facts proved in evidence.”

30. Thirdly, this is inconsistent with the current model jury directions on the approach to expert evidence in the summing-up. Our courts act on the assumption that directions of law can be, and are obeyed by the jury. There should not be any divide between such directions and reality. If indeed deference were inevitable, this would cause a re-think of our trial procedures in this regard.

31. Fourthly, this concession would have a most damaging effect upon the conduct of the lawyers on both sides in a criminal trial. It is their task, most especially that of those advancing the expert evidence, to present the evidence and the issues in as clear a way as possible to enable assessment of the merits. The lawyers should be trained to do so, and the most effective court room technology used. The culture of the lawyers should be that it is in their own interests and the interests of justice that the jury do indeed understand and can assess the

merits of the expert evidence. The role of the trial judge from the early case management stage, through to observing the jury during the trial should be to carefully supervise this exercise. We would be most concerned if any part of the report were to occasion complacency or resignation about the possibility of success in this task. Sadly there may be costs pressures which may lead to the cutting of corners in this respect. We hope that the Final Report can play an important role in reinforcing this point.

32. Fifthly, the common law places much reliance upon the collectivity of the jury. They are enjoined to pool their common sense and experience of the world. There is no doubt that they do so in relation to their differing educational attainments. Whilst, inevitably, there will be some or many jurors for whom no amount of explanation will convey the means to assess scientific evidence, the common law has faith that their collectivity will normally overcome this in their private discussions.

Miscarriages of Justice: Paras. 2.12- 2.33.

33. We note that the Paper has focused understandably upon some of the major miscarriage of justice cases since about 2001: Dallagher, Clark (Sally), Cannings and Harris. We agree that they are quite sufficient to demonstrate ‘a real ongoing problem which demands an urgent solution’.

34. This is not by any means a recent problem. This conclusion will only be reinforced by historic examples of miscarriages of

justice to which unreliable expert contributed significantly. For example the infamous 'Griess' test of Dr Frank Skuse for traces of nitroglycerine on hand swabs, in the Birmingham Six case. It was later recognised that the test could produce a positive from having handled playing cards: cellulose.

35. There are specific practical problems with the handling of new **and emerging science** which are not set out in the Paper. Many new processes are developed at considerable expense by private commercial companies. They will wish to preserve commercial confidentiality about their processes. Sometimes their culture is resistant to peer review publications and to open disclosure. They may pay a heavy financial price for acknowledging weaknesses in process or contradictions. They are naturally motivated by the profits resulting from acceptance by the courts. They should be under no doubt that the courts expect standards of openness before they are admitted to this market; just as the national regulatory bodies expect transparent clinical trials, and peer review before acceptance of drugs or technology for patient use.

36. In such cases, the commercial enterprises have the discipline of potential negligence liability as motivation for high standards. When those same entities enter the field of forensic science, there is a public policy bar upon negligence liability for the evidence given by expert witnesses. No 'duty of care' is owed towards the potential victim of mistakes, a wrongly convicted defendant. The discipline of civil liability in damages is lacking. It

is therefore all the more important that the courts act as 'gatekeeper' in the criminal courts.

37. The Court of Appeal has deftly avoided confronting the approach to this problem, by glossing the dilemma. Two illustrations of this are:

(i) Clarke [1995] 2 Cr App R 425 at 430, cited at para. 3.6 of the Paper: it "*would be entirely wrong to deny to the law of evidence the advantages to be gained from new techniques and new advances in science*".

(ii) Harris at para. 270 cited at para. 3.8 (4) of the Paper: "*developments in scientific thinking should not be kept from the court simply because they remain at the stage of hypothesis.*"

This is an over simplistic and potentially dangerous course. There will be occasions where it is right to deny admissibility to such material.

38. The effect of the changes proposed in the Paper would indeed rightly be to prevent the calling of evidence at such an embryonic stage of verifiable reliability. It is submitted that such expert evidence would not pass the helpful Australian test (cited at para. 4.9, footnote 14, of the Paper), namely that the area of expertise '*has not sufficiently emerged from the experimental to the demonstrable*.'

<u>Part 3: The common law and calls for reform.</u>

39. Para 3.3, footnote 8 cites Platt [1981] CLR 332, for the proposition that a jury has to be sure beyond reasonable doubt

about the correctness of a prosecution expert opinion before relying upon it. This is a common fallacy. The above proposition is specific and appropriate to the particulars facts as set out in Platt. Save and except for a 'Mushtaq' direction to the jury in relation to the 'voluntariness' of a confession, which is a very specific rule, a jury does not have to be sure about anything other than the ultimate issue. Of course it is also tautological to say that where there is only one item of prosecution evidence, the jury have to be sure about that in order to convict. Otherwise, the jury is allowed to put together pieces of evidence, some direct, some circumstantial: some most probably correct, some possibly correct: some flawed, some unquestionable: some objective, some biased: and can then ask itself, whether in the totality it is satisfied of guilt.

40. Famously, Bridge J. as the trial judge in the original Birmingham Six trial, corrected defence counsels' speeches which expressed this fallacy. Indeed, if this were the law, it is surprising that there are no examples, of which we are aware, of defence counsel objecting to the admissibility of expert evidence, on the basis that no reasonable jury could be sure about its accuracy.

Part 4: Proposals for reform

41. Option 1 would ignore all the strong indicators that expert evidence has different effects from conventional evidence within the trial process, poses special problems of handling at trial, and has contributed potently to demonstrable miscarriages of justice.

42. Para. 4.7: we would prefer conceptually to keep quite separate ‘reliability’ from ‘relevance’. An assertion may be unreliable or even a lie, but before determining its merits it will be relevant, because it bears upon the issue: i.e. may affect its determination. We do not see why the exclusion of some evidence because on balance it may be more unfairly prejudicial than probative, should be expressed to be based upon its relevance. It is better and clearer to face up to its relevance.

43. Option 2 would establish far too low a threshold of admissibility to establish effective protection against the demonstrated problems, and would perpetuate the inconsistency and ‘laissez faire’ approach at the heart of the problem.

44. We do not quite follow paras. 4.17- 4.26, and what is meant by obtaining a ruling on admissibility, which is a ‘rule of law.’ However, this has more relevance to the procedural mechanisms for obtaining an authoritative ruling, which will bind other courts, as to a particular technique of forensic science. We will address that later, since it effects the implementation of Option 4, which we endorse.

45. We agree that Option 3, the Frye type test is far too rigid a test and arguably does indeed cede the supervisory duty of the court to a consensus of third parties. There are good reasons why the USA approach has moved on from Frye. The Frye test does date from 1923, when perhaps scientific advances were not as common as now. Whilst this test should be one important factor upon admissibility, it should not be the sole determinant.

There are obvious difficulties in precisely applying the concept of 'general acceptance' anyway.

46. However, it did only relate to the 'scientific theory' underpinning the actual expert's work: i.e. the principles being applied, not their actual application. We therefore suspect that it would not have resulted in the exclusion of the vital fresh evidence in the two appeals cited at para. 4.32.

47. We agree that Option 4, the Daubert approach, gives that flexibility which is necessary to cater for the wide variety of expert evidence which will come before the criminal courts. The stated factors from that judgment at para. 4.47 should form the core of the proposed 'guidelines' to judges. We would emphasize that the second criterion, 'peer review and publication', is of great significance. It provides for a long term and objective opportunity to test and refute the theory and practice of the technique. It also evidences the proper willingness of its proponents to subject their 'project' to outside scrutiny and criticism. One by-product should often also be the availability of defence expert witnesses to advise the defence, and if necessary give evidence.

48. We agree with the Paper's answers to the broad categories of criticism of the Daubert approach.

49. We note the concern expressed in the paper, based upon evidence from the USA as to the inability of elements of the

judiciary to address scientific issues, and apply the Daubert approach in practice. Effective change will therefore require a rigorous training regime for judges and lawyers.

50. It should be remembered that although there will always be an urgency to solving serious crime by the use of forensic science; it is rare that there will only be one historic opportunity to achieve that end. The retention of crime, suspect and control samples will often facilitate the ends of justice, when reliability can better be established. There have been several recent examples of convictions for very old offences by this means as set out in this document's introduction.

Part 6: Proposals for consultation

Proposal 1: A "gate keeping" role and reliability-based admissibility test.

51. We agree that there should be an explicit "gate-keeping" role for the trial judge with a clearly defined test for determining whether the proffered expert evidence is sufficiently reliable to be admitted.

52. The Paper suggests that the trial judge would prior to determining the "gate-keeping" question, have to be satisfied of the following:

(i) Is the evidence logically relevant to the disputed matter?

(ii) Would the evidence provide the jury with substantial assistance?

(iii) Does the witness qualify as an expert in the field, and would he or she be able to provide an impartial opinion?

53. Great care must be taken in the drafting of the statutory provision. If the test is to be put on a statutory footing it should not be piecemeal but cover all steps to admissibility. The first three stages proposed reflect the current common law, namely is the proposed expert evidence relevant e.g. does it go to an issue in the case, is it outside the knowledge of the jury, thus providing assistance and does the proposed witness qualify as an independent expert in that field. We are of the opinion that all steps to admissibility should be reflected in the statute, as well as the proposed 'gate-keeping' provision. The statute should also expressly retain other exclusionary rules, such as S. 78 PACE 1984. The use of the word 'sound' rather than 'proven' or 'accepted' leaves the door open to new areas of expertise: provided that it '*has … sufficiently emerged from the experimental to the demonstrable*.'
see above at para 38.

Guidelines for Judges re admissibility of expert evidence

54. We agree with the guidelines for judges on the admissibility of scientific expert evidence, at para. 6.26 and 'experience based' expert evidence at para. 6.35.

55. These guidelines in particular, stress the need for previous validation and, in turn, knowledge of any specific and previous

discrediting. However, there is no route suggested for the compilation of, or access to, such information. Access to such information is likely to be more difficult for the defence than e.g. the FSS.

56. Some attempt has already been made to address what the report of an expert should include. In R. v. Bowman The Times March 24, 2006, the Court of Appeal approved the statement of an expert witness's duties at trial contained in R. v. Harris**;** R. v. Rock**;** R. v. Cherry**;** R. v. Faulder [2006] 1 Cr.App.R. 55(5), namely

(i) details of the witness's qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of expertise and any limitations thereon;

(ii) a statement setting out the substance of the instructions received, however received, the questions upon which an opinion was sought, the materials provided, and the materials which were relevant to the opinions expressed or upon which they were based;

(iii) information as to who had carried out any tests, and their methodology, and whether such work was carried out under the supervision of the witness;

(iv) where there was a range of opinion in the matters dealt with in the report, a summary of the range of opinion and the reasons for

the opinion given; any material facts or matters which detracted from the witness's opinion and any points which should be made against it;

(v) relevant extracts from the literature or other material which might assist the court;

(vi) a statement that the witness had complied with the duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise and an acknowledgment that the witness would inform all parties and, where appropriate, the court in the event of any change of opinion on the material issues; and these guidelines applied equally to supplementary reports:

57. In order for the proposals to be workable in practice there needs to be:

(i) proper accreditation of experts;

(ii) amendments to the guidance of what is required to be contained in an expert's report to include e.g. names and dates of previous cases in which they have given evidence and details of cases in which their evidence has been criticised (whether on appeal or at first instance);

(iii) disclosure of the material that forms the foundation from which their conclusions are

drawn e.g. databases; photographs; recordings etc.

58. The proposed guidelines as set out at para 6.26 in the Paper, mixes the value of the science and the value of the scientist together. They are not weighted. We are of the opinion that if there is any failure or weakness in any of the science specific tests, then the esteem in which the scientist is held should not be permitted to outweigh the deficiencies of the science. Likewise, just because an opinion is a minority one, if the science is sound it should not fail because the expert is relatively unknown.

Methodology

59. Experts should have to set out their methodology, follow any 'best practice', ensure that a full and proper record of all work is undertaken (this is especially important at primary crime scenes where a subsequent expert is reliant on the correctness of the recordings of the first expert or SOCO). Their workings should be open and transparent. Disclosure and access to primary databases for the opposing party's expert would need to be ensured.

Adherence to standards and guidelines

60. It should be a requirement that an expert has adhered to the standards and guidelines as set down by the relevant regulatory body. A large amount of scientific areas have industry wide guidelines e.g. GCP good clinical practice. It may be that in some areas that codes of practice will need to be drafted.

The expert's reasoning

61. We would ask that the guidelines strongly reinforce the proper role of 'expert evidence', which is to assist the tribunal of fact to reach its conclusion on the 'ultimate issue'. To this end, it is vital that where possible there be available at trial the best practicable record of any observations or findings. This particularly applies of course to medical expert evidence e.g. in sexual abuse cases or from a post- mortem. In the former example, we note the emphasis rightly given to the making of a photographic record at section 9.5. ('Examination technique') of 'The Physical Signs of Child Sexual Abuse' produced by the Royal College of Paediatrics and Child Health, March, 2008. The same would also further the vital objective that there should be 'equality of arms' between prosecution and defence. Without such a record, it will normally prove impossible for any later effective check to take place. The opposing party, and thus the interests of justice, are thereby prejudiced, since deciding any challenge to the unrecorded finding will be reduced to a matter of 'trust'.

Timing of rulings and appeals

62. We do not consider it necessary to confine Trial Judges always to rule before the jury is sworn. No doubt this will very often be the case, and all parties would want to know where they stand at the outset of the trial. Nevertheless, there may be circumstances where there has been late exchange of information, which will need further exploration by both sides, and there is no prejudice to anyone if, while this is done, the

trial starts and deals with other issues. Generally, we would expect that issues about experts would be raised at an early stage, and dealt with by directions and agreement at case management hearings. The Criminal Procedure Rules will need to be amended accordingly.

63. We agree that the ruling on admissibility would be a question of law and, as such, could be examined by the Court of Appeal.

Proposal 2: The onus of persuasion

64. We agree that judges can properly take judicial notice of the evidential reliability of opinion evidence where its area of operation has already been clearly established, but are concerned that this might involve the 'automatic' inclusion of evidence which is unreliable for other reasons.

65. The reliability of expert evidence can be in dispute not merely because of the theory or methodology of the science (or faux science) involved, but because of the quality of the expert and his/her work in that particular case. Where an expert in an established field has mistaken the factual basis upon which his conclusion is reached, made fundamental errors or otherwise manipulated the results, we consider that opposing parties should not be de-barred from ruling it out on a pre trial hearing. Although such cases are likely to be extremely rare, we assume for the avoidance of doubt that the present procedure on seeking rulings on admissibility before the evidence is called will continue to operate, in conjunction with the new reliability test.

66. We accept that, as stated at para 6.54 (2) there are categories of evidence which are so fundamentally unsound that judges need not consider them further, e.g. astrology or phrenology. However we can see possible situations where judges might seek to rule out expert evidence without a hearing, when that evidence *may indeed* be reliable and admissible, although unusual or in an unusual context. For example, the validity of psychiatric evidence as to the reactions under stress of persons suffering from post traumatic stress disorder was difficult initially to establish at first instance. Consideration should be given to permitting appeals on such rulings as a preliminary issue.

67. We agree that the onus of persuasion as to admissibility should lie upon the party seeking to adduce the evidence. We also agree that there should be no difference whether the evidence is being adduced by prosecution or defence. Otherwise, there would be the wholly anomalous position whereby the defence could call evidence failing a threshold imposed upon the prosecution, to which the prosecution could presumably not respond in kind, if they could not comply with a stricter standard applying only to them. The task at this stage is to persuade the tribunal that the proposed evidence is reliable enough to be admissible, and not to persuade the tribunal of fact that it is correct. Accordingly we fully endorse the view at 6.59 that questions of the standard of proof should not arise at this stage. We envisage no particular difficulties arising in the practical establishment of admissibility: the process is one frequently

encountered in the course of the criminal trial, for example where a defendant challenges the admissibility of a confession, where considerations of its truth or otherwise are subsumed within considerations of reliability.

Proposal 3: Assistance from Court Appointed Assessors

68. We take it that the court appointed assessor (in effect an amicus expert) would be required to assist the judge in the preliminary assessment of admissibility before the evidence went to the jury. Any hearing would be in the nature of a voir dire, with reports being disclosed in advance. We can see no difficulty in principle, in judges having such assistance in particularly problematic cases. There is a similar procedure under the Civil Procedure Rules (CPR 35.15).

69. Paragraph 6.68 sets out that the requirements of natural justice involve the parties entitlement to question the assessor's reasoning. Obviously, we approve this. However there seems to be some confusion about the status of the assessor. If he or she were to be made available for cross-examination as is proposed, the assessor would be more like a court appointed independent witness. We consider that their status should be that of a court appointed independent witness, although their primary function may be to clarify difficult scientific areas for the judge. Any unwelcome implications of the assessor being a private adviser, incompatible with open justice in an adversarial system, are thus avoided.

70. We note the suggestion at footnote 70 that the Forensic Science Regulator could compile a list of experts qualified to discharge the duties of assessment. We suggest, tentatively, that this rather begs the question about the accreditation and registration of experts generally about which we have concerns. Unlike jointly instructed experts in civil litigation, we would not expect all parties to have to agree, or have the right to agree on the appointment of any particular court independent witness. However there would have to be a measure of professional agreement that persons on the FSR list were in fact suitable, and were leaders in their field. An appointment panel containing representatives of the Law Society and the Bar Council, and a set of agreed criteria would go some way to ensuring basic agreement with the scheme.

71. We appreciate the attempts in the Paper at paras. 4.17-4.26, 6.44- 6.46 and 6.53 – 4, to grapple with the procedural issue of how effective rulings are to be obtained on admissibility, which can avoid duplication of litigation on the same issue. However, we are not sure that an answer has been found. The closest the Paper comes to addressing the choice of mechanism is at footnote 57 to para. 6.54, where reference is made to the obtaining of a decision of the High Court or Court of Appeal, which would presumably bind the Crown Court. To this end the Paper tried to define such a ruling as a 'ruling of law', presumably because any other kind of ruling could not be binding.

72. In State v Kunze 97 Wash. App. 832, 988 P2d. 977 (1999), the Court heard 15 conflicting experts on the reliability of 'ear print' evidence and ruled it inadmissible. Three 'experts', including Van der Lugt, told the Judge that there was such general acceptance, but twelve "long time members of the forensic science community" gathered from across the United States swore to the contrary. Four of the experts said that the FBI refuses to use such a technique. This hearing no doubt has had the salutary influence of a 'test case' ruling. We are anxious that the commercial enterprises behind new scientific methods, should not be permitted to 'forum shop' around Crown Courts, seeking favourable rulings on admissibility, and gathering a 'momentum of credibility'. The Criminal Procedure Rules should enjoin and facilitate a transparent process of 'test case' rulings in the Crown Court: which if tested and confirmed on appeal, would lend genuine credibility to a new and emerging scientific technique. Certainly the CPS nationally ought to be able to track when such an issue arises for adjudication.

Proposal 4: [A] - Education

73. We have already stated our view of the importance of this exercise. We consider that further and better education in dealing with expert evidence is crucial for the Bar, the judiciary, the Crown Prosecution Service in house advocates, and solicitor advocates in independent and private practice. We agree that it is not necessary to train judges or advocates *as scientists,* rather the training should increase the skills of understanding scientific methodology, identifying flawed reasoning, and challenging

illogical assumptions; this is a necessity for a modern and fair criminal justice system.

74. We note that there are methodological areas in practice which are not well understood, e.g. statistics. Even with established techniques such as DNA analysis prosecutors, and defenders, repeatedly stumble into the 'eponymous' fallacy. We have some concerns that, under the new scheme, when evidence is assessed as reliable and passes the first hurdle, the less experienced advocate will confuse that process with the necessary *challenge* to the evidence, and merely let it go to the jury in an unexamined form.

75. The Home Affairs Committee in their report 'Forensic Science on Trial' (Seventh Report of Session 2004 – 1005) identified a pressing need for better training. They suggested for example that judges be given annual updates on scientific developments relevant to the criminal justice system; that the Bar make some minimum forensic training mandatory; that a Science and Law forum be set up to facilitate communication and cooperation between those disciplines, and that a scientific review committee could be set up within the CCRC to scrutinize developments in the field. Those recommendations have not been followed. We consider they would be useful. Under the present arrangements, the CBA run well attended and effective courses as part of the CPD programme, which include specific areas such as the prosecution of rape cases; and the JSB, are active in continuing judicial education. Further courses devised by both organizations could fill some part of gaps identified.

Proposal 4: [B] - Accreditation

76. We note that the existing voluntary schemes for registration of experts have been beset by difficulties, and that experts generally appear unenthusiastic about voluntary registration over and beyond their professional bodies. The Council for the Registration of Forensic Experts was expected to be self funding through registration fees, and its failure to meet those targets led to its dissolution in March 2009. The Forensic Science Regulator has recently concluded a consultation on proposals for forms of accreditation, offering two models for consideration (one run by Skills for Justice; the other utilizing UKAS) but as we understand it neither scheme is to be mandatory. The Office for Criminal Justice Reform has indicated to the FSR that they do not propose a mandatory scheme because of the practical difficulties inherent in it, and it may be that the practical problems inherent in central compulsory registers are too great and that the present piecemeal system of experts 'registration' – for example in the Law Society register, the Academy of Experts etc – is the best that can be devised.

77. However this is and will continue to be an area of concern for the defence in a criminal trial. The finding and funding of suitably qualified experts can be exceptionally problematic particularly for solicitors out of metropolitan areas, where LSC restrictions on the travel costs of experts can be prohibitive; or where experts are few and far between in a specific field; or where the fees of experienced or well known experts are beyond the permitted budget in publicly funded cases. The perception

that Crown and defence do not operate on a level playing field is widespread.

78. However accreditation and its attendant difficulties should not be confused with the additional requirement for some form of centralized information as to the standing of expert witnesses. It is implicit within the paper that the proper assessment of the reliability of experts depends upon knowledge of their performance not only within the scientific community but in court, as experts, (as at 6.26 (g) and 6.35 (b) iv).

79. The proposed guidelines at para 6.26 includes the caveat 'whether there is evidence to suggest that the expert witness has failed to act in accordance with his or her over riding duty of impartiality'; and 'whether the expert's methodology or reasoning has previously resulted in a demonstrably valid (sic) or erroneous opinion' .

80. Without knowledge of previous cases, such assessment is impossible. We propose that experts be required, as part of their duties of neutrality and responsibility to the court rather than the party who has instructed them, to disclose in their report the names and citations of all cases in which they have previously been instructed. Prosecution and defence would thus have equal access to information upon which questions of neutrality and impartiality can be determined. In cases where there has been judicial criticism of any expert, we propose that a protocol could be devised between the FSR and the judiciary in which any adverse comments or rulings were recorded. The present

situation is that the parties can on occasions find newspaper or internet reports of adverse findings against experts, which may be inaccurate or piecemeal: this is not a proper basis upon which the standing of experts should be assessed.

Sentencing

81. The Paper deals exclusively with miscarriages of justice at trial level. However, justice can be ill served by expert evidence at sentencing levels. Dangerousness assessments are expert opinion, frequently conducted by probation officers on an opaque OASYS system which is all too rarely challenged; HR20 and Sexual Offender scales are ill understood and ill applied. We suggest that full disclosure of methodology, assessment tools and reasoning process as per 6.35 be applied to this area. Issues relating to the use of expert opinion and pre-sentence reports can be dealt with at case management hearings following arraignment.

Impact assessment.

82. We are not in a position to say whether the paper captures all the relevant costs. The paper at C51 indicates that there would be a rise in court costs as a result of the gate-keeping exercise, but that there may be overall savings where unreliable evidence is ruled out earlier in the court process.

83. However we can envisage defence costs rising because of the need for more court attendance by experts at a preliminary hearing, further contact between solicitors and experts and additional research required. We trust that the LSC would adjust

their funding arrangements so that the defence were not prejudiced.

84. It was suggested, in the Auld report, that where a judge after proper consideration of the issues approved the use of an expert by the defence there should be automatic funding made available for this. At present, a judge's comments as to the utility of a proposed expert report can be helpful in an application for prior authority but are not determinative of it. We propose that in appropriate circumstances – for example where the prosecution has served a late report and time is limited for the defence reply to it – a judge's approval of the need for the report should be sufficient authorisation of reasonable funds.

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