LAW COMMISSION EXPERT EVIDENCE REPORT

A FURTHER RESPONSE BY THE CRIMINAL BAR ASSOCIATION

JANUARY 2011.

1. The Criminal Bar Association represents about 3,600 employed and self-employed members of the Bar who prosecute and defend in the most serious criminal cases across England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts; ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

Objective

2. In late November 2010, the Vice-Chairman was approached by the Law Commission, to comment informally upon the draft **Criminal Evidence (Experts) Bill** ("the bill"). This is in the context of the publication of the Law Commission Consultation in 2009, a Consultation to which the CBA responded in that year.

Material

3. There is a substantial amount of material to consider on this topic and it is of assistance to consider the chronology and previous responses:

   i. 7th April 2009 Law Commission Report no 190: "The admissibility of expert evidence in criminal proceedings in England and Wales".

   ii. July 2009 CBA response to Law Commission consultation on Expert Evidence July 2009 [***Chair: Patrick O'Connor QC, Gillian Jones, Dermot Keating, Jeanie Mackie***]

   iii. June 2010 'departmental objections' [***this were concerns expressed to the Law Commission from governmental departments re costs etc and prompted a further consultation]***

   iv. June 2010 Draft policy, Law Commission June 2010 [***dealing with the composition of a panel that would assist a judge in appointing a court appointed expert***][6 pages]

   v. 16 November 2011: "Expert evidence in criminal courts-the problem" – a lecture presented to the Forensic Science Society by Lord Justice Leveson [20 pages] ***[illustrates judicial support for reform. Of note is the section re complementary measures at p.17-18 and the need, inter***

alia, of greater training. This lecture is cited in the Law Commission report para 1.25]

vi. Parts 1-8 of the Law Commissions draft final report [146pgs] including:

a. Part 1: introductions [p.1]
b. Part 2: summarises the current law on the admissibility of expert evidence [p.15]
c. Part 3: consultation [p.21]
d. Part 4: admissibility [p.57]
e. Part 8: the new test in practice [p.132]

4. The material provides a detailed analysis of the area of expert evidence and sets out why there is a need for reform. It is noteworthy that the Law Commission consultation was prompted by a report from the House of Commons Science and Technology Committee. In short it was considered that expert opinion evidence was admitted in criminal proceedings too readily and with insufficient scrutiny. Numerous miscarriages of justice have been cited including the cases of Dallagher (2002) [Ear print expertise], Clark (2003) and Cannings (2004) –both dealing with sudden infant death syndrome.

Overview

5. The Law Commission have settled upon a new "**reliability-based admissibility test"**- requiring the trial judge to assess the evidential reliability of the tendered evidence. This has been described as a "Daubert-type test" in reference to the United States Supreme Court decision.

6. There are four recommendations [see para 1.48 of the Report]:

7. 1# That there should be a new test in primary legislation which would prevent the admission of expert opinion evidence which is not sufficiently reliable to be admitted;

    a. This is set out at clause 1(2) and clause 4 where "reliability" is defined. Clause 4 is well set out. It defines when clause 1(2) is made out.

8. **2# That the legislation should include a power which would permit the trial judge to presume evidential reliability where there is no appearance of unreliability**;

    a. This is set out at clause 5(2). It is disengaged where the court considers at the outset that the expert opinion evidence "might not be sufficiently reliable".

9. **3# That the legislation should set out the factors the court should take into consideration when applying the reliability test;**

    a. Factors that may provide grounds for determining that expert evidence is not sufficiently reliable are set out at clause 4(2)(a)-(e).

    b. The draft Bill also sets out at clause 4(3)(a) that the court must have regard to the generic factors set out in Part 1 of the Schedule.

    c. Part 2 of the Schedule allows that the Lord Chancellor may by Statutory Instrument provide for other factors relevant to specific fields of expertise.

10. **4# That the legislation should compise a new statutory code for the admissibility of expert evidence in criminal proceedings generally, supplanting the various common law admissibility limbs**.

    a. This is set out at clause 1 and is a codification of the common law position including the Turner Test [para 4.2/4.8].

    b. Clause 2 sets out a qualification test including that the court should be satisfied according to the civil standard (Clause 2(2)).

    c. Clause 3 sets out the impartiality test.

Draft Bill

11. The codification of the common law principles regarding admissibility (basic rules, qualifications and impartiality) is clear and to be applauded. [Clauses 1-3]

12. The reliability test clause 1(c) and clause 4 (with Part 1 of the Schedule) provides guidance as to the application of the rule. It is balanced with a degree of flexibility (clause 4(3)) and allows the judge to consider which of the generic factors is applicable and also to consider anything else which appears to the court to be relevant.

13. Paragraph 5 sets out the procedural matters for reliability. The trigger for the test would be upon representation by one of the parties (Clause 5(2) or by the court of its own volition clause 5(3).

14. To avoid a disproportionate amount of applications, the draft Bill provides the court with a power to presume evidential reliability where there is no appearance of unreliability**. Clause 5(2) sets out that any representation as to insufficient reliability only bites "if it appears to the court that it might not be".** This perhaps is one area of potential controversy but the rationale is well set out and justified in our view. The test itself is not pitched at too high a level. It is the application of this presumption of reliability that will have to be examined in practice.

15. Clause 6 deals with appeals.

16. Clause 7 deals with disclosure and privilege.

17. Clause 8 deals with the topic of court appointed experts. This is the topic that led to the further consultation in 2010. It actually was a policy suggested by the CBA in our original response to the consultation. It transpired later that both the Law Society and CBA felt unable to assist with the composition of a panel that would consider the identity of a court appointed expert. The draft Bill adopts the idea of a panel but Clause 8(3) sets out that a selection panel can be established by the Lord Chancellor. It is anticipated that the circumstances in which a court utilises this power will be limited, although when it does occur, it may be quite important and have a real impact on an area of expertise.

Discussion points: policy and complementary measures

18. The underpinning policy is to ensure that only reliable expert evidence is presented at trial. The creation of such an admissibility threshold requires the judge to take on a 'gate keeping' role and the judge must be satisfied that the evidence is sufficiently reliable to be admitted i.e. that it is based on sound principles, technologies, methods and assumptions that have been applied to the case and the conclusions are logically sustainable.

19. The generic factors and guidelines set out in a schedule in the draft Bill are designed to encourage improvement in the standards in the presentation of expert evidence and the treatment of such evidence by practitioners and the courts.

20. A further area of concern in relation to expert evidence is the perceived inability or failure of advocates to test or challenge the expert evidence pre trial or during the trial process [See para 1.44 of LC report and LJ Leveson lecture p.17-18]. It is that failure that has prompted the need to introduce legislation and to present the judge with a 'gate keeper' role. Greater training is an obvious and useful tool to address this. This would seem to be an area where the CBA could be proactive in addressing and perhaps could be incorporated into the CBA seminars and lectures.

21. It will be interesting to see what impact the recent dissolution of the Forensic Science Service will have on standards of expert evidence presented by the prosecution bodies. It could be argued that the codification of standards such as in this draft Bill and schemes such as QAA are designed to counter balance the feared reduction in standards as the financial cuts take effect.

Conclusion

22. In summary, our view is that this is a carefully drafted Bill which has been modified slightly in light of the responses to the 2009 consultation. The initial

consultation appears to have received substantial support from all quarters. It remains to be seen how often the provisions are utilised in practice, if and when they become statute. It is designed to reduce/avoid miscarriages of justice –it is hoped that it heralds a new mindset and increased awareness by practitioners and members of the judiciary to the limitations and dangers that accompany expert evidence.

7th January 2011.

Dermot Keating

Gillian Jones