Submission to
The Criminal Procedure Rules Committee
Part 33 – Expert evidence

Prepared by
the *UK Register of Expert Witnesses*

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Contents

Executive Summary

This is the submission of the *UK Register of Expert Witnesses* to the Criminal Procedure Rules Committee's consultation paper on Part 33 (Expert Evidence) of the Criminal Procedure Rules. It draws together 488 contributions from expert witnesses listed in the *Register*.

Many of the problems with expert evidence in those criminal trials that have been the focus of recent high-profile media coverage reveal a systemic failure of the criminal justice system to handle properly conflicting expert opinions. The drafting of Part 33 of the Criminal Procedure Rules provides the opportunity to address these systemic failings.

Doing so will improve the administration of justice because it will help to overcome the current reluctance of many expert witnesses to contribute to a justice system that can leave them unfairly exposed to public, press and peer pillory.

Based on an analysis of the proposed text of Part 33, the rules governing expert evidence in the Civil Procedure Rules, and 18 years of experience working with expert witnesses from all disciplines, this submission makes the following recommendations that:

- All the rules of procedure that expert witnesses are expected to know, understand and apply should be brought together into Part 33.
- Expert evidence should be brought under the complete control of the court – without such power, any attempt to improve the use of expert evidence in the criminal courts will be severely undermined.
- There should be a clear statement that the duty the expert witness owes to the court overrides any duty to anyone else, and that experts have a duty to independence and objectivity.
- Consideration should be given to whether 'reconnaissance' reports and staged instructions are desirable and capable of being inculcated into the Rules.
- The power to put written questions to expert witnesses, similar to that provided under CPR 35.6, should be considered.
- The strong support amongst expert witnesses for the use of pre-hearing meetings of experts suggests that, in the interests of clarity, the Rules Committee should retain rules 33.4 and 33.5 as drafted.

- Consideration should be given as to whether it is desirable to formulate additional rules to bring *Daubert*-style[1] assessment of scientific evidence into the criminal justice system.

- Although recognising the radical nature of such a move, allowing for pre-trial agreement of expert evidence could help to remove experts from the trial stage, thereby avoiding any tendency towards a 'cult of personality' and improving the handling of complex expert evidence.

- Court-appointed expert assessors would be a more natural role to introduce to the criminal justice system than would be the single joint expert.

- The majority of the guidance in CPR 35 PD and the Experts' Protocol should be included within the ambit of Part 33.

We strongly urge the Criminal Procedure Rules Committee to take this unique opportunity to show, through Part 33, that the real reasons for past problems have been recognised and addressed.

[1] *Daubert -v- Merrell Dow Pharmaceuticals Inc* (1992) 509 US 579

Introduction

This is the submission of the *UK Register of Expert Witnesses* to the Criminal Procedure Rules Committee's consultation paper on Part 33 (Expert Evidence) of the Criminal Procedure Rules (CrimPR). The first draft of this response was posted on the *Register*'s website (http://www.jspubs.com) in December 2005. The 3,000 experts listed in the *UK Register of Expert Witnesses* were then invited to consider the response and feed back their own views. We also enabled experts to contribute by lending their support to, or recording their rejection of, the views contained in our initial response through an on-line polling system. In the end, 67 contributions were received from expert witnesses currently listed in the *Register*.

The guiding principle

The first principle set out by Mr Justice Creswell in the celebrated *Ikarian Reefer* case is that:

> *'… expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.'*

This guiding principle, though set down in the context of a civil case, has just as much relevance to expert witnesses in the criminal justice system. It also reminds us that the opinion an expert voices on a given set of facts in a civil case should not change if those facts were transferred to a criminal case. So, why should the rules governing the use of expert evidence in criminal cases not be exactly the same as those in the civil justice system?

Is it possible that:

- the difference in the standard of proof,
- the severity of the consequences for the defendant,
- the fact that a trial is inevitable in all defended criminal cases, or
- the inequality of arms between the prosecution and defence

are reasons enough to have different rules?

The following submission considers the proposed text of Part 33 of the Criminal Procedure Rules with the question firmly in mind: Why should this rule be any different from Part 35 in the CPR?

About the UK Register of Expert Witnesses

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.

Perhaps the most 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. In the past year we have introduced re-vetting. Now, 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 *Register*.

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, and currently attracts around 25,000 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 50 factsheets, court reports on cases that have implications for expert witnesses, CPR Viewer software and our expert *e-wire* service. This information flow ensures that experts in the *Register* have the opportunity to be amongst the best informed, with respect to expert witness-specific issues, in the country.

We have also helped experts to deal with some of the problems that have arisen from the unfortunate inability of the expert witness associations to work together productively. The most notable is our work to produce a *Combined Code of Guidance for Experts* from the two competing codes. This was in place for 4 years before being replaced by the recently published Civil Justice Council's Experts Protocol – a most welcome development.

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!', this guide helps lawyers and experts to work together more productively.

Our daily contact with expert witnesses – drawn from across all disciplines, and including both those 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'.

Drawing the rules together

The Civil Procedure Rules (CPR) Part 35, together with its practice directions and the new Experts' Protocol, have become a valuable 'one-stop shop' for all the rules and official guidance for expert witnesses instructed in the civil justice system. This means that expert witnesses have come to regard CPR Part 35 as the 'Bible' in the civil justice system. It seems to us inevitable that if the Criminal Procedure Rules (CrimPR) scatter various elements of the rules governing expert witnesses across a number of Parts, any saving made by avoiding superfluous repetition of the rules will be far outweighed by the loss of clarity for expert witnesses. Not being lawyers, expert witnesses have no reason to refer to the vast bulk of the procedural rules. However, experts do benefit from knowing the small number of rules that affect them. Bringing all these rules together – as does CPR 35 – helps expert witnesses to assimilate the rules more quickly.

Naturally, therefore, we do not see any need, from the expert witness perspective, to bring the rules in Part 24 into Part 33. Issues of disclosure are of no direct relevance to expert witnesses, being only relevant to those who instruct them.

Recommendation 1

We would strongly urge the Rules Committee to draw all the rules that expert witnesses are expected to know, understand and apply into Part 33. This will allow Part 33 to take on quickly the same status as CPR 35.

Level of support for this recommendation from our CrimPR Survey [1]

Agree	95%	Neutral	0%	Disagree	5%

[1] *Survey conducted on www.jspubs.com during December '05 and January '06*

Court control of the expert evidence

In the system of case management that existed pre-CPR, lawyers held sway and often used expert evidence as part of their case management strategy. All too often this strategy involved finding the most circuitous route to court, and misuse of expert evidence was just one tactic adopted. It was, perhaps, understandable that the 'hired gun' was seen from time to time. CPR has swept all this away. But it did so by:

- placing expert evidence under the complete control of the court
- promoting the adoption of a cards-on-the-table approach to litigation
- giving absolutely clear guidance for expert witnesses on their overriding duty to the court.

Part 33 adopts neither CPR 35.1 (a duty to restrict expert evidence to 'that which is reasonably required to resolve the proceedings') nor CPR 35.4 (the court's power to restrict evidence). It is these two rules that combine to place expert evidence under the complete control of the court. Without this power, the civil courts would have been unable to achieve the great improvements in the use of expert evidence manifest over the past few years. If the criminal courts are denied this power, how can they hope to achieve the same change in ethos that is needed?

Recommendation 2

We believe the Rules Committee should consider placing expert evidence under the complete control of the court, as without such power any attempt to improve the use of expert evidence in the criminal courts will be severely, if not fatally, undermined.

Level of support for this recommendation from our CrimPR Survey [1]

Agree 82% Neutral 13% Disagree 5%

[1] *Survey conducted on www.jspubs.com during December '05 and January '06*

33.1 Reference to 'expert'

This rule is intended to define the circumstances in which Part 33 would apply to a witness. It is modelled on CPR 35.2 but in substituting the word 'person' for 'expert' it is rendered far less effective. How would 33.1, as drafted, prevent a witness of fact, 'a person who is required to give or prepare evidence for the purpose of criminal proceedings', being covered by Part 33?

Recommendation 3

We would suggest the following wording for Part 33.1: 'A reference to an 'expert' in this Part is a reference to a person who is required to give or prepare expert evidence for the purpose of criminal proceedings.'

Level of support for this recommendation from our CrimPR Survey [1]

Agree 91% Neutral 5% Disagree 4%

[1] *Survey conducted on www.jspubs.com during December '05 and January '06*

33.2 Expert's duty to the court

The overriding objective in both CPR and CrimPR is to enable the court to deal with cases justly. However, in giving explicit guidance on how experts should interpret their duty to the overriding objective, CPR 35.3(2) provides a clarity that is missing in the current form of Part 33.2.

In the civil justice system, expert witnesses have found great benefit in using CPR 35.3(2) to resist improper pressure from lawyers, clients and other experts. As we have noted already, any cost incurred by being explicit, if repetitive, in Part 33 will be massively outweighed by the clarity that will result.

Recommendation 4

We suggest the Rules Committee includes in Part 33.2 a clear statement that the duty the expert witness owes to the court overrides any duty to anyone else. It would also be appropriate to use Part 33.2 to remind experts of their duty to independence and objectivity.

Level of support for this recommendation from our CrimPR Survey [1]

Agree 93% Neutral 1% Disagree 6%

[1] *Survey conducted on www.jspubs.com during December '05 and January '06*

Experts' reports

33.3 Form and content of expert reports

By using substantially the same rules as CPR with respect to the form and content of an expert report, CrimPR risks replicating the upward cost pressure present in the current civil system. This is because the rules, as drafted, require two 'Rolls Royce' reports be obtained covering all aspects of some element of the expert evidence. This is so even if at trial 75% of the evidence is not disputed.

The Rules Committee welcomes the practice being adopted by the CPS in using summary reports of expert opinion evidence as a means to speeding up disclosure of the prosecution case. Indeed, the Committee goes as far as explicitly relaxing Part 33.3 in such circumstances. We believe there is an argument that the Rules Committee should go even further.

Whilst the CPR have been a source of major improvement in the conduct of civil litigation, one consequence has been the move towards every expert report being written as if it will be put before the court. Great care must be taken over the writing of such reports. This inevitably increases costs, and is one reason why the cost of expert reports has risen in recent years. However, the vast majority of civil cases never get to court – instead they settle. In such cases the expert's report is used as a negotiating tool between the parties; requiring it to be a 'Rolls Royce' report is wasteful.

In our submission to the LSC consultation paper (*The Use of Experts*, Nov 2004) we asked whether it is necessary for reports used in this way to be as detailed as those that will go before the court. If not, then an increase in efficiency and a reduction in costs could be achieved by ensuring experts are instructed to prepare an initial 'reconnaissance' report at an agreed cost, proportionate to the quantum of the case, that would allow the parties to seek a negotiated settlement. Only in the small number of cases that do not settle would the additional expense of a full report, for use in court, need to be incurred. We believe this model could be adapted for use in the criminal justice system.

'Reconnaissance' reports and staged instruction

In the criminal justice system, we believe there is scope to use 'reconnaissance' reports as a way of speeding up the initial consideration of a case. This would work equally well for the prosecuting authority, when it is assessing which charge to prefer, as for the defence, in their early stages of assessment.

An expert witness could be instructed by the prosecution to prepare an initial report. This would be designed to conduct a 'reconnaissance' of the expert matters raised by the case and to identify potential areas for more detailed analysis. If the seriousness of the criminal charge warrants investigation of particular avenues of expert enquiry, further report stages could then be sanctioned.

We have twice asked the experts in the *UK Register of Expert Witnesses* whether a staged approach to the instruction of experts would be likely to help achieve proportionality between the cost of expert evidence and the seriousness of the crime. In our LSC Survey (see Annex 4), which underpinned our submission to the Legal Services Commission's November 2004 consultation paper *The Use of Experts*, we found that 80.8% of the 190 respondents agreed. In our Carter Review Survey we found that 79.5% of the 231 respondents agreed. There is clearly a belief amongst experts themselves in the potential benefits of a staged approach to the instruction of expert witnesses.

This approach, already adopted by experienced litigation lawyers in the civil arena, results in breaking potentially large expert witness assignments into smaller, more easily managed stages – and each stage of reporting acts to inform the next. A staged reporting system would ensure that a 'Rolls Royce' report is prepared only when the nature of the evidence, and the 'seriousness' of the case, justified it.

However, in its current form, Part 33.3 would inhibit any of this from happening because many of the reports produced under such a system would not meet the high reporting standards.

Recommendation 5
We suggest the Rules Committee considers whether 'reconnaissance' reports and staged instructions are desirable, capable of being inculcated into CrimPR and, if so, whether further relaxation of Part 33.3 is warranted.
Level of support for this recommendation from our CrimPR Survey [1] Agree 65% Neutral 16% Disagree 18% *[1] Survey conducted on www.jspubs.com during December '05 and January '06*

Written questions to experts

The consultation paper makes no reference to the powers under CPR 35.6 for parties to put written questions to experts instructed by another party. This is a useful feature of CPR and we can see no good reason to exclude such a power from Part 33.

Recommendation 6

The Rules Committee should consider including a power to put written questions to expert witnesses similar to that provided under CPR 35.6.

Level of support for this recommendation from our CrimPR Survey [1]

Agree 91% Neutral 0% Disagree 9%

[1] *Survey conducted on www.jspubs.com during December '05 and January '06*

Pre-hearing assessment of expert evidence – Parts 33.4 and 33.5

Following the introduction of CPR, the adversarial tendency towards evidential ambushes in the civil justice system has been reduced greatly. The openness enshrined in the CPR means that expert evidence is disclosed early, and the experts in a case are able to identify the real areas of disagreement well in advance of any trial. This model should be applied in the criminal jurisdiction.

If expert witnesses instructed by the prosecution and defence had the opportunity to exchange opinions in pre-trial meetings of experts, it is likely that:

- much of the expert evidence could be agreed, saving time at trial
- the real areas of disagreement would be identified – with possible further reports then being commissioned
- the true nature of the expert evidence would become clear, leading to an early guilty plea or the halting of a weak prosecution case.

In working on the *UK Register of Expert Witnesses* submission to Lord Carter's Review of Legal Aid Procurement, our expert witness respondents told us that some judges are pre-empting Part 33 by ordering expert discussions and the preparation of joint statements. Our respondents have found this exercise an effective means of identifying the core issues in the technical evidence, provided all the experts understand their primary duty of independence and objectivity. In the Carter Review Survey (See Annex 4) we conducted during October and November 2005, we found that 84.2% of our 231 respondents agreed that pre-trial meetings of experts should be introduced in criminal cases. In the view of 92.3% of our respondents, pre-trial meetings of experts would lead to a better, and earlier, assessment of the expert evidence.

Recommendation 7

There is strong support amongst expert witnesses for the use of pre-hearing meetings of experts. We suggest that in the interests of clarity, the Rules Committee retains Rules 33.4 and 33.5 as drafted.

Level of support for this recommendation from our CrimPR Survey [1]

Agree 88% Neutral 4% Disagree 8%

[1] *Survey conducted on www.jspubs.com during December '05 and January '06*

Possible problems with meetings of experts

More than one expert reported that unless the current 'gladiatorial' culture in the criminal justice system can be changed, there is little chance of meetings of experts working in practice.

> *'The criminal system is so much more gladiatorial I am not sure that opposing parties will welcome experts talking to each other. In a recent case in which experts were asked to report on photocopies of photographs I was reporting for the first defendant. The second defendant's expert submitted a report which put the first defendant "in the frame" as it were. However when he arrived at court and saw the original photographs he agreed with my opinion and was rapidly sent home by the second defendant's counsel without giving evidence. The case then collapsed on the grounds that, quote, "The expert evidence is contradictory and there is no other way of determining who was responsible for injuring this child".'*

There is also a concern that some experts regularly used by the prosecution seem not to understand that their primary duty as an expert witness is to be independent and objective. For example:

> *'I have a reservation about the use of pre-trial meetings of experts. Put simply, it is that some experts regularly used by the prosecution do not seem to see their task as objective but, perhaps inspired by history (Spilsbury et alia) or perhaps inspired by television drama, as one of obtaining a conviction.'*

Now it is clear that expert witnesses working for the prosecution will have a different mindset to that of a defence expert. The difference is neatly summarised by one of our respondents in this way:

> *'Typically a prosecution expert (horrible phrase) comes from an investigatory background and looks to see whether there is evidence that points to a crime*

and a perpetrator. A defence expert looks for anomalies, alternative explanations and the like.'

Crucially, however, this difference in mindset should not result in an expert forming a different opinion on a given set of evidence – but merely change the presentation of that opinion.

Recommendation 8

Unless the rules of court impose a clear duty on each and every expert witness in a criminal case to independence and objectivity, introducing pre-trial meetings of experts in criminal cases will not result in cost savings. As noted previously, the proposed text of Part 33.2 will need to strengthen further the requirement of independence and objectivity of all expert witnesses.

Level of support for this recommendation from our CrimPR Survey [1]

Agree	90%	Neutral	5%	Disagree	5%

[1] *Survey conducted on www.jspubs.com during December '05 and January '06*

Take the expert out of the courtroom

It would be possible to extend the idea of meetings of experts into a system in which expert evidence is assessed, or even 'agreed', in a pre-trial hearing (although perhaps that is too radical for now). These ideas have developed out of our analysis of recent problems within the criminal courts – cases such as Cannings, Clark and Anthony – in which prosecutions depended almost entirely on disputed scientific evidence.

Science in the courtroom

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 falsifying evidence could be found. 'Falsification', as it is known, means science can never provide absolute certainty.

In criminal cases, the court has to be sure beyond reasonable doubt before returning a guilty verdict – say something in excess of 90% certainty. By contrast, in the civil arena the standard of proof is on the balance of probabilities – so 51% is fine. Clearly, it is only in the criminal arena that the underlying nature of science has the potential to cause problems.

The Court of Appeal decision in the Angela Cannings Appeal (*R -v- Cannings* [2004] *EWCA Crim* 1) concluded:

> *'If the outcome of the trial depends exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed.'*

The central tenet of the Court of Appeal decision is that where a court is presented with evidence that is solely, or mostly, opinion evidence, and where there is a strong divergence of opinion amongst the experts, the court should not feel confident to arrive at a verdict of guilt.

Because there was no means by which the expert evidence could have been tested in a pre-trial setting, it was not until the end of the trial that the court could have been aware that the case against Angela Cannings fell into this category. If a pre-trial meeting of experts had resulted in a clear conclusion that there were almost no areas of agreement on the expert evidence, perhaps the trial judge would have been better able to determine that the case was not one that ought to be put to the jury.

Pre-trial assessment of expert evidence

So, what sort of pre-trial assessments might be tried? It is perhaps helpful to first consider the dangers inherent in expert evidence before looking at a way of dealing with them.

Legitimate areas of enquiry concerning expert evidence are:

- the suitability and qualification of an individual expert and the reliability of that expert's evidence
- the problem of frontier science or pseudo-science, and what happens when there are new developments
- risk evaluation in relation to expert evidence that is not guaranteed to be free from error.

In the United States Supreme Court, *Daubert -v- Merrell Dow Pharmaceuticals Inc* (1992) 509 US 579 laid down a four-part test to be applied to all expert evidence that was scientific in nature. These four parts are:

- whether the theory or technique 'can be (and has been) tested'
- whether the 'theory or technique has been subjected to peer review and publication'
- in the case of a particular technique, what 'the known or potential rate of error' is or has been
- whether the evidence has gained widespread acceptance within the scientific community.

As a result of *Daubert*, expert evidence in the US is more likely to come under closer scrutiny, and at an earlier stage, than in UK proceedings. The parties are aware of the requirements from the outset, and it is common for the court to hear interlocutory applications in relation to the admissibility or relevance of such evidence.

Whilst *Daubert* is not without its own problems, US lawyers have at least made some attempt to address the difficulties surrounding the nature of scientific evidence and its relationship to the judicial process. If our courts were to formulate similar rules, they would, in our assessment, be doing much to tackle the problem of how courts handle expert evidence. The House of Commons Science and Technology Select Committee in their report *Forensic Science on Trial* has endorsed this approach.

Recommendation 9
We suggest that the Rules Committee considers whether it is desirable to formulate additional rules to bring Daubert-style assessment of scientific evidence into the criminal justice system.

Level of support for this recommendation from our CrimPR Survey [1]

Agree 48% Neutral 45% Disagree 7%

[1] *Survey conducted on www.jspubs.com during December '05 and January '06*

As can be seen from the above table, there is some work left to do in explaining this approach to expert witnesses if the large neutral component revealed in our CrimPR survey is to be removed.

Pre-trial agreement of expert evidence

Whilst perhaps too radical for the present, it would be possible to move towards a system in which complex technical evidence was heard in a pre-trial setting, with the lawyers present but no jury. At trial, the jury would be given the 'agreed' expert evidence. This approach would deal with the 'cult of personality' that can develop at trial, exemplified by Professor Sir Roy Meadow.

Professor Meadow 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?

However, if the expert evidence in the Cannings or Clark cases had been heard in a pre-trial arena, not only would the effect on the jury of any expert's 'star quality' be nullified, but the chance of the actual evidence being properly scrutinised by the system would have increased. Something for which Cannings, Clark and Meadow would all have been grateful.

A modification on this scheme is proposed by Professor Geoffrey Beresford Hartwell of the University of Glamorgan Law School in his response to our proposed submission to Lord Carter's Review of Legal Aid Procurement:

> *'One radical possibility is that the Court itself should consider appointing an expert with an understanding of the subject to chair meetings, presque sub-hearings, from which a record of agreement and disagreement would be prepared for use in Court. It would be that rapporteur's findings (he or she would be a Special Assessor, perhaps – with powers to direct further enquiry where appropriate) that would be the evidence in Court, unless circumstances were*

exceptional. The additional cost of the Special Assessor would be offset by the saving in court time. An additional benefit would be that a jury would hear a distilled version of the expert evidence without the distracting effect of cross-examination.'

Recommendation 10
We suggest that the Rules Committee considers whether the radical power to allow for pre-trial agreement of expert evidence should and could be included within Part 33.

Level of support for this recommendation from our CrimPR Survey [1]

Agree	81%	Neutral	7%	Disagree	12%

[1] *Survey conducted on www.jspubs.com during December '05 and January '06*

Single Joint Experts

Court-appointed rather than party-appointed

The Rules Committee gives as one of its reasons for introducing the Single Joint Expert (SJE) into the criminal justice system the desire to reduce the proliferation of reports that reach substantially the same conclusion. We have argued here that staged instructions are more likely to achieve this without raising the fear that a single mind has determined the expert issue. Staged instructions fits well with the adversarial system while still offering the potential of increased efficiency in the use of expert evidence.

The purpose of the expert witness is to extend the knowledge base of the court. The expert's overriding duty to the court, to independence and to objectivity means that the expert's position is aligned far more closely with that of the judge than with the advocates in the proceedings. In passing, we note that this is why it is false to argue that because barristers and solicitors have seen their immunity to suit removed, so should expert witnesses. That line of reasoning could only be applied if judges lost their immunity.

Furthermore, if the telephone helpline of the *UK Register of Expert Witnesses* provides any measure, the experience of many expert witnesses when working as an SJE in the civil justice system is often highly unsatisfactory. Some of the common gripes include:

- the struggle to obtain clear and consistent instructions from the parties
- the suspicion that they are not being given all the facts by one or all the parties
- the requirement to split a fee note into two or more pieces and chase each party for payment.

All these practical problems could be resolved if, instead of permitting SJEs to be appointed and instructed by the parties, Part 33 only allowed the use of court-appointed expert assessors. Instead of trying to shoehorn the SJE into the adversarial system, accept that the concept has far more in common with inquisitorial systems of justice. Let the court-appointed expert assessor become the judge's expert. Let the expert's instructions come from the judge, not the parties (though they will undoubtedly need to have input). Where evidence was required that fell within the expertise of the court-appointed expert assessor, then it would be that expert who provided the evidence. If the assessor felt some further investigation was necessary, he or she could undertake that additional work.

We would see the use of court-appointed expert assessors to be every bit as sparing as the Rules Committee forsees for the use of SJEs under Rules 33.7 and 33.8. But our approach

would crystallise the distinction between party-appointed experts and the court-appointed expert assessor. It would also greatly improve the effectiveness of the expert. Furthermore, it fits more naturally for the independent and objective expert to be seen to sit alongside the judge, rather than in the no-man's land occupied by the SJE in the civil justice system.

Recommendation 11

We believe court-appointed expert assessors would be a more natural role to introduce to the criminal justice system than would the single joint expert.

Level of support for this recommendation from our CrimPR Survey [1]

Agree	75%	Neutral	15%	Disagree	9%

[1] Survey conducted on www.jspubs.com during December '05 and January '06

Guidance for experts

The consultation is mute on the contents of any associated practice direction or experts' protocol. Both these elements of CPR contain essential advice and guidance. Of particular note are:

- the instruction concerning disclosure to experts of court orders contained in CPR 35 PD 6A
- the requirements contained in section 7 of the Experts' Protocol concerning the practical aspects of appointing experts
- Section 8 of the Experts' Protocol on the required qualities for instructions to experts.

If these elements of guidance, in particular, and ideally much of the other guidance contained in these two documents, can be included along with Part 33, the hard-won improvements in the use of expert evidence in the civil arena will, we think, be transferred quickly to the criminal justice system.

Recommendation 12
We urge the Rules Committee to consider including the majority of the guidance in CPR 35 PD and the Experts' Protocol within the ambit of Part 33.
Level of support for this recommendation from our CrimPR Survey [1] Agree 88% Neutral 7% Disagree 5% *[1] Survey conducted on www.jspubs.com during December '05 and January '06*

Conclusions

Coming, as they do, 6 years after the Civil Procedure Rules, the Criminal Procedure Rules have the opportunity to both learn from and improve upon the rules governing expert evidence contained in CPR Part 35. Modelling Part 33 on CPR 35 is an excellent starting point, but there is scope to consider some radical new powers.

Many of the problems with expert evidence in criminal trials, which have been the focus of much high-profile media coverage in recent years, reveal a systemic failure of the criminal justice system to handle properly conflicting expert opinions. The drafting of Part 33 of the CrimPR provides the opportunity to address these systemic failings. Doing so will improve the administration of justice because it will help to overcome the current reluctance of many expert witnesses to contribute to a justice system that can leave them unfairly exposed to public, press and peer pillory.

We would strongly urge the Criminal Procedure Rules Committee to take this unique opportunity to show through Part 33 that the mistakes of the past have been recognised and addressed.

Annex 1: Polling results

Work profile of the contributors

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
- How much of each category is publicly funded

These data have allowed us to see that 86% of our expert contributors undertake some publicly funded criminal cases, with 35% spending more than 20% of their time on such work.

Results

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

Contributors

This is a list of the expert witnesses who chose to express their views through the on-line voting system. Experts with a 'Y' after their name have asked that their contributions be kept confidential.

Barry Cawkwell	N
David Kempson	N
Dr Chris Bowman	N
Dr G.A.Rose	N
Dr Grant Benfield	N
Dr Keith V Coaley	N
John Dabek	N
Mr Paul Anderson Roger	N
Neil Egnal	N
Rod Newbery	N
Silvain Edouard Josse	N

Annex 2: Answers to specific questions

Answers

This annex gives the responses made by 21 experts to the specific questions set in the Consultation Paper through the *Register*'s website. The ID number links to the list of contributors given at the end of the annex.

Question 1 Are any of these additional rules required, or are the existing rules sufficient?

ID	Comment
1	Yes
2	Additional rules are required.
4	Yes, in their absence I have been using the civil rules as a guide, but this is unsatisfactory.
6	Additional rules that bring clarity to the role of Expert Witnesses are good and several of the proposed changes are clearly in this category.
7	No
8	I have only indirectly been involved as an expert in criminal cases. I fully support the responses to all questions except {33.7} that I would not ever wish to see the right of the defence to appoint its own expert and for that expert's evidence to be put before the court curtailed in any way in a criminal case.
9	Existing rules are adequate
10	All CrimPR rules relating to the conduct, duties and performance of the Expert should be gathered in one place i.e. Rule 33. The additional rules are necessary and helpful.
11	Not required
12	Rules mirroring the Civil Procedure Rules are a very good idea and therefore the additional rules are good in principle.
17	Don't know - don't understand the legal issues involved. Experts should be neutral - those who do mainly prosecution or mainly defence should be excluded - the balance should be 50% or thereabouts.
18	Existing rules work well most of time.

Question 2: Is the expert's duty to the court appropriate?

ID	Comment
1	Yes
2	Yes, and it would be very beneficial to have this clearly stated to avoid any confusion.
4	Yes. But, experts also have a (subordinate) duty to their client. The compatibility of these two duties is unclear. If the duty to the Court is totally dominant, then the duty to the client seems to vanish, which does not seem right. It would be helpful to have some guidance on this. There still seems to be a "balance of forces" between Crown and Defence in criminal cases, and I feel that it is necessary for me, for example when acting for a defendant, to ensure that no evidence that is properly available to my client in my area of expertise is missed by me. I don't think I should make the same effort to the opposite effect, because the other side do that. Criminal cases are in any case not symmetrical, because the Crown has to prove its case and the defence only has to disprove it. So, it is unlikely that two perfectly objective experts, on opposite sides, would come up with the same evidence.
6	I have some difficulty with the wording "by giving objective, unbiased opinion on matters within his expertise" because it make no reference to any instructions that he may have received or the nature or provision of the evidence upon which he is asked to express that opinion.
7	Yes
8	
9	Yes - this should be overriding.
10	Yes, it must be the overriding duty in all matters, to enable the Court to be educated in the technical matters in issue and the nuances of interpretation for decisions required by the Court.
11	Yes
12	Yes, the expert's overriding duty to the Court is appropriate and critical.
17	Yes barring above comments of 'guns for hire' as 'only' prosecution or defence witnesses.
18	When in the witness box an experts overriding duty always has been to the court although not all seem to appreciate this. A written statement includes a declaration it is believed to be true and implies that duty.

Question 3: Are the requirements for the content of an expert's report appropriate?

ID	Comment
1	Yes
2	Yes, will you be publishing a sample "statement that the expert understands his duty to the court".
4	Yes
6	Why does 33.3 2 (c) include the words "which are material to the opinions expressed in the report or upon which those opinions are based". Surely the Expert should be required to disclose all instructions that he has received including instructions such as "there is no need for you to comment on.....". This helps the expert to focus on those matters where Counsel is seeking his expert opinion and makes it clear to all parties who decided that the expert would not comment on something.
7	Not sure for criminal cases
8	
9	Yes
10	Yes but not in all circumstances. The rule should be amended to ensure that the expert has the facility to prepare reports for evaluation of the evidence at an earlier stage not necessarily in a format that is a full 'ready for court' version. This earlier report should be cheaper to prepare in the interests of proportionality if a case is unlikely to go all the way to trial.
11	Yes
12	Yes.
17	These are not defined at present in criminal - they should have the same requirements as for civil cases but it should be made clear whether it is on a balance of probabilities or beyond reasonable doubt - the issue is often blurred when reports prepared for civil proceedings are then used in criminal cases or vice versa
18	A bit long winded.

Question 4: Is draft rule 33.4(2) necessary?

ID	Comment
1	Yes
2	Yes, it would be even better if this could be done without the experts necessarily having to go to court on this occasion.
4	33.4(2)(b) may be going too far in requiring the experts to expose their reasoning at that early stage.
6	This MUST be limited to giving notice on those points where they agree. To give notice of those points where they disagree AND the reasons for that disagreement would be both very expensive and remove the "testing" of those disagreements from the court room which is where they should be tested. (I'm happy to expand on this verbally with a practical example if it helps.)
7	Not sure
8	
9	No
10	If the imposition of independence, objectivity and an overriding duty to the court is established then pre-trial meetings of experts would save a great deal of Court time at trial and possibly prevent sub-standard evidence being used to bring prosecutions. Pre-trial meetings of experts and the preparation of a joint statement would focus the Court's attention on the disputed matters and therefore the addition of 33.4(2) is essential if this is to be achieved.
11	No
12	yes, it is necessary and will emphasise the need for similarities and differences in expert opinion to be highlighted and considered before Trial.
17	-
18	No comment

Question 5: Is it possible to require a discussion between experts? If so, is that appropriate?

ID	Comment
1	Yes and yes
2	Yes, in the work that I do it often happens but only on the day of the case.
4	Yes, but there will have to be a culture change if it is to be effective. It is not so easy as it was with the Civil rules.
6	I fully support the principle of a discussion but it should not be mandated as a "meeting". I had a very positive telephone conversation with the Prosecution Expert in one case, we agreed a joint statement on one important, although we had come to different conclusions in our reports.
7	yes
8	
9	Yes it's possible and yes it should be compulsory if directed
10	There is no point in ordering a discussion between experts unless they have the ability to discuss issues off the record without disclosing the content of their discussions either to their instructing solicitors or the Court. It is only helpful to have such a meeting to agree the points in contention between them and narrow the differences in their evidence to assist the Court. It may not be appropriate to order such a discussion in certain cases on the grounds of public policy.
11	Yes and it is appropriate
12	Yes, it is possible and indeed essential to the pre-hearing consideration of expert evidence.
17	Yes - this could cut out misunderstandings between experts and clarification of the 'unresolved issues' would be better. This is especially a problem with complex medical or scientific issues where the judge/barristers (even the jury!) will have difficulty
18	It is already possible and in my experience judges do require it occasionally. I find it useful although I know this is not everyone's view.

Question6: Is there any place in criminal proceedings for a power to require the appointment of a single joint expert? If so, is draft rule 33.7 adequate or should it be restricted in some way?

ID	Comment
1	No
2	This is more difficult if the experts can agree then fine but if not then each expert should be allowed their say.
4	I am concerned about this because of the asymmetry of criminal cases. The single expert would be forced into taking account of proof tests such as "beyond reasonable doubt" and the fact that the Crown has to prove something but the defence has nothing to prove. I think that the influence of a single expert could have an excessive influence on judges and juries, but we can't expect them to handle these asymmetrical factors.
6	Is there a requirement for all parties to ask the court for permission to instruct an Expert? If not then it is difficult to see how this would work because by the time a second party decides that they wish to introduce expert evidence the other party will have already appointed their own expert.
7	yes
8	While I agree that a single expert could be of use if appointed as an assessor, I believe that in a criminal case, the defence should always be permitted to produce its own expert evidence and that that evidence and any other expert evidence should be subject to testing. I have, unfortunately, seen enough civil cases to know that there are many experts who do not have sufficient expertise in a particular corner of the field on which the trial hinges. The trouble is that many of them do not realise it themselves until they are challenged and some not even then. imaging one of them acting as a SJE or even as an assessor.
9	Yes this should be possible. No the rule is not adequate.
10	The only fair trial of the issues is to permit each party to use their own experts unless the court wants to appoint its own expert. The use of a judicially appointed court expert to advise the Court rather than a Single Joint Expert would be more appropriate in criminal cases.
11	Yes and Yes Either
12	SJE is a useful possibility but, in reality, there is almost always conflicting opinion between experts on criminal cases and therefore the facility should be present in the system but the Court must almost work the other way in criminal compared to civil. In civil, the idea is SJE unless a good reason why not. In criminal, the option is more effective as SJE not appointed unless there is a good reason to do so, i.e. there is no conflict between opinions/thinking. SJE is almost ruled out by the very nature of the criminal process, because the liberty of the subject is at stake in most cases.
17	No point in single experts - basic principle of prosecution vs defence remains.
18	No - both sides frequently need expert advice. I find that if my opinion is the same as the Crown's expert it normally results in a guilty plea. This more than saves my fee. I doubt that a defendant would trust a single joint expert.

Question 7:Should these additional rules be joined with the rules in Part 24, or should those rules be joined with these in Part 33?

ID	Comment
1	
2	Part 33.
4	
6	?
7	yes
8	
9	Yes they should be combined with Part 33
10	The only reason to re-iterate or move any of the rules in Part 24 would be to provide better guidance to the Expert Witness on their role, duty and requirements. The matter of disclosure and access to documents is for solicitors and not a question for experts so it would not make sense to put Part 24 in Part 33 as these are matters outwith the control, direction and power of the Expert.
11	Either
12	there should be a link between the two. as part 24 is established, it may be better to add it to Part 24 rather than the other way round. ONE OTHER POINT Rule 33.8 (3) - the way that the Court needs to look at fees, if it does so in a given case, is not to limit the fees but limit the amount of fees that the parties can recover from public funds - the solicitors themselves should be made responsible for any difference between that and the cost for the expert to do the work. otherwise, it will lead to fewer experts offering their services and those experts are more likely to be of lower quality.
17	-
18	no comment

The Respondents

ID	Name	Private	Work profile						
			expert witness workload	Percentage of workload spent on…					
				Criminal cases		Civil cases		Family cases	
				PF	Non-PF	PF	Non-PF	PF	Non-PF
1	BARSON, Anthony J	N	90%	10%	90%	-	100%	90%	-
2	BISHOP, C A	N	10%	99%	1%	-	90%	10%	-
4	COX, Tony	N	75%	50%	50%	-	10%	10%	-
6	EMERY, Richard	N	100%	80%	20%	-	100%	-	-
7	FRANCOIS, Charlene	N	95%	-	100%	-	-	100%	-
8	GREEN, Solomon	N	100%	100%	-	-	-	4%	-
9	KIDD, Stewart	N	25%	5%	95%	-	-	-	-
10	LINNELL, Kay	N	50%	15%	55%	30%	100%	10%	30%
11	LOWENSTEIN, Ludwig	N	85%	60%	30%	10%	95%	80%	90%
12	MAGNER, Tom	N	60%	40%	60%	-	100%	-	-
17	SPRIGG, Alan	N	100%	10%	10%	80%	100%	100%	100%
18	WALKER, George W	N	100%	99%	1%	-	99%	99%	-

Key: PF = Publicly funded work, Non-PF = Non publicly-funded work

Annex 3: Correspondence

This annex presents all the correspondence received on the consultation from expert witnesses listed in the *UK Register of Expert Witnesses*.

Correspondence received by e-mail

Private	No
From:	TeriBeale@aol.com
Date:	Tue, 27 Dec 2005 08:21
Message	I would like to add to my submission the following although I see that it has been considered I feel strongly that it needs to be addressed. In my field of Accident Reconstruction and Traffic Consultancy, in Criminal cases the Prosecution Expert is always a serving Police Officer normally either from a dedicated Collision Investigation Team or Traffic Unit. The problem is both the mindset of Police Officers and the way in which both CIT's and Traffic Units are run. The Police Investigator carries out ALL the investigation including trying to ascertain whether anyone has committed any criminal offences. This hardly makes them objective. In addition Police officers do not take kindly to anyone questioning them and they become more determined to prove the other expert wrong. I have had many experiences of this and indeed when I was in the Police I admit that's how we operated. In almost all cases the adversarial system means that the Prosecution 'Expert' is biased towards the Police case and cannot be objective. The use of experts in Criminal cases is on the increase hence the reason why we are having this discussion and in my view if the Police are going to rely on Expert evidence then that expert MUST be divorced from the Criminal investigation and deal purely with Expert matters. In Fatal or serious accident cases the Collision Investigators should be that and that alone but to save costs in most forces the CI officer doubles as the investigation officer and the one who recommends court proceedings. This means that the Defence Expert is always under severe attack in court from the Prosecution as I know only too well I have the scars to prove it and as an ex-police officer I am attacked with much more vigour!! Criminal Courts are not pleasant places to be when you are giving expert evidence on behalf of the defence. The point surely has to be that Experts are there to give evidence of FACT and OPINION within their field and that should be unbiased and objective. I cannot see how the investigating police officer whatever his expertise can be a true Expert Witness in the full sense of the word. He must be a Prosecution witness and be treated as such. Terry Beale

Private	No
From:	grahame@goodyer-online.com
Date:	Wed, 14 Dec 2005 11:57
Message	Chris, In response to the latest review on CrimPR. I like the idea of a 'court-appointed expert assessors and pre trial meetings'. I have not personally had my evidence cross examined in court so I cannot say for certain how I would react in court. However the idea that qualified experts and their legal representatives could sit and agree expert evidence, if only to clarify what is agreed and what is disputed, would mean going into court with less controversy between the parties and allowing the judge and the jury to conclude what is right and what is not in each case. The judge also has the power then to say what is up for discussion/cross examination and what is not prior to the hearing.

	It would also give the courts time to decide if further expert opinion would help. If two experts can't agree, could 3 or 4? The 'Daubert' style of accrediting expert witness reports also has merit. It has the 4/6 eyes principle which is already applied in day to day business in Financial Services and again would add weight or question expert evidence before court hearings, rather than during. I should mention my area of expertise (investment performance analysis) is rarely needed in criminal proceedings but that doesn't mean to say it won't one day. Grahame Goodyer Investment Analyst and Consultant

Private	No
From:	Neil.Egnal@barnet-pct.nhs.uk
Date:	Wed, 14 Dec 2005 10:34
Message	I have been doing EW work in the UK since 1987. The Civil P rules have simplified the process and I have been relieved in not to have to attend court as often as previously. Unfortunately the CPS still insists on court attendance in many cases, most unnecessary sitting and waiting for hours on end to be called for 5 minutes to confirm that contents of my report are correct etc. Let's hope the new Crim P rules alleviate some of the time wasting.

Private	No
From:	nigel.young@computer-expert.co.uk
Date:	Tue, 13 Dec 2005 22:41
Message	I am very strongly in favour of experts acting as assessors not as SJE's in criminal cases. The difficulties will lie not with the experts' willingness to act in this capacity but 1. The unwillingness of the Courts to give such status to experts 2. The unwillingness of the Courts to adopt an inquisitorial pose and instruct experts 3. The lack of experts who have experience of both Prosecution and Defence work in criminal cases. This is a serious problem because prosecution-instructed experts in several specialisms tend to be ex-police officers with an investigatory background; defence-instructed experts tend to have a different background and attitude and can be more sceptical over the meaning of evidence. I think it unfortunate that expert reports have to be written in the same format and with the same header as statements by witnesses of fact. I would suggest that expert reports should be clearly differentiated. Initial investigatory reports are not totally suitable for submission to the Courts. They cannot address the specific charges because these have not yet been selected by the CPS. Nigel young FAE

Private	No
From:	EddieJosse@aol.com
Date:	Tue, 13 Dec 2005 11:57
Message	At the end of the day, what matters is the training and expertise of the expert in his/her field of expertise and his/her ability to assess the relevant issues in a legal case relating to the expertise, describing one's opinions with the reasoning and voicing these thoughts in court being prepared to defend one's stance or modify it if considered necessary. Eddie Josse

Private	No
From:	faswann@legalforensics.co.uk

Date:	Tue, 13 Dec 2005 14:33
Message	I normally insist on a full bundle of documents, so that I am aware of what the case is all about, to avoid putting one's foot in one's own mouth. To be drip fed information, at various stages prevents an overview of the case, and causes extra work, over and above that provided for in the initial Estimate. In theory, the instructing solicitors can apply to have the Legal Services Commission 'Prior Authority' increased, as further and additional instructions follow. However, in my experience, most solicitors indicate that any additional Fees will have to be put to Taxation, which invariably means a long delay, followed by a reduction in what is being claimed. Regardless of whether an 'Expert' is acting as a simple individual instruction, or as a Single Joint Expert' the overriding rule in my personal opinion is that the said 'Expert' MUST BE INDEPENDENT. I state quite clearly on my 'Profile' and within my 'Terms of Engagement' that:- "My primary duty is to the courts; to maintain my independence, integrity and impartiality" This is not always as straight forward as it sounds. I have been dismissed because the solicitor thought I should be on his client's 'side'. He who instructs and pays the money, and all that cobblers. Of major concern is 'Wasted Costs Orders' being made against 'Expert Witnesses' on the basis that they have caused delays. Most delays are the result of solicitors inefficiency, and failure to provide accurate and meaningful instructions, and the 'Expert' being kept appraised of court dates. Most solicitors wait until well after they have received Counsel's Advice, before panicking to find an 'Expert' who can "knock up a report on the quick" something that I cannot, and will not, do. I have not infrequently found solicitors and counsel who inform the court that "their Expert Witness report is still awaited" in order to avoid certain court dates or interfere with their other engagements. This is particularly irksome when they persuade you to accept instructions at a very late stage, just prior to a 'fixed trial date' on the basis that they will get the date changed; when they fail, they blame it all on the 'Expert' that they have just instructed. I avoid this situation by ensuring that ALL contacts with solicitors or counsel are followed by my written understanding of what I have been orally told. Finally (I could go on and on) Most of my 'dealings' are with the Forensic Science Service and Forensic Alliance, both of which are primarily owned by the Home Office. They have regular meetings with Police and 'official' parties' and from my own experiences, there is no way that they can be described as INDEPENDENT, IMPARTIAL, ETC. Policy decisions in these organisations are made by 'Managers' who have no or little experience at the 'sharp end' merely being qualified in 'Da MANAGEMENT' as ordained by the Home Office. THE UK REGISTER OF EXPERT WITNESSES IS THE BEST THERE IS, AND REAL VALUE FOR MONEY. I RECEIVE MORE POTENTIAL INSTRUCTIONS THAN I CAN DEAL WITH, ALL THROUGH THE UKREW. Please keep up the good work! Frank Alan SWANN INDEPENDENT Legal~Forensic Consultant, Special Security Services & Legal Forensics.

Private	No
From:	vogelvet@talktalk.net
Date:	Tue, 13 Dec 2005 12:36
Message	If the prosecution produce a reconnaissance report, the defence has the expense of producing an assessment of it. When further prosecution reports are produced, getting more and more specific, further specific assessments have to be obtained by the defence. Then when the final expert report is produced by the prosecution, the defence expert has to rehash everything into his rebuttal report. This must inevitably result in extra expense in all cases that come to court. Colin Vogel

Correspondence received by post

Dr Roger Ballard M.A., Ph.D., F.R.A.I.
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Dr Chris Pamplin
Editor
UK Register of Expert Witnesses
11 Kings Court
NEWMARKET
Suffolk
CB8 7SG

12 December 2005

Dear Dr Pamplin

Expert evidence and CrimPR

This letter is written in response to your request for further input *vis* the CrimPR in the latest issue of *Your Witness*.

In a number of cases in which I have recently been instructed to provide expert evidence I have become acutely aware of the contradictions between my duty to provide an objective opinion to the court (rather than acting as a 'hired gun') and the strongly adversarial character of criminal trials. Whilst I'm sure my experience is not unique, it nevertheless appears to loom particularly large with respect to the issues which I normally find myself addressing: the likely consequences of the specific characteristics of the religious, linguistic and cultural context within which the events and behaviours at stake in the trial took place. The trials in which I am usually instructed are invariably high profile in character, and have led to charges of murder, rape, money-laundering, drug-smuggling and so forth. My specific area f expertise is in the linguistic, religious, familial and cultural characteristics of Britain's South Asian communities.

Although I am much more usually instructed by the defence than the prosecution, my unease has been particularly acute in a number of cases where I was instructed by the latter, who in my still somewhat limited experience display what I can only regard as an alarming tendency to use me as a hired gun. A recent case dramatically encapsulates the potential consequences.

I was approached by a detective from a police force which at this stage is best left nameless, asking whether I was in a position to prepare a report for use in what appeared to be a case of honour killing. I indicated that I was indeed in a position to address such issues, and I was eventually instructed to prepare my report only a short while before the case was set down for trial.

When I examined all the documents forwarded along with my instructions, it was clear that the prosecution took what they considered to be a straightforward view of what had gone on. That all the male members of a young Asian woman's family were vigorously opposed to her involvement with a boyfriend whom she was proposing to marry but of whom they did not approve, and that in order to prevent the family being further dishonoured they conspired together to murder the boyfriend.

However my reading of the evidence led me to a very different conclusion: namely that there was no obvious motive for the family as a whole to take out the boyfriend. Indeed there were

strong indications that whilst the girl's father had initially been vigorously opposed to such a marriage, his wife had subsequently persuaded him to change his mind. Likewise the second defendant, the girl's younger brother, appeared to have no feelings of malice whatsoever towards the dead boyfriend. By contrast there appeared to be plentiful evidence that the elder brother had long been bitterly jealous of his sister, and even more so of any young men with whom she became involved. For this and other reasons which need not detain us here, my report concluded with the opinion that in this case the 'honour killing' hypothesis (in which all the males of the family acted collectively under the father's instructions) did not stand up, and that in my view the prospect that the elder brother alone did the deed, motivated jealousy, was much more closely congruent with the available evidence.

However when the counsel for the prosecution received my report, they decided not to use it. I suspect that they were by then too heavily committed to the honour [-] killing hypothesis to change tack. Instead my report was disclosed to the defence as unused evidence. However greatly to my surprise, the defence decided not to use it either – mainly, I suspect, because it nailed the older brother, even though it offered his younger brother (aged only 15) a comprehensive defence. The result was that in trial where a cultural issue – 'honour [-] killing' – all parties took the view that it would be potentially disadvantageous to have an expert perspective on these matters laid before the jury.

Clearly this was a rather unusual outcome. Nevertheless it seems to me that it [a] highlights a crucial point. That where the parties to such trials regard the expert witness as a gun for hire, but nevertheless one who may be perverse enough to take his duty to the court sufficiently to hit a target other than the one at which he is invited to aim, then one's best strategy may well be to blagg it, in the confident expectation that the jury won't know any better. Most alarmingly of all I get the strong impression that in my neck of the woods, it is the Police and the Prosecution who are amongst the most enthusiastic devotees of such practices.

There is one obvious way in which such tactics could be brought to a halt: that as in the CPC, provision should be available for the expert to report directly to the court, rather than to the party instructing him. But although I regularly include a CPC-style form of words in my reports, my efforts to serve the court rather than those instructing me can be – and regularly are – vitiated by a court procedure which remains unremittingly adversarial.

Given the specialist field within which I operate, I am not [in a] position to assess whether my experience is fairly unique or more or less commonplace. Nevertheless the experience of being reduced to the position [of] a bagatelle in the midst of processes adversarial manoeuvring is not one with which I feel at all comfortable. Hence the inclusion of some kind of backstop against that possibility – which clearly stands in comprehensive contradiction with the role which an expert is nominally expected to fulfil – in the up-and-coming CrimPR would be extremely welcome.

Yours sincerely
Roger Ballard

Annex 4: The Surveys

The CrimPR Survey

Date	12 December 2005 to 22 January 2006
Constituency	All experts in the UK Register of Expert Witnesses with e-mail addresses. A total of around 2,400 experts.
Format	Self-contained web survey with experts only notified by e-mail. This survey provided a moderate amount of background information and would take a little time to complete, which will tend to depress the number of respondents – but those who do respond will tend to have a clear view on most issues.
Location	http://www.jspubs.com/ Surveys/CrimPR0512/Survey.cfm
Responses	37

The Carter Review Survey

Date	31 October to 24 November 2005
Constituency	All experts in the UK Register of Expert Witnesses with e-mail addresses. A total of around 2,400 experts.
Format	Self-contained web survey with experts only notified by e-mail. This survey provided a moderate amount of background information and would take a little time to complete, which will tend to depress the number of respondents – but those who do respond will tend to have a clear view on most issues.
Location	http://www.jspubs.com/ Surveys/Carter0510/Survey.cfm
Responses	231

The LSC Survey

Date	3 December 2004 to 21 February 2005
Constituency	All experts in the UK Register of Expert Witnesses (2841) and on the *e-wire* list (6736).
Format	Self-contained web survey with experts notified by e-mail and, for the experts listed in the *Register*, by mail. This survey provided a large amount of background information and would take some time to complete, all of which will tend to limit the number of respondents – but those who do respond will tend to have a clear view on most issues.
Location	http://www.jspubs.com/Surveys/LCD0411/Index.cfm
Responses	190