

**Response to  
the Law Commission's Consultation Paper**

**'The admissibility of expert evidence in criminal  
proceedings in England and Wales – A new  
approach to the determination  
of evidentiary reliability'**

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the *UK Register of Expert Witnesses***

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## Executive Summary

The Law Commission proposal to introduce a pre-trial assessment of the expert evidence put before juries in criminal trials is to be broadly welcomed. Expert evidence is unusual in that it is based heavily in opinion. Unlike the *facts* brought to the court by other witnesses, *opinions* do not lend themselves so readily to testing through adversarial challenge. An experienced expert witness convinced of the veracity of his (properly formed) opinion cannot be deflected easily by a non-expert advocate. Indeed, the court already sees expert evidence as being a special type of evidence, and we contend that it deserves special handling if it is to inform rather than mislead, particularly in criminal trials dominated by expert evidence.

Based on 356 contributions from expert witnesses, we feel that the Law Commission's proposals – including the use of guidelines to assist judges in their determination of evidential reliability for scientific and for experienced-based expert evidence – are workable in practice. Indeed, most of our expert witness contributors think that with a little extra effort they could provide the required evidence of underpinning reliability and that the tests would be likely to expose expert evidence with an inherently unreliable provenance.

Crucially, though, our expert witness contributors recognise that weeding out expert evidence with an inherently unreliable provenance will not do enough to solve the problem of expert evidence *that is itself unreliable* going before criminal juries. But they do think that the introduction of pre-trial meetings of the judge, lawyers and expert witnesses (similar to *Daubert* hearings in the US jurisdiction) would be more likely to achieve this. Such meetings would be designed to explore the expert evidence and provide time for its importance *in the context of the litigation* to be subject to a period of quiet reflection – a necessity denied in the current system. The vast majority of our expert witness contributors think that this approach would be likely to identify unreliable or irrelevant expert evidence before it was put before a jury.

As currently drafted, the additional time it would take for expert witnesses to prepare the evidence necessary to pass the tests set by the proposals will have non-trivial cost implications. Unless the Legal Services Commission has sufficient funds to meet this extra cost, the proposals will fail in practice.

The Law Commission's views on the generic accreditation of experts *as expert witnesses* have been overtaken by the work of the Forensic Science Regulator. Accreditation may **seem** to offer an enhanced level of confidence in expert evidence. However, the truth is that accreditation can never assure quality because quality comes from each individual's *ongoing* rigorous and error-free implementation of proper procedures; *a priori* accreditation can give us merely some measure of past performance. The only meaningful accreditation of an expert witness is as an *expert*, and that has to be undertaken by the expert's professional regulatory body.

## Introduction

This is the response of the *UK Register of Expert Witnesses* to 'The admissibility of expert evidence in criminal proceedings in England and Wales' Consultation Paper issued by the Law Commission on 7 April 2009. The first draft of this response was posted on the *Register's* website (<http://www.jspubs.com>) in early April 2009. The 2,500+ experts in the *Register* were then invited to consider the response and feed back their own views. We also enabled experts to contribute by taking part in a detailed on-line survey followed by a shorter 'rating' survey (see Appendix 1). In the event, 124 expert witnesses contributed to the first survey (of whom 54 classed themselves as scientists) and 233 expert witnesses contributed to the second survey.

J S Publications has published the *UK Register of Expert Witnesses* since 1988. The *Register* has developed over the years from a simple directory publishing project into a support organisation for expert witnesses. Most of our time is now spent on the professional support and education of expert witnesses.

The *Register* holds details on expert witnesses drawn from a wide range of disciplines, with just under half coming from medical fields. The majority of expert witnesses in the *Register* are more heavily engaged in civil litigation than criminal. This bias towards civil work is due in part to the better financial rewards and work conditions available with civil work.

An important feature of the *UK Register of Expert Witnesses* is the vetting we've undertaken since the product's inception way back in 1988. Indeed, our many conversations with lawyers have highlighted the importance they place on knowing that listed experts are vetted. As well as the initial vetting undertaken at the point of application to join the *Register*, all experts have the opportunity to submit to regular scrutiny by instructing lawyers in a number of key areas, such as report writing, oral evidence and performance under cross-examination. The results of the re-vetting process are published in the printed *Register*, in the software and on-line.

The printed *Register* is distributed free of charge to a controlled list of around 10,000 selected litigation lawyers. The on-line version of the *Register* is also available free to anyone with an Internet connection (see [www.jspubs.com](http://www.jspubs.com)), and currently attracts around 27,000 searches per year.

We provide registered experts with a variety of free educational resources. These include our quarterly *Your Witness* magazine, a series of more than 60 factsheets, court reports on cases with implications for expert witnesses, our Expert Witness Year Book, our LittleBooks series and our expert witness *e-wire* service. This information flow ensures that experts listed in the *Register* have the opportunity to be amongst the best-informed, with respect to expert witness-specific issues, in the country.

However, we also recognise that the quality of expert evidence is controlled in large part by the quality of the instructions received. Sadly we have observed a marked decrease in the quality of instructions to expert witnesses in recent times. To try to help combat this trend, we have published *Practical Guidance for Expert Witnesses in Civil Cases*, subtitled “What lawyers think experts should know but seldom get round to telling them!”, and its equivalent for the criminal arena. These guides help lawyers and experts to work together more productively.

Our daily contact with expert witnesses – drawn from across disciplines and including some who undertake an occasional instruction and others who work almost exclusively as expert witnesses – has given us a detailed understanding of this ‘litigation support industry’.

## A welcome new approach

We believe that the Law Commission's proposal to introduce a *Daubert*-style pre-trial assessment of expert evidence in criminal trials is to be broadly welcomed. Indeed, we have long called for just such a move. We have observed that problems with the court's use of expert evidence have arisen often because the expert evidence itself has not come under close scrutiny until the trial, when it was then played out in front of a jury.

Survey A response (n=113)				
	Important	Neutral	Unimportant	Don't know
How important is it that the criminal courts exert greater control over what expert evidence can be put before the jury?	63.7%	22.1%	11.5%	2.7%

See Appendix 1 for details of the surveys.

### Expert evidence is a special type of evidence

Expert evidence is unusual in that it is heavily based in opinion. 'Normal' witnesses testify as to fact, and the adversarial trial process is well suited to testing each witness for the honesty of their evidence. We do not think the same applies to the opinions that are the foundation of expert evidence. If it did, we would expect the adversarial system to be far better than it appears to be in detecting expert evidence that is based on flimsy data.

Survey B response			
	Agree	Neutral	Disagree
The adversarial system is designed to test the truthfulness of witnesses. (n=207)	60.8%	11.6%	27.6%
An expert convinced of the veracity of his opinion is telling the <i>truth</i> when he states that opinion (regardless of whether that opinion is, in fact, <i>correct</i> ). (n=208)	76.3%	6.3%	17.4%
An experienced expert is unlikely to be persuaded to change his opinion by a non-expert advocate (in the absence of any change to the underpinning evidential base or methodological error). (n=207)	84.5%	4.2%	11.3%

See Appendix 1 for details of the surveys.

Some expert evidence is mostly factual, but expertise is required to glean the facts. This class of expertise includes blood alcohol analyses and the calculation of slip coefficients. Other expert evidence is based in experience; while it is factual for the expert concerned, it would be unknowable to people 'outside the trade'. This class of expertise includes an experienced retailer giving evidence on what is custom and practice in his trade.

If analytical procedures are followed correctly and all the evidence is put before the court (even those tests that seem to the expert to give irrelevant or erroneous results), then there is little scope for these classes of expert evidence to mislead the court.

However, much expert evidence is to some degree based on opinion. This is where problems can arise. Much of supposedly scientific evidence is, in truth, the opinion of a scientist based on his training, experience and (possibly) some test results. For example, consider the expert evidence that a head injury was non-accidental based purely on the presence of three intra-cranial injuries<sup>1</sup>. It is (often) fact whether or not the three injuries are present, but it is an opinion that this triad of injuries points to a non-accidental injury. Or take ear-print (or fingerprint) evidence. While it appears that deterministic measurements are taken to characterise a print, it falls to the opinion of the examiner as to what exactly to measure.

This *opinion* class of expert evidence is recognised by the courts as being a special type of evidence, and we believe it demands special treatment if it is to inform rather than mislead the court. Leaving the adversarial system to work out which expert witness is 'correct' in a disagreement between expert witnesses is not a task for which the adversarial system is well suited.

<b>Survey B response (n=205)</b>			
	<b>Agree</b>	<b>Neutral</b>	<b>Disagree</b>
The adversarial system is not particularly well suited to testing the correctness of an expert opinion.	70.3%	14.2%	15.5%

See Appendix 1 for details of the surveys.

There are cogent arguments against letting the traditional adversarial approach hold sway when testing the correctness of expert evidence, not least of which is the apparent unwillingness of juries to accept the uncertainty introduced by differing expert opinions. More troubling to us is the willingness of judges to accept majority verdicts in criminal cases dominated by conflicting expert evidence, e.g. the Keran Henderson case. Unless one believes that juries behave unreasonably, isn't a 10–2 majority verdict the very definition of reasonable doubt?

### ***Adversarial challenge of expert evidence***

When expert evidence is challenged in court, the opinion evidence itself ought to be probed, tested and challenged for its basis in science or experience. But how often does the barrister turn from this difficult task to simply attempting to undermine the credibility of the expert? Most of our expert respondents believe this happens, and most have had it happen to them.

<sup>1</sup> acute encephalopathy, bleeding around the brain and retinal bleeding

<b>Survey B response (n=208)</b>			
	<b>Agree</b>	<b>Neutral</b>	<b>Disagree</b>
A non-expert advocate faced with an expert who is firm in his opinion will often try attacking the expert as a proxy for attacking the opinion.	83.2%	9.3%	7.5%

See Appendix 1 for details of the surveys.

Now, experts ought to be able to withstand a personal attack. Indeed, challenging the credibility of the individual is acceptable if it is focused on determining whether he is truly expert and capable of giving unbiased evidence. But when this approach is used as a proxy for the more demanding task of testing the science, does it serve the interests of justice? We think not.

<b>Survey A response (n=107)</b>				
	<b>Often</b>	<b>Sometimes</b>	<b>Seldom</b>	<b>Don't know</b>
How often do barristers attack you as a proxy for attacking your evidence?	18.7%	47.7%	29.9%	3.7%

See Appendix 1 for details of the surveys.

The trial proper is not a conducive environment for the careful analysis of complex evidence drawn from a body of knowledge that is, by definition, alien to the jury, judge and lawyers. Such analysis takes time, and it often requires the opportunity for quiet and considered reflection. This simply cannot be done at trial.

Of course, for many cases the expert evidence will not be hugely complicated, or it will not be central to the determination of the issues in the case. In such cases, leaving the examination of this evidence until the trial may be appropriate. But when the expert evidence is complex and/or the trial depends principally on that evidence, experience has shown that the current system does not work well.

By introducing an early assessment of the reliability of the underlying body of knowledge from which the expert evidence is drawn, the Law Commission proposals go some way towards addressing the problems that arise from delayed scrutiny of the expert evidence. But are they workable? Do they go far enough? Would they have dealt any better with the cases put forward by the Law Commission as justification for the changes proposed?

### ***Are the proposals workable in practice?***

In order to work, these proposals need all experts to be able to demonstrate that their opinions are drawn from a sufficiently reliable body of knowledge. Is this practical? The respondents to our survey didn't think this would be a problem.

<b>Survey A response (n=117)</b>				
	<b>Fairly easy</b>	<b>A bit tricky</b>	<b>Hard</b>	<b>Don't know</b>
How easy would it be for you to demonstrate that your evidence was reliable?	79.5%	12.8%	6.8%	0.9%

See Appendix 1 for details of the surveys.

While much expert evidence is based in science, there is the whole area of expert evidence based on experience (e.g. forensic accountancy or experts in custom and practice for a particular trade). The Law Commission recognises this and it proposes two distinct sets of guidelines to cover each type of expert evidence.

### Scientific evidence

The seven-part guidelines for scientific expert evidence drew broad support from the expert witnesses who responded to our survey. The suggestion contained in para 6.26(1)(a) – that scientific evidence will likely be reliable if it is based upon properly tested principles, techniques and assumptions – is supported by more than 90% of our expert witness respondents.

<b>Survey A response (n=73)</b>			
	<b>Likely</b>	<b>Not very likely</b>	<b>Don't know</b>
If scientific evidence is 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, how likely is it to be reliable?	91.8%	2.7%	5.5%

See Appendix 1 for details of the surveys.

Interestingly, given the accepted problems with peer review as a metric of reliability – e.g. most forensic science operates outside the peer review system (see Para 2.26 from the consultation paper) – nearly 80% of our expert witness respondents believe that, when available, peer review is an important measure of reliability.

<b>Survey A response (n=74)</b>				
	<b>Important</b>	<b>Neutral</b>	<b>Unimportant</b>	<b>Don't know</b>
How relevant is a peer-reviewed body of specialist literature to the determination of reliability?	79.7%	14.9%	5.4%	0.0%

See Appendix 1 for details of the surveys.

Overall, the expert witnesses who felt that they would be covered by this part of the proposals believed that the steps proposed would work in practice. Furthermore, they mostly felt that they would be able to demonstrate their standing in their scientific community quite easily.

<b>Survey A response (n=73)</b>				
	<b>Well</b>	<b>Neutral</b>	<b>Not well</b>	<b>Don't know</b>
How well do these steps work in practice for determining the reliability of expert evidence in your specialism?	63.0%	15.1%	21.9%	0.0%

See Appendix 1 for details of the surveys.

<b>Survey A response (n=75)</b>				
	<b>Fairly easy</b>	<b>A bit tricky</b>	<b>Hard</b>	<b>Don't know</b>
How easily could you demonstrate your standing in your scientific community?	76.0%	12.0%	8.0%	4.0%

See Appendix 1 for details of the surveys.

Finally, when it came to how scientifically literate the judge would have to be to understand the submissions being made on reliability, our expert witness correspondents were split. The majority felt that if the expert witness could not reduce the material to a form that could be followed by anyone with a good tertiary education (1<sup>st</sup> degree level), then he was not doing his job properly. However, some experts felt that the judge would need to be very literate in the area of expertise concerned. Overall, though, it is fair to say that to enable them to undertake their proposed new role, the judiciary would need to be critical consumers of science, rather than trained scientists.

<b>Survey A response (n=72)</b>					
	<b>Not at all</b>	<b>'A' level</b>	<b>Degree level</b>	<b>Post-graduate</b>	<b>Don't know</b>
How scientifically competent would the judge have to be to understand the evidence demonstrating the reliability of the body of knowledge from which your evidence is drawn?	22.2%	33.3%	30.6%	12.5%	1.4%

See Appendix 1 for details of the surveys.

## Experiential evidence

The four-part guidelines for experience-based expert evidence likewise drew broad support from the expert witnesses who responded to our survey. Overall, the expert witnesses who felt that they would be covered by this part of the proposals believed that the steps proposed would work in practice. Furthermore, they mostly felt that they would be able to demonstrate their standing in their expert community quite easily.

<b>Survey A response (n=108)</b>				
	<b>Well</b>	<b>Neutral</b>	<b>Not well</b>	<b>Don't know</b>
How well do these steps work in practice for determining the reliability of expert evidence in your specialism?	65.7%	17.6%	13.0%	3.7%

See Appendix 1 for details of the surveys.

<b>Survey A response (n=109)</b>				
	<b>Fairly easy</b>	<b>A bit tricky</b>	<b>Hard</b>	<b>Don't know</b>
How easily could you demonstrate your standing in your expert community?	78.0%	12.8%	6.4%	2.8%

See Appendix 1 for details of the surveys.

When it came to how technically literate the judge would have to be to understand the submissions being made on reliability, our experiential expert witness correspondents were just as split as were the scientific experts.

<b>Survey A response (n=106)</b>					
	<b>Not at all</b>	<b>'A' level</b>	<b>Degree level</b>	<b>Post-graduate</b>	<b>Don't know</b>
How technically competent would the judge have to be to understand the evidence demonstrating the reliability of the body of knowledge from which your evidence is drawn?	23.6%	34.9%	29.2%	8.5%	3.8%

See Appendix 1 for details of the surveys.

## Practicalities

### *Separating science and experience*

Of course, there is not always a clear divide between expert evidence that is scientific in provenance and that which is experiential. As noted above, much clinical medical evidence is heavily experiential, as is much forensic science (e.g. fingerprints and face recognition). Social and behavioural science is also a difficult area because, in the words of one of our respondents:

*"[Social and behavioural science] occupy a middle ground: though rigorous in their analytical techniques, virtually all the hypotheses so tested, and the conclusions so reached, are based on observational evidence. Human beings do not easily lend themselves to controlled experimental test."*

However, our expert witness respondents largely felt that with a little work this separation would not be a problem in practice.

<b>Survey A response (n=106)</b>				
	<b>Fairly easy</b>	<b>A bit tricky</b>	<b>Hard</b>	<b>Don't know</b>
How easily could you separate your science-based opinions from experience-based ones?	65.1%	24.5%	10.4%	0.0%

See Appendix 1 for details of the surveys.

### *Science cannot deliver certainty*

There is a fundamental incompatibility between what science can offer and what the English legal system seeks. And that is 'certainty'. The courts want it; science cannot provide it. For any hypothesis to be scientific it must be capable of being proved wrong – if only the evidence proving it wrong could be found. This fundamental principle of science means it can never provide absolute certainty.

Much of the vitriol that has been poured on Professor Meadow flows from this incompatibility. He was a world-acclaimed authority, and by all accounts his mere presence in court had a way of winning over juries. What was more, the Court of Appeal noted that he had a certain arrogance. What is arrogance if not a species of self-belief? What do lawyers and the courts crave? Certainty. Is it any wonder that Professor Meadow was called back time after time after time?

The area of medical science is an excellent example of the limitations of science. As one of our contributors puts it:

*“The Cochrane Collaboration<sup>2</sup> on Clinical Research has demonstrated that the overwhelming majority of research in several of the medical disciplines is fundamentally flawed. Where would this fact leave these proposals?”*

When it comes to science, the court needs to acknowledge that little is certain!

### *Demonstrating reliability is practical*

Encouragingly, the overwhelming majority of our expert witness respondents felt that with a bit of work they would be able to provide the necessary evidence of the reliability of their evidence, whether scientific, experiential or both.

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<sup>2</sup> The Cochrane Collaboration (<http://www.cochrane.org/reviews/>) is an international non-profit collaboration of academics that maintains a library which brings together all the evidence on a given question. It uses a standard methodology to assess evidential quality and produces a synthesis report. Cochrane is considered by many to be the best evidence available on the outcome of a medical intervention.

<b>Survey A response (n=114)</b>				
	<b>Fairly easy</b>	<b>A bit tricky</b>	<b>Hard</b>	<b>Don't know</b>
Could you provide the necessary evidence of the reliability of your opinion?	60.5%	27.2%	11.4%	0.9%

See Appendix 1 for details of the surveys.

#### *Bar on some categories of evidence?*

There is a concern that the proposals might tend to bar some categories of evidence that find objective validation of their underpinning methodologies difficult to achieve. However, when asked to identify some examples, our expert witness respondents only came up with 'novel science'. However, the proposals deal with this type of evidence satisfactorily (in that, provided the underlying scientific methodologies are proper and properly applied, the novel science may be considered potentially reliable). So we have not found any major body of evidence that would be excluded routinely by the proposed tests.

#### *Cost implications*

Requiring experts to prepare the additional justification material will involve extra costs. Will the Legal Services Commission (LSC) be in a position to meet these costs? We asked experts how much extra time they think it would take to put together the required body of evidence.

<b>Survey A response (n=107)</b>					
	<b>10%</b>	<b>25%</b>	<b>50%</b>	<b>100%+</b>	<b>Don't know</b>
How much extra time (compared with the time it takes to write a report) would it take to put together such a body of evidence?	16.8%	27.1%	18.7%	23.4%	14.0%

See Appendix 1 for details of the surveys.

The clear majority think it will add over 25% more time. Furthermore, 25% of our expert witness respondents think it could more than double the time it currently takes for them to write a report.

<b>Survey A response (n=113)</b>				
	<b>Yes</b>	<b>Some repetition</b>	<b>No</b>	<b>Don't know</b>
Would you have to repeat this exercise for each case or would it be a one-off task?	50.4%	42.5%	6.2%	0.9%

See Appendix 1 for details of the surveys.

Nearly half of our respondents thought that the exercise would have to be repeated for each case, while only 6% thought it would be a one-off task. Clearly, then, the cost implications of these proposals are not trivial.

<b>Survey B response (n=207)</b>			
	<b>Agree</b>	<b>Neutral</b>	<b>Disagree</b>
Unless the Legal Services Commission has sufficient extra funds to meet the additional cost that will arise as experts prepare the necessary evidence of reliability, these proposals will fail to work in practice.	85.8%	7.2%	7.0%

See Appendix 1 for details of the surveys.

### *Who are judges to assess science?*

Some will ask whether judges are capable of assessing the methodological underpinnings of scientific evidence. While it must be helpful to educate judges in the proper assessment of scientific methodologies, placing the onus on those who seek to adduce a piece of expert evidence to demonstrate its suitability seems to make this training less critical than if an inquisitorial system was being proposed. As shown above, what we will need is judges who are critical consumers of science, not judges who are scientists. As one of our expert witness respondents put it:

*“... judges are very skilled in weighing evidence and the basis of the evidence without having scientific training. Indeed, if the expert has explained the area and set out its basis, simply and clearly, the judge would not require specialist knowledge to understand what is being said.”*

### *Communication skill of the expert*

In all this one must not lose sight of the need for good communication skills in the expert witness. As one of our respondents puts it:

*“A weak piece of evidence presented well can carry more weight in the dispute than a good piece of evidence badly presented.”*

### ***Onus of persuasion***

In criminal trials it is usual for the prosecution to have to prove its case beyond reasonable doubt. This leaves it for the defence to ‘just’ introduce some reasonable doubt. So there is an implicit imbalance in the tasks facing the prosecution and the defence.

But it is now proposed that the side wishing to introduce a piece of evidence must prove its reliability. Does imposing the same duty on both sides – to prove the underlying reliability of the proposed evidence – run counter to the currently prevailing balance? In the minds of our expert witness respondents, it does not seem to.

<b>Survey A response (n=112)</b>			
	<b>It is right</b>	<b>It is not right</b>	<b>Don't know</b>
Is it right for the onus to be on those who propose to adduce evidence to have to prove its reliability – or does this go against the usual practice of the defence only having to introduce reasonable doubt?	63.4%	17.9%	18.7%

See Appendix 1 for details of the surveys.

### ***Testing the proposals against past cases***

It is natural to consider the four cases the Law Commission cites at justifications for change to see if these proposals would have prevented the problems the Commission identified.

#### *Dallagher*

Despite the novelty of ear-print evidence as used in *Dallagher*, the Court of Appeal has been adamant that such evidence can be adduced. But the court should pay due notice to the inherent unreliability of such novel techniques. It seems to us that ear-print evidence is little different from fingerprint evidence, albeit that ears are more 'squashy' and so the distance between key features will not be static but change with changes in pressure.

As the Law Commission's proposals are not to introduce a *Frye*-type test, it seems to us that ear-print evidence will continue to be admissible. This is because (see para 6.33 of the consultation paper) the prosecution would likely be able to demonstrate that the provenance of such analysis, which is akin to fingerprint evidence, renders it potentially reliable.

#### *Clark*

The Law Commission focuses on the second Court of Appeal case to call into question the statistical evidence given in court by Meadow. The second appeal heard no evidence on statistics and little argument, but Kay LJ still felt able to offer the following dicta:

"Thus it seems likely that if this matter had been fully argued before us we would, in all probability, have considered that the statistical evidence provided a quite distinct basis upon which the appeal had to be allowed."

In our view this is a most unfortunate dicta. In contrast, the first Court of Appeal did hear evidence on the statistical evidence and found that in the context of the trial it had 'minimal significance'.

Let us not forget that:

1. Meadow was quoting published data

2. Professor Berry, one of the editors of the book being cited, also gave evidence and he pointed out the implicit danger of simply multiplying the probabilities, and
3. limited time was spent on these statistics because they related to Sudden Infant Death Syndrome (SIDS), and no-one was maintaining that the deaths were SIDS-related.

However, despite misgivings about the way the Law Commission makes its case, we do agree that had the court had a formal duty to explore this statistical evidence ahead of the trial, it would have been very likely to have excluded the evidence as irrelevant or unreliable.

### *Cannings*

The *Cannings* case is not persuasive because the conviction was overturned on the basis of new evidence, not discredited expert evidence. The case reveals a different problem that the current proposals fail to tackle.

The initial convictions were based almost entirely on conflicting opinion evidence. As noted by the Court of Appeal, in such cases it is unwise to proceed. But at what point under the current rules can the court decide to stop proceedings? Not at the end of the prosecution case, because at that point the serious disagreement has yet to surface. And if the proposed evidence of the experts had met the test of methodological reliability, the trial would have proceeded anyway and these new proposals would not have prevented it.

Unless the court can look at the particular evidence in a case, and not just the reliability of the underpinning methodologies, the *Cannings*-type case will not be prevented. What is needed to prevent another miscarriage like that in *Cannings* is a power for the judge to prevent a trial that “depends exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable expert” being put to the jury. That could happen after all the evidence has been put to the jury, or, we think perhaps better, after a pre-trial hearing of the expert evidence in cases dominated by expert evidence, i.e. at a *Daubert* hearing. We will return to this extension of the proposals shortly.

### *Harris and others*

The case of *Harris and others* is very persuasive because the source of the problem was the poor quality of the database underpinning the triad of intracranial injuries. These proposals would have ensured that this flaw was discovered before the evidence was placed before the jury.

### *Conclusion*

So, in respect of *Dallagher*, *Clark* and *Cannings*, we do not believe that the Law Commission’s proposals would have made a difference. However, in *Harris and others*, it would have made a difference. But this does not mean we reject the proposals. We simply think that justifying them on these grounds was neither necessary nor effective.

## Do they go far enough? The case for *Daubert* hearings

The Law Commission proposes that the party wishing to adduce expert evidence should have to demonstrate the reliability of the body of knowledge from which it is drawn. Critically, that is not the same as determining if the proposed evidence is in fact *correct*. It would remain for the trial process to determine what weight to apply to any expert evidence adduced. Does this go far enough? Few of our expert witness respondents think so.

Survey A response (n=112)				
	Satisfactory	Neutral	Unsatisfactory	Don't know
How satisfactory is it that these proposals only seek to test the reliability of the underlying body of knowledge, and the derivation of the expert evidence from that source, rather than testing the reliability of the expert evidence itself?	17.2%	29.4%	47.4%	6.0%

See Appendix 1 for details of the surveys.

Survey B response (n=206)			
	Agree	Neutral	Disagree
Expert evidence that is drawn from a reliable body of knowledge can still be <i>unreliable in its own right</i> .	69.7%	17.6%	12.7%

See Appendix 1 for details of the surveys.

Because of this basic concern, and despite thinking that the proposals as they stand are workable, our expert witness respondents are unsure that the proposals have much chance of achieving their stated aim of preventing unreliable expert evidence from reaching trial.

Survey A response (n=112)				
	Effective	Neutral	Ineffective	Don't know
If implemented without change, how effective would the Law Commission's proposals be at preventing unreliable expert evidence reaching the criminal trial?	31.9%	26.7%	19.8%	21.6%

See Appendix 1 for details of the surveys.

We believe that any move to earlier assessment of expert evidence is a good thing. On that basis we support the Law Commission's proposals. But we would go further. When the complexity of the expert evidence in a trial warrants it, we believe that the court should have the ability to call a pre-trial hearing at which the judge, the lawyers and the expert witnesses come together to appraise critically the expert evidence. The purpose of this hearing, which would be far less formal than the trial, would be to allow all concerned to hear all the expert evidence in context. The participants at the meeting

would be encouraged to probe and explore the ramifications of the evidence to be adduced. Crucially, the participants would receive the time necessary for quiet reflection to really appreciate the importance of the evidence as they wait for the trial date proper to arrive.

Such a process might permit a judge to make a ruling to exclude some of the evidence as being irrelevant or inadmissible for other reasons, e.g. the evidence is unreliable even though it is drawn from a body of knowledge capable of delivering reliable evidence. It would also prevent barristers playing their adversarial games with opinions, and bring into sharp focus any new and unconsidered opinions that arise out of adversarial challenge of the expert evidence at trial. It is an idea that is strongly supported by our expert witness respondents.

Survey B response (n=205)			
	Agree	Neutral	Disagree
In cases that are prosecuted mainly on expert evidence, a pre-trial meeting of the judge, lawyers and experts (designed to explore the expert evidence and provide time for its import to be given quiet reflection) would be likely to identify unreliable or irrelevant expert evidence.	86.4%	4.8%	8.8%

See Appendix 1 for details of the surveys.

While holding such meetings would have its own cost implications, the additional costs would probably be offset by:

- cost savings from the likely narrowing of the issues
- the removal of unreliable expert evidence from the process
- the valuable opportunity gained to reflect on the importance of the expert evidence, and
- the consequential reduction in appeals and miscarriages of justice.

In general, any move to put expert evidence under closer pre-trial scrutiny is welcomed. But a *Daubert*-style assessment of expert evidence is not a panacea. The system must also:

- ensure juries become more ready to accept the doubt that is implicit in expert opinion evidence
- give the power to a trial judge to follow the Court of Appeal decision in *Cannings* and be able to stop a trial that has become dominated overwhelmingly by serious disagreements between eminent experts
- not permit majority verdicts in cases dominated by expert evidence..

## Accreditation

The Law Commission refers to the possible use of accreditation to improve the quality of expert evidence. We utterly reject the idea that the generic accreditation of experts as expert witnesses is meaningful or desirable.

Accreditation may **seem** to offer an enhanced level of confidence in expert evidence. However, the truth is that accreditation can never assure quality because quality comes from each individual's *ongoing* rigorous and error-free implementation of proper procedures; *a priori* accreditation can only give us some measure of past performance. Note that...

- The Forensic Science Regulator has moved the focus away from accrediting individuals as expert witnesses.
- The Council for the Registration of Forensic Practitioners has closed its doors.
- The Office for Criminal Justice Reform has explored the possibility of changes to the law to introduce compulsory registration of forensic practitioners and expert witnesses. They decided against seeking amendments to the law to introduce mandatory registration, preferring to leave registration as a matter of policy rather than law. Their reasons for this included the complexity and costs of achieving a large inclusive list of experts.

The Better Regulation Executive's principles teach us that the very best regulation of the quality of expert evidence would offer transparency, accountability, proportionality and consistency, and would be targeted according to need. We already have such a system in operation – it is the detailed scrutiny that can be brought to bear by the lawyers, the judge and the other expert witnesses upon the evidence adduced in a case *within the context of that case*.

Of course, even with this optimal system in place, problems with expert evidence in the criminal justice system have arisen in the past. But these have usually stemmed from a systemic failure of the court properly to handle conflicting or novel scientific evidence, due in part to inadequate court procedures. We believe that the Law Commission's proposals are a positive step towards tackling these systemic weaknesses, but in fact hope that more can be done.

## Appendices

### Appendix 1: The surveys

#### Survey A: The detailed survey

Date	26 May to 30 June 2009
Constituency	All experts listed in the UK Register of Expert Witnesses
Format	Self-contained web survey with experts notified by e-mail and, for the experts listed in the <i>Register</i> , by mail. This survey provided a moderate amount of background information and would have taken some time to complete, all of which limited the number of respondents. However, those who did respond had a clear view on most issues.
Location	<a href="http://www.jspubs.com/Surveys/LC0904/SurveyA.cfm">http://www.jspubs.com/Surveys/LC0904/SurveyA.cfm</a>
Responses	124

#### Survey B: The quick 'rating' survey

Date	29 June to 3 July 2009
Constituency	All experts listed in the UK Register of Expert Witnesses
Format	Self-contained web survey with experts notified by e-mail only. A short survey, with limited background information linked in, which elicited a larger response. Opinions on complex issues showed more experts who were undecided. This survey was designed to test some of the major conclusions that had been reached as a result of the first survey and our own analysis.
Location	<a href="http://www.jspubs.com/Surveys/LC0904/SurveyB.cfm">http://www.jspubs.com/Surveys/LC0904/SurveyB.cfm</a>
Responses	233

The results of the surveys are presented in table form within the body of the response.

## ***Appendix 2: Respondent work profile***

### Work profile of the contributors to Survey B

We asked each contributor to tell us:

- What percentage of his or her workload is expert witness work
- How the expert witness workload is split between criminal, civil and family cases.

These data have allowed us to prepare the following work profile analysis:

- 71% of our expert contributors undertake some criminal cases, with 41% spending more than 20% of their time on such work.
- 94% of our expert contributors undertake some civil cases, with 80% spending more than 20% of their time on such work.
- 22% of our expert contributors undertake some family cases, with just 11% spending more than 20% of their time on such work.

The results of the survey are presented in table form within the body of the response.

**Appendix 3: Answers from experts to the specific questions**

This appendix gives the responses made by three experts to the specific questions set in the Consultation Paper through the *Register's* website. The ID number links to this list of contributors.

ID	Name	Private	Work profile			
			Expert witness workload	Percentage of workload spent on...		
				Criminal cases	Civil cases	Family cases
1		Y	25%	0%	100%	0%
2	MCCOLLUM, Charles	N	15%	5%	95%	0%
3		Y	100%	50%	50%	0%

**Paragraph 6.78**

“Do consultees agree with our provisional proposal that there should be a statutory test for the admissibility of expert evidence in criminal proceedings, as follows...”

<b>ID</b>	<b>Comment</b>
1	No. It is unreasonable to expect one answer to three clauses with multiple concepts within each. This is not sound practice and indicates the unlikelihood that Court Officers will have the skill necessary to make the decisions referred to above. It is for the profession of expert witnesses to make these decisions and monitor their practice.
2	Not happy with 3 as instructing solicitors do not have the expertise to do this. It is up to the expert to prove that his opinion is of any value.
3	I agree.

**Paragraph 6.79**

“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 follows...”

<b>ID</b>	<b>Comment</b>
1	No. It takes many years of study to really understand scientific research. Any research resources referred to as the basis for decisions by the expert will have been the subject of peer review. Judges are very unlikely to have the time to study the minutiae of the research processes, and it is these which speak to the reliability and validity of the research which is used as the basis of expert testimony.
2	Agreed.
3	I agree.

**Paragraph 6.80**

“Do consultees agree with our provisional proposed guidelines for experience-based (non-scientific) expert evidence, as follows...”

ID	Comment
1	<p>Once again this is an indication of a faulty Questionnaire. There are too many concepts in this Question to provide an answer with any meaning.</p> <p>Yes, for example, to (d) on impartiality.</p> <p>However, on the question of qualifications, definitely no because I have seen in Court, expert testimony discredited because a highly qualified research physicist was not a member of an purportedly professional body, which he was eligible to join on the payment of a fee, but which was equivalent to O-level. The academic in question had a PhD and a very long international publication record. This again is an example of the fallibility of those in Court in the making of decisions in areas about which they know nothing or very little.</p>
2	<p>I would add that the expert should be able to show recent relevant practical experience in the topic on which he is giving expert advice.</p>
3	<p>I agree.</p>

**Paragraph 6.81**

“Do consultees agree with our provisional proposal 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?”

ID	Comment
1	<p>Yes – but how could that be achieved without the barrister, solicitor or judge having sufficient research methods skills and the willingness to sit down and read the research upon which the expert bases his decisions.</p>
2	<p>No, the expert is the only person able to testify to the reliability of the advice he/she is giving.</p>
3	<p>I agree.</p>

**Paragraph 6.82**

“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? (See below.) If so, do consultees believe that these rules should be codified in primary legislation?”

ID	Comment
1	Yes - again with the proviso that each of the concepts in the list above should be put separately. Collapsing concepts together in this way is once again evidence of lack of knowledge of research. It would not be acceptable in undergraduate work!
2	Agreed.
3	I agree.

**Paragraph 6.83i**

“We would also welcome consultees’ 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.”

ID	Comment
1	What would be the test of "exceptional circumstances". If this test was specified reasonably the answer to this question could be Yes.
2	Sounds sensible.
3	I agree.

**Paragraph 6.83ii**

“We would also welcome consultees’ 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.”

ID	Comment
1	I have insufficient knowledge to answer this question.
2	No. If there is a jury, the jury should judge all the evidence for reliability.
3	I agree.