



The Australian Institute of

Judicial Administration Incorporated

AUSTRALIAN JUDICIAL PERSPECTIVES ON EXPERT EVIDENCE: AN EMPIRICAL STUDY

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CONTENTS

	Page
Acknowledgments	ix
Foreword.....	xi
List of Tables and List of Figures	xiii

PART ONE: SUMMARY OF KEY FINDINGS

1.1	The Survey.....	1
1.2	The Role of Experts in Contemporary Litigation	2
1.3	Judges' Concerns	3
1.4	Aspects of the Adversary System	4
1.5	Training for Advocates and Experts	5
1.6	Need for Procedural Change.....	6
1.7	The Evidence Acts 1995	7
1.8	Court-Appointed Experts, Assessors and Referees.....	8
1.9	The Exclusionary Rules of Expert Evidence	8
1.10	Changing the Culture of Partiality	10
1.11	The Challenge Ahead.....	12

PART TWO: INTRODUCTION

2.1	The Importance of Forensic Experts.....	15
2.2	The Judicial Perspective	16
2.3	Methodology of the Survey	18
2.4	Novelty of the Process	19

PART THREE: INFORMATION ABOUT RESPONDENT JUDGES

3.1	Response Rate.....	21
3.2	Representativeness of Survey Responses.....	21
3.3	Profile of Judicial Respondents.....	22

PART FOUR: PROBLEMS POSED BY EXPERT EVIDENCE

4.1	Frequency of Encountering Expert Evidence	23
4.2	Utility of Expert Evidence	23
4.3	Bias Amongst Forensic Experts.....	23
4.4	Difficulties of Comprehension.....	29
4.5	Experts Exceeding the Parameters of their Expertise	33
4.6	Non-responsive Answering of Questions by Experts	35
4.7	Failure to Prove the Bases of Expert Opinions	35
4.8	Performance of Advocates.....	36
4.9	Judges' Views of the Most Serious Problem with Expert Evidence	37
4.10	Evidence Incomprehensible because of its Complexity.....	38
4.11	Expert Reports	41
4.12	Lawyers Settling Expert Reports	41
4.13	Aspects of Expert Evidence Found Persuasive by Judges	43

PART FIVE: THE ROLE OF ADVOCATES

5.1	Performance of Advocates in Examination-in-Chief	51
5.2	Performance of Advocates in Cross-Examination	52
5.3	Judicial Difficulty in Evaluating Expert Evidence.....	55
5.4	Taking Experts Out of Play.....	55

PART SIX: TRAINING OF EXPERTS AND ADVOCATES

6.1	Further Training for Experts	57
6.2	Further Training for Advocates.....	60

PART SEVEN: JUROR PROBLEMS WITH EXPERT EVIDENCE

7.1	Judges' Views of Areas of Difficulty for Jurors	65
7.2	Judges' Views of their Capacity to Evaluate Expert Evidence	67
7.3	The Impact of Judges' Summing Up of Expert Evidence.....	67
7.4	Withdrawal of Trials from Juries	68
7.5	Judges' Views of the Most Persuasive Factors for Jurors.....	70
7.6	Trial by Statistics	72

PART EIGHT: ADMISSIBILITY ISSUES

8.1	Expert Evidence Exclusionary Rules	75
8.2	The Voire Dire Procedure.....	75
8.3	Reliability as a Condition Precedent to Admission.....	75
8.4	Courtrooms as Forums for Evaluation of Reliability	79
8.5	Representativeness of Expert Witnesses	80
8.6	Partisanship of Experts	80
8.7	Experts' Presence in Courts	82

PART NINE: THE COMMON LAW EXCLUSIONARY RULES

9.1	Rules of Expert Evidence.....	83
9.2	Retention or Abolition of Exclusionary Mechanisms	87

PART TEN: COMMONWEALTH AND NSW EVIDENCE ACTS

10.1	The Reforming Legislation	91
10.2	Impact of the Federal and NSW Evidence Acts.....	91

PART ELEVEN: COURT EXPERTS, ASSESSORS AND REFEREES

11.1	Other Sources of Expert Evidence	95
11.2	Court-Appointed Experts	101
11.3	Assessors.....	105
11.4	Referees	107
11.5	Other Procedures.....	109

PART TWELVE: CONCLUSIONS

12.1	Changing Expert Culture	113
12.2	Roads Towards Effective Evaluation.....	115

APPENDIX A: THE JUDICIAL SURVEY INSTRUMENT	119
APPENDIX B: SURVEY RESULTS	141
INDEX	163

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Ian Freckelton
Prasuna Reddy
Hugh Selby
April 1999

FOREWORD

In his proposal to the AIJA for a survey of judges concerning expert evidence, Dr Ian Freckelton noted:

There is very little by way of a hard data to inform debate on how the discretions to exclude expert evidence should be exercised. Whether judges encounter problems in applying the rule of expert evidence is not empirically known. Under Commonwealth and New South Wales legislation these discretions are going to play a vital role in determining when expert evidence is admitted into the decision-making process. It may be that the criterion of "reliability" propounded by the United States supreme Court in *Daubert v Merrel Dow Pharmaceuticals*, 113 S Ct 2786 (1993) will make its way into Australian law through application of the discretions or via the area of expertise rule. If it does, it will usher in a major change in the qualitative requirements for expert evidence. Regardless, the new Commonwealth and New South Wales evidence legislation is likely to lead to more expert evidence being admitted. There is a need for more information on whether this is a positive initiative and whether procedural changes and vocational training will be needed for experts and lawyers alike to ensure that the expert witnesses are made sufficiently accountable.

At a more basic level, the attitudes of Australian judges to expert evidence and ways in which expert witnesses present their evidence have never been surveyed. There is a very substantial volume of law on the subject of expert evidence, but the general attitudes toward expert witnesses as they function within the adversary system in Australia at this stage can only be the subject of speculation.

The importance of expert evidence to the judicial process, and to judicial administration generally, are matters which in recent times have attracted the attention of judicial officers, academics and those concerned with the reform of both civil and criminal procedures. Some courts have amended their rules to facilitate the provision of expert evidence and to ensure that reliable expert opinion is available for the guidance of the court. An example is the Order 34A of the Federal Court Rules. The courts have been anxious to stress the importance of an independent experts' duties to the court, and to emphasise that an expert should not regard himself or herself as an advocate for any party (see, for example, the Federal Court's recent practice direction containing guidelines for expert witnesses).

It is timely that there be a survey which focuses upon that attitudes of Australian judges to expert evidence. I am delighted that Dr Freckelton, an acknowledged expert in this area, has made his time available for the preparation of a comprehensive survey, which has been sent to all Australian judges, and for the co-ordination of the collation of the results of the survey. His detailed and comprehensive report, will, I am confident, attract wide interest.

Thanks are due to National Institute of Forensic Science (NIFS) for its assistance in

collating the results of the survey. I am grateful to Chief Justice John Phillips, Supreme Court of Victoria, who gave his approval for NIFS to assist in that exercise. Thanks are also due to Dr Freckelton's co-researchers Dr Prasuna Reddy, Lecturer, School of Social and Behavioural Sciences at Swinburne University of Technology; and Mr Hugh Selby, Barrister, Australian Capital Territory.

The Advisory Committee for the project has been of great assistance to the Researchers. The members of the Committee were the Hon Justice Tim Smith, Supreme Court of Victoria, Mr Andrew Palmer, Law School, The University of Melbourne, Mr Bernard Bongiorno QC, Master Kathryn Kings, Supreme Court of Victoria and Mr Rod Smith, Lawyer & Mediator, Victoria.

Finally, I would like to thank Mrs Kathy Jarrett of the AIJA, for her considerable work in preparing the report for publication.

The Hon Justice Catherine Branson
President, AIJA
June 1999

LIST OF TABLES

	Page
Table 1	Judges' Ratings of the Most Serious Problem with Expert Evidence37
Table 2	Expert Characteristics Considered Advantageous by Dallas Lawyers49
Table 3	Expert Characteristics Considered "Distressing" by Dallas Lawyers49
Table 4	Expert Characteristics Considered Advantageous by Dallas Judges.....50

LIST OF FIGURES

	Page
Figure 1	Areas Identified by Judges as the Most Difficult for Them to Evaluate Adequately (Q2.5).....40
Figure 2	Persuasive Factors When Experts Give Oral Evidence (Q2.10)47
Figure 3	Single Most Persuasive Factor When an Expert Gives Oral Evidence (Q2.11)48
Figure 4	Difficulties Encountered by Judges in Eliciting Experts' Answers in Examination-in-Chief (Q3.2)52
Figure 5	Reasons for Inadequate Cross-Examination of Expert Witnesses (Q3.5) 53
Figure 6	Necessity for Further Training of Experts in Their Forensic Function (Q4.1)58
Figure 7	Areas Identified as Most Helpful in Training Experts (Q4.3)59
Figure 8	Necessity for Further Training of Advocates in Calling and Cross-Examining Experts (Q4.4).....61
Figure 9	Areas Identified as Most Helpful in Training Advocates in Calling and Cross-Examining Experts (Q4.5)63
Figure 10	Areas Identified by Judges as the Most Difficult for Jurors to Comprehend (Q5.1).....65
Figure 11	Comparison of Judges' Perceptions of Difficult Areas of Expert Evidence for Judges and Jurors (Q2.5 & Q5.1)66
Figure 12	Judges' Opinions Regarding Withdrawal of Expert Evidence from Juries (Q5.5, Q5.6 & Q5.7)69
Figure 13	Comparison of Judges' Opinions of Persuasive Factors When Experts Give Oral Evidence (Q2.10 & Q5.10).....71
Figure 14	Comparison of Judges' Opinions of Single Most Persuasive Factor when an Expert gives Oral Evidence(Q2.11 & Q5.11).....72
Figure 15	Judges' Patterns of Exclusion of Expert Evidence (Q7.2)86

Figure 16	Exclusion of Expert Evidence by Judges (Without Party Application) (Q7.3)	87
Figure 17	Judges' Views on Abolition of Common Law Exclusionary Rules of Expert Evidence (Q7.4)	88
Figure 18	Judges' Views Regarding Use of Court-Appointed Experts (Q5.9)	102
Figure 19	Judges' Views Regarding Use of Assessors (Q9.9)	107
Figure 20	Judges' Views Regarding Use of Referees (Q9.13)	108

SUMMARY OF KEY FINDINGS AND OUTCOMES

1.1 The Survey

The survey of judges provides a first and very important opportunity to understand what it is that the Australian judiciary thinks about the presentation of expert evidence in the courts. With the use of expert evidence increasing and its complexity at times being alienating for lay decision-makers, the perspective of the judiciary is important because judges, more than any other participants in the civil, family law and criminal justice systems, consistently see expert witnesses and reports and have an opportunity to evaluate them from a dispassionate standpoint. This is not to argue that other legitimate perspectives do not exist in relation to the role of experts in the courts but to acknowledge that judges have a particularly valuable experience on a day-to-day basis in dealing with the challenges posed by the presentation of expert evidence in their courtrooms.

While many surveys are conducted to test an hypothesis, this survey had no explicit preconceptions. Rather, it sought to gather information, to go beyond the occasional comment in a judgment, and empirically to ascertain judicial beliefs or approaches in relation to the way in which evidence from other disciplines fares, and should fare, in the course of contemporary litigation processes.

All 478 Australian judges were sent the survey instrument in mid-1997 by the Australian Institute of Judicial Administration.¹ Responding to the survey was, of course, voluntary but the response rate was substantial - 244 judges or 51.05% of the Australian judiciary. The response rate, in fact, is even higher than it appears. The survey was directed toward judges with trial experience, meaning that those whose judicial practice had been exclusively appellate were ineligible to respond to the survey. This includes a number of those judges in jurisdictions with Courts of Appeal. Thus, the percentage of trial judges who answered the survey is closer to the 60% mark. Possibly there is something of a warping effect in terms of those who elected to complete the instrument, meaning that it was those who had a strong view of some kind in relation to the issues raised in the survey who may have tended to respond. Nonetheless, the fact that on any view over a half of all judges in Australia completed the survey instrument means that the answers can be said to be representative of the opinions and views of a substantial portion of Australia's judiciary. In addition to the actual answers to the survey questions, this report draws upon the many free-form comments offered by the respondents. These constitute a rich tapestry of views, experiences and suggestions upon which those contemplating reform of trial procedure and litigation processes will be able to draw.

Since this is the first time that all of the Australian judiciary has been surveyed on any issue, there is added importance in the data elicited. In any future assessment of proposals to make changes to our litigation system, and to the admission of expert

¹ See Appendix A.

evidence in particular, the databank from this survey will be an important reference point in ascertaining judicial views. For example, the fact that it is now apparent that many judges are so troubled about the quality of medical, accounting, scientific and engineering evidence that they are prepared to give serious consideration to such aids to expert evidence assessment as the appointment of referees and assessors has many ramifications. One amongst many might be the appropriateness of conducting a pilot study into the utility of using medical referees in complex medical negligence cases.²

In the meantime, there are some findings which warrant response from litigation reformers. The purpose of this summary is to highlight those findings and to draw attention to important ramifications of the answers provided to the survey.

1.2 The Role of Expert Witnesses in Contemporary Litigation

It is an axiom of expert evidence that the expert is permitted to offer opinions on the basis that information in such a form is of assistance to judges and jurors who have to make decisions about disputed facts. Without expert opinions, the tribunal of fact, be it judge or jury, would be deprived of the benefit of the insights and perspectives from other disciplines and may misconstrue the evidence before it. In short, the tribunal of fact is frequently reliant upon the quality of the expert evidence made available by the traditional forensic tools of examination-in-chief and cross-examination.

However, the forensic reality is that experts, especially in civil and family litigation, are retained by one party which is intent upon winning the case, or, if that is not feasible, upon minimising the extent of their loss. Each party pays for the experts of its choice, selecting them on the basis of the extent to which, by their opinions and the way that they express them, the experts will advance the party's contentions case. Selection of expert witnesses is not generated by a dispassionate quest for truth by either the courts/tribunals or the parties.

Of course, these realities are not novel to Australian judges who, being drawn from the ranks of experienced legal practitioners, are well familiar with the dynamics and motivations lying behind the parties' search for the supportive expert. Recognition of them has also generated proposals in England³ and an initiative by the Australian Federal Court⁴ for change to procedures. However, this tension

² See, though, the important empirical analysis in N. Vidmar, *Medical Malpractice and the American Jury*, University of Michigan Press, Michigan, 1997.

³ See, for instance, Lord Woolf MR, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, London, 1996. See also Royal Commission on Criminal Justice, *Report* (Chairman: Viscount Runciman of Doxford), HMSO, London, 1993.

⁴ See RE Cooper, "Federal Court Expert Guidelines" (1998) 16(3) *Australian Bar Review* 203; Federal Court, 15 September 1998, "Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia". See below.

between the expert being responsive to the party paying his or her fee and at the same time providing assistance to the decision-maker creates challenges for fact-finding in a great many cases heard in the courts.

Given judges' career experiences as litigators and their needs as detached decision makers, it should come as no surprise that so many in their answers to questions posed in the survey expressed concern about a tendency on the part of a percentage of experts toward a lack of objectivity. Sometimes the deficit identified was in the form of overt bias; on other occasions the partisanship in the expression of opinions was less obvious; in some instances it was an unwitting lack of neutrality. However, to the concerns expressed by judges in answer to specific questions in the survey instrument were added many caustic and cynical comments from respondents about the propensity of (too many) experts to be affiliated with the side commissioning their reports and calling them to give evidence.

At the upper end of judges' concerns was a perceived lack of independence in the views of an unacceptable percentage of forensically commissioned medical practitioners and accountants. Prominent amongst the concerns was what was described as the phenomenon of the expert functioning principally as a forensic expert - especially the medical practitioner retired or semi-retired from active clinical practice.

1.3 Judges' Concerns

Judges in different jurisdictions had different focuses of concern. For those sitting principally in the criminal area, the major worry about the comprehensibility of expert evidence was psychiatry, followed by science and psychology; for Family Court judges it was accounting evidence; for judges sitting in the civil jurisdictions it was engineering evidence, followed by accounting, scientific and statistical evidence.⁵

A perception that experts are colouring their evidence in favour of the party calling them is likely to entail a response from the decision-maker that the witness' evidence is of less probative value than it otherwise would be. This, of course, is contingent upon the bias being susceptible of identification - by the judge or the juror. There is significant advantage therefore for a party in securing an expert with the appearance or reality of objectivity, but, within an adversary system such as Australia's, only so long as their evidence coincides with a party's interests. But what does this mean for a fair trial if a party finds that genuine authoritativeness and communication skills cannot coexist, and if one or the other has to be sacrificed?⁶

⁵ See para 4.10.

⁶ Jasanoff frames the issue aggressively: "In the commodity market of expertise, persuasiveness more than raw scientific credentials determines a witness's worth. Experts may seek to establish themselves (often with the help of entrepreneurial lawyers) as specialists in particular types of cases, sometimes appearing categorically as "plaintiff's witnesses" or "defense witnesses."

1.4 Aspects of the Adversary System

In our adversarial system, even with the most detached and objective of experts, it is still inevitable that opposing parties from time to time will call eminent experts whose views will be irreconcilable. Before decision-makers can utilise expert opinion to evaluate the facts of a case, they must first decide which, if any, of the experts and their opinions should be relied upon for that purpose. The choice requires the judge to feel confident that she or he has understood the explanations proffered by the experts. So it is understandable that judges identified clarity of explanation by expert witnesses as vitally important - more important than many other factors that might play a part in influencing the evaluation of expert evidence⁷. Judges candidly conceded that many of them - some seventy percent - had had occasions where they had felt that they had not understood expert evidence in the cases before them⁸. Some twenty percent of judges responding to the survey said that they "often" experienced difficulty in evaluating opinions expressed by one expert as against those expressed by another.⁹

Judges' confidence that they have understood expert evidence, however, is just one of the factors to be taken into account when they have to decide what weight should be given to the evidence. Decision-makers need to look for touchstones of reliability, indicia including the expert being impartial, a disinclination by the expert to step beyond their limits of expertise, and a familiarity on the part of the expert with the relevant facts¹⁰. In short, the decision-maker needs to feel secure that their application of an expert opinion to facts in dispute is truly fair and reasonable. In turn, this will be a function of their perception of the quality of the evidence before them.

An interesting, albeit controversial, example of turning deliberately to an expert for help comes from a comment by one of the respondent judges who recalled a criminal trial in which, 'the accused was representing himself and plainly insane. The Crown had no instructions to call a psychiatrist as the onus of insanity falls to an accused. The accused was maintaining his sanity. I called the psychiatrist in order to put the McNaughton defence to the jury'.

That initiative, whether one agrees with it or not, also highlights the concerns of many judges about whether the courtroom is an effective forum in which to hold experts and their opinions to proper account. Half of the judges responding to the

The legal system's preference for proven winners encourages such repeat witnessing, although it substantially narrows the range of expertise that finds its way to court". S Jasanoff, *Science at the Bar: Law, Science and Technology in America*, Harvard University Press, Cambridge, 1995, at pp.46-7.

⁷ Questions 2.10, 2.11, 5.10, 5.11.

⁸ Question 3.7.

⁹ Question 3.7.

¹⁰ Questions 2.10 and 2.11.

survey expressed the view that courts are a place where the reliability of expert theories and opinions can be adequately evaluated. However, a third had the opposite view.¹¹

Implicit in the judge's decision to call the psychiatrist may well have been an expectation that the advocate for the Crown would be competent to test the psychiatrist's evidence in cross-examination. Implicit too may have been an assumption that the psychiatrist would understand his or her role in the courtroom. The capacity of both the witness and the cross-examiner to discharge their functions are checks and balances within the system against poor quality evidence emerging with an authority that it ought not to possess. However, there are occasions in which these checks and balances do not operate effectively - this is a recipe for a miscarriage of justice. While many survey respondents were content with the quality of advocacy in their courtrooms, so far as expert evidence was concerned, there were many others who were unhappy with both the advocacy and the role played by experts¹². They were concerned that the courtroom was not functioning as an effective crucible to separate the spurious from the sound expert opinions.

1.5 Training for Advocates and Experts

If many judges, who are well educated and experienced in the weighing of complex evidence, give voice to a perception that lack of objectivity abounds amongst expert witnesses, concede difficulty, at least on occasions, in evaluating expert evidence, and also are worried about the forensic skills of experts and advocates, what does this mean for the capacity of lay jurors to function as effective fact-finders in difficult cases in which expert evidence figures prominently? The answers to the survey of judges disclosed a significant recognition of the need for both experts and advocates to perform better so that the burden upon lay jurors is eased. This took the form of overwhelming support for training for expert witnesses to communicate their views better and to fulfil their role as forensic witnesses more professionally, as well as for lawyers to discharge their roles as examiners and cross-examiners more effectively.¹³

Another aspect of communication and advocacy, and one that is too often overlooked is the non-verbal. Further and more sophisticated use of demonstrative forms of evidence - charts, overheads, videos - is part of better presentation of evidence. This was advocated by many judges. Provision of information and enhancement of skills in the developing technologies of research and communication may provide a bridge across the widespread disinclination of advocates to return to advocacy school - it may provide a means of encouraging

¹¹ Question 6.4.

¹² Questions 3.1 and 3.3.

¹³ Questions 4.1 and 4.4.

involvement by both lawyers and potential expert witnesses in further training of the kind identified by the respondent judges as worthwhile.

1.6 Need for Procedural Change

In spite of the variety of difficulties identified with the functioning of expert witnesses, most respondent judges did not suggest that complex trials involving expert evidence be removed from jury decision-making, either in the civil or criminal areas.¹⁴ However, an interesting percentage articulated another view. Fifty eight judges¹⁵ expressed the opinion that complex cases involving complex and conflicting accounting evidence should be withdrawn from jurors, while the comparable figures for those in favour of the withdrawal of cases involving scientific and medical evidence were thirty eight¹⁶ and twenty five¹⁷ respectively. For these judges, the problems with expert evidence are so thoroughgoing that they are not readily remediable to a point where jurors will be able to handle them acceptably. However, the numbers proposing such a solution are modest and need to be seen in perspective.

Many judges identified a need to crystallise those issues genuinely in dispute amongst the experts prior to the formal commencement of hearings. Some respondents were content with the requirement that expert reports be exchanged some time before trial - a requirement existing in civil and family litigation generally and now increasingly applying in criminal litigation as well. However, most of those who expressed an opinion saw a value in facilitating experts conferring with one another before trial and agreeing on what is an issue in dispute and what is not. This is also a priority under the 1998 Practice Direction of the Federal Court in relation to Expert Evidence.¹⁸

Recognition of the need for pragmatism and efficient court-management appears to have engendered support amongst many judges for the proposition that experts should more often remain in court, when other experts are giving evidence¹⁹ Some respondents even advocated the practice of experts giving their evidence together - the so-called "hot tub" approach. After weighing up the opportunity and utility of cross-examination by surprise, on the one hand, and early identification and focus upon the real matters of disagreement between experts, on the other, judges' preferences decidedly inclined toward the latter. 'Let there be more efficiency and less theatre' was clearly the wish of many judges. Likewise there was ample

¹⁴ Compare the recommendations of the Roskill Committee: Lord Roskill, *Fraud Trials Committee Report*, HMSO, London, 1986 at p147.

¹⁵ Question 5.5.

¹⁶ Question 5.6.

¹⁷ Question 5.7.

¹⁸ See below.

¹⁹ Question 6.10.

recognition that expert reports, like affidavits, owe much to the guiding hand of the commissioning party's lawyer. Just how much of a guiding hand, and with what aims and limitations, will be clearer when the results of a proposed survey of litigation lawyers are available.

1.7 The Evidence Acts 1995

While a recognition by judges of the value of clarity of explanation, a quest for reliability in both opinions and their proponents, and a desire that the courtroom be a truly effective accountability forum are the three key outcomes from the survey, there are several aspects of the expert evidence presented in courts awaiting final determination by the appellate courts.

The first of these is the effect of the new evidence law regime, introduced at Commonwealth level and in the ACT and New South Wales by 1995 legislation²⁰. The statutory provisions simplify the common law exclusionary rules of expert evidence by (apparently) abolishing the common knowledge and the ultimate issue rules and omitting the basis and the area of expertise rules. It may be that there will be increased focus upon ascertaining what constitutes an expert opinion, as against an opinion that essentially is speculation or is not based on the expert's specialised knowledge.²¹ The exclusionary discretions have an important and potentially enhanced role in regulating the admissibility of expert evidence as a result of the legislative changes. How this will translate into admissibility decisions remains to be seen²². The survey respondents, drawn from all jurisdictions, when asked to evaluate those provisions revealed little inclination, however, to abolish traditional approaches to the admissibility of expert evidence. Certainly there was little support for statutory intervention to abolish the common law rules of expert evidence. The survey demonstrated unequivocally that most judges are not in favour of the abolition of any of the common law rules, with only 56 respondents, for instance, supporting the abolition of even the most criticised of the rules - the ultimate issue rule.²³

The answers of judges sitting in jurisdictions where the new legislation applies indicated that in the early phase of the implementation of the evidence legislation they perceived the new evidentiary rules to have made little difference to their exclusionary decision-making in relation to expert evidence. Whether this changes with further appellate review of trial decisions remains to be seen. For the present, there cannot but be an amount of uncertainty in face of what appears to be only a

²⁰ Evidence Act 1995 (Cwlth) and Evidence Act 1995 (NSW).

²¹ See *HG v The Queen* (1999) 73 ALJR 281.

²² See *Allstate Life Insurance Co v. Australia and New Zealand Banking Group Ltd* (1996) 137 ALR 138 at 142-4; *Pepsi Seven-Up Bottlers Perth Pty Ltd v. Federal Commissioner of Taxation* (1995) 132 ALR 632 at 643; *Westpac Banking Corp v. Jury*, unreported, NSW Supreme Court, 17 October 1995 per Rolfe J.

²³ Question 7.4(d).

slow take-up of the principles underlying the new expert evidence provisions in the 1995 legislation. Such uncertainty has the potential to mean that some expert evidence that was not admissible under the common law but now is admissible under the statutory provisions is not being adduced to the extent that it could be.

1.8 Court-Appointed Experts, Assessors and Referees

While only a few respondents had ever appointed expert witnesses, assessors or expert referees, there was strong in-principle support for such measures²⁴ - much more so, for instance, than for the imposition of fetters upon the numbers of expert witnesses permitted to be called by parties.²⁵ It was apparent, though, that the usage of court-appointed experts, assessors and referees troubled some judges who had not used them because of the inroads it was perceived that they would make upon the role of the judge as a “ring-keeper” within the adversarial model. Mostly, though, judges said that they had not used court-appointed experts either because they had not been asked to do so by the advocates appearing before them or because they had determined such a course not to be necessary.²⁶

Some respondents also were worried about the costs and the mechanics of such initiatives. By contrast, though, it appears that, at least with referees, the perception of the continuing costs of litigation in the absence of an expert referee determination of a technical issue has been what has convinced parties to use a referee.

Related to a judicial preparedness to delegate some technical fact-finding to experts are the questions of how effective or more effective is an inquisitorial approach to expert issues. Although the survey does not provide any insights on this topic, the companion survey of Australian magistrates, undertaken in October 1998, should assist.²⁷ Amongst many other questions, those magistrates with inquisitorial experience as coroners and in the children’s welfare jurisdiction have been asked about the outcomes from having the court call experts.

1.9 The Exclusionary Rules of Expert Evidence

If there is any one underlying theme that stands out in the survey responses, it is the desire of judges for expert help that is objective and reliable. Another aspect of that quest is whether expertise in a particular field is sufficiently developed to constitute useful expertise at all. This is a debate which may not be possible of clear resolution - especially in a world of proliferating subdisciplines, subspecialisations

²⁴ Questions 9.5, 9.9 and 9.13.

²⁵ Although this was not an issue specifically traversed by the questions.

²⁶ Question 9.3.

²⁷ See I Freckelton, P Reddy and H Selby, *The Australian Magistrates’ Perspectives on Expert Evidence: An Empirical Study*, AIJA, Melbourne, 1999 (forthcoming).

and rapid advances in knowledge and methodology.²⁸ A 1912 Victorian judgment fastened upon the reputation of a technique amongst scientists as a indicium, if not a determinant, of its reliability. However, reliability was not treated as a precondition to admissibility.²⁹ By contrast, the United States decision of *Frye v. United States*³⁰ treated the question of the status of a scientific technique or theory amongst scientists as an admissibility criterion. This 'general acceptance' focus protected judges and jurors from the charismatic charlatan, and the iconoclastic expert fringe-dweller. At least that was what it was intended to do. It proved extremely controversial.³¹ In *Galileo's Revenge: Junk Science in the Court Room*³², Huber exposed the myth: there was poor quality expert evidence, and plenty of it, being accepted in courts across the length and breadth of the United States. In the mid 1990's the United States Supreme Court, but not all State Supreme Courts in the United States, moved to a test with a series of criteria, or hurdles, to establish whether expert evidence had sufficient reliability to be employed by the trial court³³.

Australian courts, unlike those in the United States, have not had occasion to determine definitively what are the criteria for the admission of expert evidence. The importance of general acceptance amongst the community of peers was highlighted in Victoria, albeit not as an admissibility test, more than a decade before the Americans³⁴; however, since then appellate decisions have concentrated on issues such as the ultimate issue rule, what is and is not common knowledge, and whether an expert has stepped beyond his or her expertise. No authoritative determination has yet emerged on the threshold question of whether an "area of expertise" test exists along the lines of those applied in the United States, Canada or New Zealand, before or after the Evidence Acts 1995 (Cwlth and NSW) and, if it does, what are its criteria. In response to questions posed in the survey, the majority of judges responding expressed the view that "reliability" should not be a precondition to

²⁸ See the recognition of the legitimacy of subspecialisation in the medical context in *Rogers v Whitaker* (1992) 175 CLR 479 where the question of duty of care was viewed in terms of not that of a doctor, not that of a surgeon, not that of an ophthalmic surgeon but of an ophthalmic surgeon specialising in corneal and anterior segment surgery.

²⁹ *R v Parker* [1912] VR 152 per Madden CJ in the minority and not on the question of admissibility per se but on the probative value of dactylography evidence.

³⁰ 293 F 1013 (1923).

³¹ See, for instance, EJ Inwinkelried, *The Methods of Attacking Scientific Evidence*, 3rd edn. Michie Co Charlottesville, 1997; DE Bernstein, The Admissibility of Scientific Evidence After *Daubert v Merrell Dow Pharmaceuticals Inc* (1994) 15 *Cardozo Law Review* 2139.

³² PW Huber, *Galileo's Revenge: Junk Science in the Courtroom*, Basic Books, New York, 1991; see also KR Foster and PW Huber, *Judging Science: Scientific Knowledge and the Federal Courts*, MIT Press, 1997; CT Hutchison and DS Ashby, "*Daubert v. Merrell Dow Pharmaceuticals Inc*: Redefining the Bases for Admissibility of Expert Scientific Testimony" (1994) 15 *Cardozo Law Review* 1875.

³³ *Daubert v Merrell Dow Pharmaceuticals*, 125 L Ed (2d) 469; 113 S Ct 2786 (1993).

³⁴ *R v Parker* [1912] VR 152.

admissibility of expert evidence³⁵. Approximately a quarter of those responding expressed the view that it should be a precondition but comparatively few thought that “falsifiability” should be a key determinant of “reliability”.³⁶ This view, however, may not preclude both concepts playing a significant role in the interpretation of the prejudice/probative discretion.

1.10 Changing the Culture of Partiality

Whether key admissibility decisions are lurking now in appeal papers, or are a decade away, there is one step which can be taken straightaway to enhance the quality of expert evidence in Australian court rooms. Among expert witnesses and within the judiciary in England, in particular, recent years have seen a recognition of the need to develop codes of ethics and practice for forensic experts which will consolidate an expectation and practice of objectivity³⁷. This has most prominently found expression in the September 1998 Federal Court of Australia’s Practice Note, “Guidelines for Expert Witnesses”.³⁸ There is much to be said for the standardised making of a declaration by an expert which embraces the principles of independence and sound practice expected of the expert report writer or witness. The United Kingdom-based Academy of Experts requires its members to subscribe to a declaration which is to be attached to their forensic reports.³⁹ That declaration, along with the expert witness training provided by the Academy, serves to meet the need for forensic experts to understand their role and their obligations.

Symbolically, such a declaration is eloquent in terms of the ideals expressed. In time, it is likely to forge a culture of obligation on the part of expert witnesses primarily to the courts, rather than to the parties paying their fees. Finally, the presence of such a declaration articulates values, departure from which is likely to lead to little weight being placed upon the defaulting expert’s views. We recommend the following mandatory declaration for all expert reports:

I,, DECLARE THAT:

1. I recognise that my overriding duty in writing reports and in giving evidence is to the Court/Tribunal, rather than to the party commissioning me and/or paying my fees.

³⁵ Question 6.2.

³⁶ Questions 6.2 and 6.3.

³⁷ See, for instance, *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyd’s Rep 68 at 81-2, which has since been applied by Stuart Smith LJ in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1995] 1 Lloyd’s Rep 455 at 496 and Evans LJ in *Vernon v Bosley (No 1)* [1997] 1 All ER 577.

³⁸ See para 12.1 below.

³⁹ The Federal Court Practice Note mandates a limited declaration by the expert about the sufficiency of their inquiries. See also New South Wales Supreme Court, Practice Note No 104, Professional Negligence List: Expert Witnesses (1998) 44 NSWLR 725 at 727-8.

2. I have used my best endeavours to produce my report in sufficient time to enable proper consideration of it.
3. I have made myself reasonably available for discussion of the contents of my report with professional representatives of all parties involved in the litigation.
4. I have provided within my report
 - (a) details of my relevant qualifications;
 - (b) details of the literature and other significant material that I have used in arriving at my opinions;
 - (c) identification of any person, and their qualifications, who has carried out any data selection, data inspection, tests or experiments upon which I have relied in compiling my report; and
 - (d) details of any instructions (whether in writing or oral, original or supplementary) which have affected the scope of my report.
5. I have used my best endeavours in my report, and will endeavour in any evidence which I am called to give,
 - (a) to confine myself to expressing opinions as an expert within those areas in which I am specially knowledgeable by reason of my skill, training or experience;
 - (b) to distinguish among the data upon which I have relied, the assumptions which I have made, the methods that I have employed, and the opinions at which I have arrived;
 - (c) to indicate those data, assumptions and methods upon which I have significantly relied to arrive at my opinions;
 - (d) to give succinct reasons for each of the opinions which I express;
 - (e) to be objective and unbiased;
 - (f) to make the opinions which I express clear, comprehensible and accessible to those not expert in my discipline;
 - (g) to be scrupulous in terms of accuracy and care in relation to the data upon which I rely, my choice of methods, and the opinions which I express arising from those data;
 - (h) to indicate whether I have been provided with all the data necessary for me to arrive at the views which I have expressed and whether I need further information.

- (i) to indicate whether I have been apprised of any data or choice of method which might entail opinions which are inconsistent with the opinions which I have expressed; and
 - (j) to indicate whether I have been unable for any reason to employ the methodology which I would prefer to use before expressing an opinion.
- (6) If I become aware of any error or any data which impact significantly upon the accuracy of my report, or the evidence that I give, prior to the legal dispute being finally resolved, I shall use my best endeavours to notify those who commissioned my report or called me to give evidence.
 - (7) I shall use my best endeavours in giving evidence to ensure that my opinions and the data upon which they are based are not misunderstood or misinterpreted by the Court/Tribunal.
 - (8) I have not entered into any arrangement which makes the fees to which I am entitled dependent upon the views I express or the outcome of the case in which my report is used or in which I give evidence.

The Australian judges responding to the survey have marked a lack of partisanship as the first requirement in the search for reliability. They also expect experts in their courtrooms to have relevant prior experience, to stay within their special competence and to be thoroughly prepared.

1.11 The Challenge Ahead

For most cases, judges have expressed the view that with procedural reform and improved performance by both advocates and experts the courtroom is an adequate, although not ideal, place to test expert opinions, even when they are complex and inconsistent. Procedural reforms have the potential to assist decision-makers, be they judges or jurors, to better understand and evaluate expert evidence. Similarly, a change to the culture prevailing amongst many expert witnesses, accompanied by enhanced exercise of skills by experts and lawyers alike, would reduce the problems of comprehension, confusion and unnecessary complexity. For this, carefully targeted training has much to commend it and is enthusiastically advocated by judges.⁴⁰ An immediate challenge is for experts and advocates alike to be persuaded that they can improve their performance, and so their marketability, by acquiring more skills and experience in dealing with areas outside the traditional compass of the law.

The answers by judges to the survey instrument and their many comments and suggestions articulate a preparedness on the part of a substantial part of Australia's judiciary to confront in a flexible way the difficulties posed by complex and conflicting evidence by experts. Many do not feel themselves constrained to an

⁴⁰ See answers to questions 4.2 and 4.3.

uninvolved, non-interventionist role but are ready, in principle, to become involved in the litigation to the extent necessary to render the evidence before them susceptible of effective evaluation.⁴¹ They are concerned to reduce what they identify as a culture of inadequate objectivity by many doctors, accountants, scientists and psychologists, to improve the performance of experts and advocates alike and to explore means of bringing information before the courts in a form which is both clear and amenable to sophisticated and cost-efficient assessment.

The judges' responses to the questions posed in the survey require litigation reformers to customise their proposals for change to address the areas identified by the Australian judiciary as actually problematic in practice, experts to make changes in respect of the adverse aspects of the culture of their forensic practice, and advocates to adapt to calling and cross-examining practitioners from other disciplines more effectively.

⁴¹ See the answers to questions 9.1 –9.14 and the comments thereto.

PART TWO: INTRODUCTION

2.1 The Importance of Forensic Experts

Experts play a vital role in Australia's legal system. As the suppliers of informed opinions on matters beyond the ken of lay finders of fact, they provide a key source of information on the basis of which legal decisions are made every day in the courts. Their role is to shed light on areas that would otherwise not be adequately appreciated or understood.¹ Hence the importance that their evidence be well adduced, communicated and understood.

Because of their importance to the fact-finding processes of the courts, special privileges are extended to experts. Most witnesses are confined to giving evidence by recounting facts within their direct knowledge. Experts, by contrast, are permitted to give their evidence in the form of opinions, as well as of fact, provided that their evidence is relevant, does not breach evidentiary rules such as the hearsay rule and provided that it complies with the various common law and statutory exclusionary rules of expert evidence.

Relatively little is known about many aspects of expert evidence, including "the extent to which problems with the use of expert witnesses occur in proceeding"² There is a need to understand many aspects of forensic experts' contribution to the fact-finding process, including matters such as the extent of the influence that they actually command; their representativeness of the views prevailing within the community of experts; the utility of their evidence; the extent to which expert evidence is understood; and the degree to which the processes that bring expert witnesses to court as part of the adversary system may erode their role as neutral suppliers of information to the courts.

Some information, though, has recently become available. It underlines the importance of learning more about the role of expert evidence and the need to regulate it on the basis of the information made available by reliable processes. For instance, a study into the cost of civil litigation in the County Court of Victoria and the District Court of Queensland in 1992 disclosed that medical reports and attendance at court by medical practitioners made a substantial contribution toward litigation costs. In Victoria, it was found that expert witnesses consumed 16 percent of the cost of cases that proceeded to verdict and 27 percent of the cost of cases

¹ Saunders J as long ago as 1554 in *Buckley v Rice Thomas* (1554) 1 Pl Comm 118 at 124; 75 ER 182 at 191 commented that "If matters arise in our laws which concern other science and faculties we commonly call for the aid of that science or faculty which it concerns, which is an honourable and commendable thing for thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them." Similarly, Lord Pearce in *R v Toohey* [1965] AC 595 at 609 held that where a witness for physical or psychological reasons is incapable of giving a reliable account to the jury "it must surely be allowable for medical science to reveal this vital hidden fact to them." See also *Farrell v The Queen* (1998) 155 ALR 652; *R v Turner* (1974) 60 Cr App R 80 at 83; *Quick v Stoland* (1998) 157 ALR 615 at 625.

² Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, ALRC IP 20, AGPS, Canberra, 1997, at p.69.

settled at pre-trial conferences.³ In Queensland, the figures were substantial, although not quite so pronounced: 15 and 10 percent respectively.⁴ On this ground alone, the trial system needs to examine how the information that experts can make available to the courts can be utilised most cost-efficiently. However, even more important is the need to regulate expert evidence so that first it is available for all sides in litigation - prosecution and defence, plaintiff and defence, insured and uninsured, the legally aided and those without legal representation - and secondly so that it is comprehensible for tribunals of fact. In these ways problems with the availability and quality of expert evidence will be less likely to contribute to miscarriages of civil and criminal justice.

2.2 The Judicial Perspective

Judges are in a unique position to contribute an informed perspective on the way in which expert witnesses function within the adversary system. However, until now comparatively little has been known about the views of judges in Australia or internationally in relation to expert evidence and expert witnesses. What has become known has emerged from judicial decisions in relation to admissibility, and the reasons given for them, and from judge-alone decisions in civil and criminal cases. In addition, some judges in extra-curial addresses to legal conventions, medico-legal conferences and the like have expressed views on matters concerning expert evidence.⁵ No systematic study has been undertaken until now into the views of Australia's judiciary on the subject of expert evidence and reports.⁶

The primary aim of the judicial survey, the results of which are described below, has been to determine what Australian judges collectively think in relation to a number of both controversial and non-controversial matters concerning expert evidence. The survey takes place on the assumption that parties will continue to exercise the fundamental role for selecting, calling and questioning expert witnesses and that in civil litigation costs will generally accompany the outcome of the litigation. This latter consideration is one of the key factors that militates against the entrepreneurialism that characterises the United States legal culture in respect of expert witnesses.⁷ The report also acknowledges an environment in which legal aid

³ P Williams, R Williams, A Goldsmith and P Browne, *The Cost of Civil Litigation before Intermediate Courts in Australia*, AIJA, Melbourne, 1992, at p.72.

⁴ Ibid.

⁵ For an example of another form of extra-curial reflection, see G Fricke, *Tales from the Courts*, Lothian Books, Melbourne, 1999, at p 17, expressing views in favour of court-appointed experts.

⁶ Compare the studies by A Champagne, D Shuman and E Whitaker, "An Empirical Examination of the Use of Expert Witnesses in American Courts" (1991) 31 *Jurimetrics Journal* 375; DW Shuman, A Champagne and E Whitaker, "An Empirical Examination of the Use of Expert Witnesses in the Courts - Part II: A Three City Study" (1994) 34 *Jurimetrics Journal* 193; A Champagne, DW Shuman and E Whitaker, "The Problem with Empirical Examination of the Use of Court-Appointed Experts: A Report on Non-Findings" (1996) 14 *Behavioral Sciences and the Law* 361; JS Cecil and TE Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706*, Federal Judicial Center, Washington DC, 1993.

⁷ See PW Huber, *Galileo's Revenge: Junk Science in the Courtroom*, Basic Books, New York, 1991; S Jasanoff, *Science at the Bar: Law, Science and Technology in America*, Harvard University Press, Cambridge, 1995.

is declining in its availability in criminal, children's and family law litigation and is largely not available for civil and administrative litigation. A further context which is relevant in Australia is that the pool of available experts in any area of specialisation within a state or territory can be shallow, most available witnesses being known to lawyers regularly involved in initiating or defending litigation.⁸ They are also known to experienced judges, but not, of courses, generally to lay jurors.

Many of the issues traversed in the survey relate to the traditional functioning of the adversary system and pose the question of whether Anglo-Australian courts need to take a more interventionist and innovative role in the procedures that they employ to resolve civil, criminal and family law disputes. To this extent the survey picks up and scrutinises a series of issues raised in the 1996 report by Lord Woolf, *Access to Justice*.⁹

The project is timely because of the assertions advanced in some quarters that Australia's commitment to the adversary process needs to be revisited, in part, on the basis that the community cannot underwrite its cost and on the basis that juries can no longer cope with the complexities and conflicting nature of modern-day expert evidence. With the increasing use of computer-aided technologies by the court system and with the easing of impediments to the reception of expert evidence by the Evidence Act 1995 (Cwlth) and the Evidence Act 1995 (NSW), these issues promise to become more pressing.¹⁰

In addition, the contention has long been advanced by some, especially medical practitioners¹¹, that juries consisting of experts or panels of experts deciding the specialist matters in dispute should replace the traditional, lay finders of fact. Others have proposed caps on the numbers of expert witnesses. Still others have maintained that the problems, such as they are, lie with inadequate provision of evidence by experts. A few have argued that the legal profession must take responsibility for a measure of those problems of comprehension that exist in relation to expert evidence and that the myth of lawyers functioning effectively as the fourth estate of the courtroom¹² in making experts accountable must be exploded in order to encourage

⁸ This is so especially in more specialised areas of endeavour but even amongst psychiatrists and psychologists there is only a very modest number of practitioners who devote part of their practice to forensic work with any consistency.

⁹ Lord Woolf MR, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, London, 1996.

¹⁰ Cecil and Willging in the United States context maintain that "Evidence involving complex issues of science and technology plays an increasing role in federal litigation": JS Cecil and TE Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence, 706*, Federal Judicial Center, Washington DC, 1993, at p.3.

¹¹ For a review of this contention, see C Jones, *Expert Witnesses*, Clarendon Press, Oxford, 1995; I Freckelton, "Doctors as Witnesses" in I Freckelton and K Petersen (ed), *Controversies in Health Law*, Federation Press, Sydney, 1999; I Freckelton, "The Challenge of Junk Psychiatry, Psychology and Science: The Evolving Role of the Forensic Expert" in H Selby (ed), *Tomorrow's Law*, Federation Press, Sydney, 1995.

¹² Just as the media are asserted to act as the fourth estate within the general community, making

lawyers to undertake further training, to use communication technologies better and to prepare effectively for cross-examination of experts.¹³

It has also been asserted by some that fundamental, or at least significant, procedural change is needed within Australia's courts to facilitate the accessible provision of comprehensible evidence by experts.¹⁴ In the course of 1997/98 the Federal Court mooted procedural reforms to the adducing of expert evidence within its jurisdiction¹⁵ and in September 1998 issued "Guidelines for Expert Witnesses".¹⁶ Such reforms are receiving active consideration in a number of other jurisdictions. The current survey explored the views of Australia's judges upon each of these issues.

2.3 Methodology of the Survey

In 1996 the two lawyer authors prepared a draft survey instrument to raise a number of the issues relating to the role of expert witnesses in the Australian court system. The design process consisted of a draft being circulated for comment to trial and academic lawyers within Australia, England, the United States and The Netherlands, as well as to sociologists and criminologists. In November/December 1996 a pilot instrument was circulated to 14 judicial members of the Australian Institute of Judicial Administration.

The results of that pilot were written up for publication in the *California Davis Law Review*.¹⁷ The purpose of its being published in that forum was twofold. The paper which formed the basis for the law review article was presented at the specialist symposium on the subject of expert evidence in California, hosted by Professor Imwinkelried of the University of California at Davis. This prompted further helpful feedback about the survey process from an international perspective as the symposium consisted of contributors from the United States, England, The Netherlands and Australia.¹⁸ However, the feedback was not such as to contaminate the responses from Australian judges as none were in attendance and publication

people and institutions accountable for their conduct.

¹³ See, for instance, P Wilson, "Lessons from the Antipodes: Success and Failures of Forensic Science" (1994) 67 *Forensic Science International* 79 at 84; I Freckelton, "Wizards in the Crucible: Making the Boffins Accountable" in JF Nijboer and JM Reijntjes (ed), *Proceedings of the First World Conference on Criminal Investigation and Evidence*, Koninklijke Vermande, The Hague, 1996.

¹⁴ See, for instance, J Bourke, "Misapplied Science: Unreliability in Scientific test Evidence" (1993) 10 (2) and (3) 123 and 183; I Freckelton, *The Trial of the Expert*, Oxford University Press, Melbourne, 1987.

¹⁵ See RE Cooper, "Federal Court Expert Guidelines" (1998) 16(3) *Australian Bar Review* 203.

¹⁶ See para 9.1.

¹⁷ M Brown and P Wilson, *Justice and Nightmares*, New South Wales University Press, Sydney, 1992; Freckelton, "Judicial Attitudes Toward Scientific Evidence: the Antipodean Experience" (1997) 30(4) *University of California Davis Law Review* 1137.

¹⁸ The symposium was published in 1997, Volume 30(4) *University of California Davis Law Review*.

was not until well after the final survey instrument was distributed throughout Australia.

The involvement with the Californian symposium elicited considerable international interest and also, in combination with the comments from the judges who completed the pilot instrument, enabled refining of the final survey instrument. The result was that while a number of suggestions were made about the design of the initial instrument by the judges who completed it, very few criticisms of the format or methodology of the final instrument were made by judges. A full copy of the survey instrument is to be found at the back of this report under the title "Appendix One". In mid-1997 the judicial survey was distributed by the Australian Institute of Judicial Administration to the 478 judges throughout Australia.

Phase three of the project has commenced at the time that the writing-up of the judicial survey is being completed.¹⁹ Once again through the Institute, all magistrates in Australia received a modified version of the judicial survey instrument in October/November 1998 to enable evaluation of their views on issues concerning the use of expert evidence in their courts. This will permit an analysis of the issues arising in the magistrates' courts in respect of expert evidence, as well as comparison of the results of the judicial survey with the results of the magistrates' survey.²⁰ A particular feature of phase three of the study is a focus upon the more inquisitorial aspects of Australia's legal system - the coroners' courts and the welfare divisions of children's courts.

The fourth phase of the project is planned to be a survey of litigation lawyers to garner their views on the role of experts, their perspective on whether the role presents problems and, if so, what solutions they can identify.

2.4 Novelty of the Process

The survey instrument was designed in the awareness that no comparable research exercise in relation to the judiciary had previously been undertaken in Australia. The Australian Law Reform Commission attempted to conduct a survey of some judges as part of its Sentencing Reference in the early 1980s but had not met with success. A smaller survey of Victorian judges was conducted as part of the Starke report on sentencing²¹ and a number of less formal projects of modest dimensions had incorporated the views of some judges from time to time. However, the aim of this

¹⁹ The version of the survey for magistrates has profited from comments made by the judicial respondents, a small number of additional issues being raised for response, and has been framed so as to be pertinent for cases heard within magistrates' courts, including magistrates sitting within the coronial and children's welfare jurisdictions.

²⁰ See I Freckelton, P Reddy and H Selby, "Australian Magistrates' Perspectives on Expert Evidence: An Empirical Study", *AJJA*, Melbourne, 1999 (forthcoming).

²¹ See PF Brown and CM Steger, "The Perception of the Efficacy of Pre-Sentence Reports Submitted to Victorian Reports" in PF Brown and CM Steger, *Evaluations of Pre-Sentence Reports in Victoria by Legal Professionals*, Report prepared for the Victorian Sentencing Committee, Melbourne, 1988; see further PF Brown, "Pre-Sentence Reports", ch.62 in I Freckelton and H Selby (ed), *Expert Evidence*, 5 volume looseleaf service, LBC Information Services, Sydney, 1993-.

project was to procure the views of a substantial percentage of Australia's judiciary, so it was realised that a number of professional measures needed to be taken to give the exercise a reasonable prospect of success.

The view was adopted that it was essential to guarantee the anonymity of respondents so as to ensure that the results of the survey could not be used, or be perceived to be used, as any form of encroachment upon judicial independence, an issue of ongoing, and perhaps escalating, sensitivity. The Australian Institute of Judicial Administration wrote to all judges in Australia through its then Executive Director, Professor Peter Sallmann, explaining the project, and the credentials of the primary researcher. He encouraged judges to participate. Along with each survey instrument was an envelope which could be used by the respondent to remit the completed survey form. Judges were asked to complete the instrument within approximately three weeks and were sent a reminder after two weeks. Late-completed instruments were accepted.

Survey forms were neither numbered nor by any means traceable to particular respondents, unless they chose to identify themselves, as a few did. The collation process of both quantitative data and qualitative data in the "Comments Column", which ran throughout the whole instrument, was undertaken by the National Institute of Forensic Science, under the guidance of the statistician member of the author team, Dr Reddy.

A few methodological issues posed difficulties. Chief amongst them was how to deal with answers that demonstrated non-compliance by respondents with instructions that had been given within the body of the survey instrument. A number of questions, for instance, asked for a single response but in fact elicited multiple responses from participants. Such responses are acknowledged in this report, when they occurred, and account for the different total sample sizes when percentages are shown. The technique of using the first answer has been used on some occasions in order to overcome the problem of multiple responses. However, this procedure is inappropriate when the response format is categorical, such as being given a choice of "yes" or "no" for a single question. In those instances, when more than one response was incorrectly given by a respondent, the procedure adopted was to identify the most frequently occurring response in the sample as the basis for further statistical analyses.²² Throughout the report, percentages (%) are calculated on the actual number of responses to the question (n), excluding missing responses.

²²

This is standard procedure in the treatment of missing data: see BG Tabachnick and LS Fidell, *Using Multivariate Statistics*, 3rd edn, Harper Collins, New York, 1996.

PART THREE: INFORMATION ABOUT RESPONDENT JUDGES¹

3.1 Response Rate

The survey was designed to be focussed upon trial judges, rather than appellate judges. Of the 478 judges in Australia, 244 responded, a response rate of 51.05%. This is a very positive response rate, testimony both to the involvement of the Australian Institute of Judicial Administration and the National Institute of Forensic Science, but also to the fact that judges were reassured about the anonymity of the process and the importance of the exercise. It was also evident from many judges' comments that they regarded the process of completing the survey as both worthwhile and interesting. It should be noted also that the response rate to the survey is in one sense higher than the bare 51.05% figure indicates. Only judges with trial experience as part of their judicial office were eligible to complete the survey. A number of judges who have sat only in appellate courts, such as those existing in New South Wales, Queensland and Victoria, do not satisfy this criterion. This means that the response rate of eligible judges with trial experience is in fact closer to the 60% mark. This high response rate to the survey is all the more significant as it must be conceded that the survey instrument was lengthy and demanding of those completing it.

3.2 Representativeness of Survey Response

A question arises in the context of almost any voluntary, self-selecting survey as to whether those who have responded are representative of the population of those eligible to answer. In this survey the response rate was high by contrast with many other surveys of other professional groups². A variety of factors inevitably works upon the reasons why respondents do and do not respond to survey instruments. Reasons for non-responsiveness include temporary absence, illness, lack of interest in the area, disinclination to participate in survey projects and simply being too busy. No feedback came to the authors about the reasons why some judges failed to reply.

A survey instrument about any controversial area tends to prompt responses from those with views about it - either of approval for the status quo or a desire to see, and perhaps even function as, a catalyst for change. Those without strong views may be less likely to feel the motivation to devote the time to responding, especially if the instrument is demanding. Thus there is a possibility with the current survey responses that a skewed distribution of views is represented with a proportion of those who have not responded not having strong views about the role of expert witnesses in the courts.

¹ This Part deals with questions in Part One of the survey instrument.

² Kerlinger, for instance, notes that returns of less than 40 or 50 percent for mail questionnaires are common; higher percentages are rare: F N Kerlinger, *Foundations of Behavioral Research*, Harcourt Brace, Florida, 1992 at p.380. Notably, the response to the subsequent survey of magistrates was almost identical: 51.12% (205 out of a possible 401).

3.3 Profile of Judicial Respondents

Judges were asked to identify their predominant area of judicial practice (**Question 1.1**). It was apparent that answering the question was not straightforward for many respondents as their judicial work, not surprisingly, was mixed. However, about a quarter of respondents 66 (27.05%) indicated that their main area of practice as judges was criminal trials, while 18 (7.38%) said appellate cases; 33 (13.52%) said family law hearings; 19 (7.79%) said personal injury/workers' compensation hearings; 29 (11.89%) said commercial/equity hearings. Thirty respondents (13.39%) indicated that their predominant area of practice was "other", including intellectual property, bankruptcy, taxation, judicial review, and administrative appeals³.

The answers to this question, while to some degree affected by the provision of multiple answers, have enabled the distillation of whether judges doing mostly criminal, civil or family law work have different views about matters canvassed in the questionnaire. This is indicated throughout the report where significant variation occurs amongst the views of judges practising in different areas.

Respondents consisted primarily of experienced judges, a quarter having served as judges for between 2 and 5 years (25.41%, n=62); a quarter for between 6 and 10 years (25.82%, n=63); a third for between 11 and 20 years (32.79%, n=80); and nearly one in ten for more than 20 years (9.02%, n=22) (**Question 1.2**). These characteristics emphasise the level of experience brought to bear by respondents to the survey. Approximately 4 in 5 respondents (79.92%, n=195) reported that they had served predominantly as state or territory judges, and one in five (19.67%, n=48) as federal judges⁴ (**Question 1.3**). Eighty-five percent of the respondents were male (85.25%, n=208), nearly 12 percent were female (11.89%, n=29) and 2.87 percent (n=7) declined to indicate their gender (**Question 1.4**).

³ The remaining 29 respondents (13%) reported more than one main area of expertise.

⁴ Two respondents did not indicate their provenance.

PART FOUR: PROBLEMS POSED BY EXPERT EVIDENCE¹

Judges were asked about the occurrence and utility of expert evidence, about possible problems with expert evidence, and about factors affecting the persuasiveness of experts and of their evidence.

4.1 Frequency of Encountering Expert Evidence

Judges were asked about the frequency with which they encountered expert evidence (**Question 1.5**). It has been asserted for some time that changes in technology, as well as in legal and scientific culture, are resulting in the use of more expert evidence in the County/District, Supreme, Family and Federal Courts².

Nearly three quarters of respondents answered that they encountered opinion evidence from experts "often" (72.95%, n=178), while a quarter said they did so "occasionally" (24.18%, n=59). The point was made in comments that expert evidence is always found in certain jurisdictions, such as personal injury cases, while one respondent commented that they "suspected" that "experts are being used more frequently in criminal trials". The responses confirm the importance of the contemporary role of the expert evidence in litigation.

4.2 Utility of Expert Evidence

Judges were asked about the extent to which they found expert evidence "useful" for the fact-finding process (**Question 2.1**). This is a matter of significance both in terms of the extent to which such evidence is actually of assistance to the task of deciding issues in dispute in the course of litigation and also in relation to the extent to which parties are calling evidence which is unnecessary and time-consuming. However, further factors enter into the assessment of the utility of expert evidence, namely the quality of the information communicated and the skills with which the information is elicited in examination-in-chief and actually delivered by the expert witness. Just over two thirds of respondents who answered the question (69.36%, n=163) indicated that they found expert evidence to be useful "often", while one in eight (13.62%, n=32) indicated that they found it useful "always". These results seem a significant endorsement of Australian expert evidence but, as will be seen below, they need to be read in conjunction with other answers provided, particularly those concerning problems with expert evidence and persuasion.

4.3 Bias Amongst Forensic Experts

Concern about the prevalence of "bias" in the evidence given by expert witnesses

¹ This Part deals with questions in Part Two of the survey instrument.

² For the observation that the courts are encountering escalating amounts of expert evidence see as long ago as 1966 H Kalven and H Zeisel, *The American Jury*, University of Chicago Press, Chicago, 1966; but more recently JS Cecil and TE Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706*, Federal Judicial Centre, Washington DC, 1993, at p.3 citing the Federal Courts Study Comm Report at 97 (April 1, 1990): "Economic, statistical, technological, and natural and social scientific data are becoming increasingly important in both routine and complex litigation".

is not a new phenomenon.³ In a leading article in the 1897-98 *Harvard Law Review* Judge Foster noted that:

"This 'bias', or inclination in favor of the party by whom the witness is employed, is probably the most frequent complaint of all against the expert witness; and the inclination of partiality is often characterized by terms indicating dishonesty and corruption"⁴

Ninety-nine years later, Lord Woolf's report into "Access to Justice" stressed the potential that experts may espouse the views of those who commission their reports and call them as witnesses⁵. He classified impartiality on the part of expert witnesses as "of paramount importance"⁶. Many of his proposals for reform were developed expressly to break down the affiliation between experts and the commissioning parties with vested interests in the litigation. A similar concern may be discerned in the 1998 Federal Court's "Guidelines for Expert Witnesses".

In the United States, the problem of expert bias is more remarked upon than in most other jurisdictions, Gross summing up the concerns unsuitably in 1991:

"One of the most unfortunate consequences of our system of obtaining expert witnesses is that it breeds contempt all around. The contempt of lawyers and judges for experts is famous. They regularly describe expert witnesses as prostitutes⁷, people who live

³ "Bias" is defined in the OED as inter alia "An inclination, leaning, bent, predisposition towards, predilection, prejudice."

⁴ WL Foster, "Expert Testimony - Prevalent Complaints and Proposed Remedies" (1897-98) 11 *Harvard Law Review* 169 at 171; see also Learned Hand, "Historical and Practical Considerations Regarding Expert Testimony" (1901-2) 15 *Harvard Law Review* 40 at 53.

⁵ Lord Woolf MR, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, London, 1996 at p.143. He particularly noted the comment of the Court of Appeal in *Abbey National Mortgages Pty Ltd v Key Surveyors Nationwide Ltd* [1996] EGCS 23: "For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend ... to espouse the cause of those instructing them to a greater or lesser extent, on occasions becoming more partisan than the parties."

⁶ Ibid, at p.142. The concerns about bias in the forensic context are not limited to those of judges. In 1881 Dr Russell Reynolds observed in *The Lancet* that, "There are some members of our profession, who have become specialists ..., who seem to think that everything that a man tells them of his subjective symptoms are matters of fact and of great importance; and on the other hand, there are those who regard every plaintiff as a knave or a fool, and most probably as a combination of the two": R Reynolds, "Specialism in Medicine" (1881) *The Lancet* 655 at 657.

⁷ One of the most "biased" attacks on expert "bias" is found in a recent work by Hagen, of which the following is representative of the book's general tenor: "In criminal trials, we have competing teams of psychoexperts analyzing the accused, first to tell the judge whether the defendant is competent to assist in his or her own defence; then, if the defendant is found competent, the defense hires another raft of experts to testify that competent or no, the defendant is mentally disordered in some way and should be found not guilty by reason of insanity, or, if not completely insane, his or her criminal responsibility should be considered less due to some diminished mental capacity or state of mind. "He cannot understand the charges against him. She couldn't tell right from wrong. He couldn't distinguish fantasy from reality. She couldn't control her actions. He is the victim of an irresistible impulse. He was traumatized by the war. She was

by selling services that should not be for sale. They speak of maintaining 'stables' of experts, beasts to be chosen and harnessed at the will of their masters. No other category of witnesses, not even parties, is subject to such vilification."⁸

However, there are significant differences between the practice of litigation in the United States, both formerly and in more modern times, and the practice in Australia. In particular, the combination of contingency fees, the availability of experts regarded as "for hire" and the absence of a rule in civil litigation that costs generally follow the event has bred a culture that remains foreign to that which prevails in Australia. Nonetheless, similar concerns about expert partiality have been occasionally and individually ventilated by judges, legal practitioners and commentators in Australia. A perspective upon how serious the problem is in practice would be useful.

Judges were asked in the survey whether they had encountered a number of problems that could impact upon the utility of expert evidence. Two thirds of those who answered the question (68.10%, n=158) reported that they "occasionally encountered" bias on the part of experts, while just over a quarter (27.59%, n=64) reported that they encountered this phenomenon "often" (Question 2.2(i)). This latter statistic is in some ways the more significant. If bias is so prevalent that over a quarter of judges meet it "often", this has ramifications for the functioning of the civil and criminal trial processes, especially if the bias is not readily detectable and measurable.

The question prompted a high incidence of commentary. A number of judges cavilled at the term "bias", linking it with deliberate disingenuousness and locating the source of frequent disagreements amongst experts in other factors. One respondent commented that experts tend to favour the party calling them, but that to call this propensity "bias" was too strong a use of the term. A similar view was expressed by another respondent: "I have never found an expert who has put forward a view which he/she does not genuinely hold, for the sake of merely supporting a case. Some views become untenable, but not because of 'bias' in the sense of a desire to further the case dishonestly." Another interpreted "bias" as a "dishonest attempt to support the party calling the expert."

However, other judges appeared to take it as a given that a large proportion of expert witnesses were partisan and variously opined that bias was particularly to be found in criminal pleas and in civil litigation, in medical cases, and in engineering cases. The comments which lamented the incidence of the abandonment of neutrality particularly singled out medical witnesses, and a number focussed upon

in a flashback. He suffers from an incapacitating mental disorder. She has a psychological disease. It's not his fault because he wasn't taking his medication." A mental devil made him do it": MA Hagen, *Whores of the Court*, Regan Books, New York, 1997 at p.5-6.

⁸ SG Gross, "Expert Evidence" (1991) *Wisconsin Law Review* 1113 at 1135; see also BM Epstein and MS Klein, "The Use and Abuse of Expert Testimony in Product Liability Actions" (1987) 17 *Seton Hall Law Review* 656 at 660; MA Hagen, *Whores of the Court*, Regan Books, New York, 1997.

psychiatrists. The comment of one judge seemed to sum up the views of many: "[Bias] is not unknown in other areas but is more entrenched in the medical profession." A number of cynical comments were notable: "I suspect that the expert says what she/he believes the party paying for the report/evidence wishes to read/hear"; "Bias is almost inevitable given that the expert is paid by one party and only called if his/her evidence helps the party's case"; "Experts seem to have a bias in favour of the party calling them. It may be an unconscious bias of course"; "The expert frequently slants his evidence in favour of the litigant on whose behalf his evidence is given"; "There are plaintiffs' doctors and defendants' doctors".

A number of responses indicated that bias became apparent in the proclivity of some experts to function as advocates. Others identified as a category of particularly biased experts those who made their living or a substantial part of their living out of providing forensic advice. One judge summed up the views of several: "Experts very readily fall into categories (Plaintiff or Defendant) when they develop an advising practice." However, once this happens, the same judge made the point that upon their becoming "type-cast, the weight of their evidence is significantly diminished", a check and balance providing some measure of protection to the system against bias. However, this safety-net is at its most effective in judge-alone trials, be they civil or criminal.

Some assumed that expert witnesses were not impartial but did not blame them: "Many experts are predictable in the sense of it is easy to know in advance what tack they will take. They are honest, but not necessarily objective".

The responses in relation to "bias" are significant, particularly the considerable proportion of the Australian judiciary reporting a consistent pattern of finding partisanship on the part of specialist witnesses called before them. The definition of bias, that is to say whether the connotation of the word necessarily involves deliberate or unwitting lack of objectivity, is less important. What appears to concern judges is the product of the bias, namely reports and oral evidence that end up being partisan.

The survey finding and comments are consistent with concerns expressed in cases in which judges have indicated their aggrievement about experts' partiality⁹. In *Permanent Trustee Aust Ltd v Boulton*¹⁰, for example, Justice Young of the New South Wales Supreme Court commented, apparently with relief, that an expert "showed a refreshing attitude for an expert witness in that he refused to put his evidence any higher than a careful expert should." By contrast, Justice Pincus of the Federal Court was explicit in his frustration in a 1987 case: "Experience suggests that too often expert witnesses display a degree of partiality, whereas the court-

⁹ Langbein (J Langbein, "The German Advantage in Civil Procedure" (1985) 52 *University of Chicago Law Review* 835) tendentiously refers to the description of experts as "saxophones", the lawyer playing the tune upon them to elicit the desired notes in the course of litigation, the witnesses being portrayed as willingly passive instruments manipulated by unscrupulous musician/advocates.

¹⁰ (1994) 33 NSWLR 735 at 739.

appointed expert may be expected to be indifferent as to the result of the case."¹¹ In *J v The Queen*,¹² too, the Victorian Court of Criminal Appeal was highly critical of the key prosecution evidence given by a prominent forensic psychiatrist in a battered woman syndrome case, and noted pointedly that the expert had not taken the trouble to acquaint himself with evidence other than that which was favourable to the side calling him, the prosecution.

Most significantly, though, a series of English decisions has endorsed a code of ethics for expert witnesses. Its primary focus, although not its only focus, is to avoid partisanship and its consequences:

"The duties and responsibilities of expert witnesses in civil cases include the following:

1. 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.¹³
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise¹⁴. An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumption upon which his conclusion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, the qualification should be stated in the report.¹⁵
6. If, after exchange of reports, an expert witness changes his

¹¹ *Neward Pty Ltd v Civil and Civic Pty Ltd* (1987) 75 ALR 350 at 351.

¹² (1994) 75 A Crim R 522 at 532.

¹³ *Whitehouse v Jordan* [1981] 1 All ER 267 at 276; [1981] 1 WLR 246 at 256-257 per Lord Wilberforce

¹⁴ See *Polivitte Ltd v Commercial Union Assurance Co Plc* [1987] 1 Lloyd's Rep 379 at 386 per Garland J and *Re J* [1991] FCR 193 per Cazalet J.

¹⁵ *Derby & Co Ltd v Weldon* (1990) Times 9 November per Staughton LJ.

view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and where appropriate to the Court."¹⁶

Lord Woolf argued that articulation of such responsibilities and duties would be welcomed by experts as a recognition of their role as "advisers to the court rather than advocates of the parties"¹⁷ The Academy of Experts in England has responded by prescribing that its members should include the following declaration between the end of an expert's report and the affixation of their signature:

I DECLARE THAT:

1. I understand that my primary duty in written reports and giving evidence is to the Court, rather than the party who engaged me.
2. I have endeavoured in my reports and in my opinions to be accurate and to have covered all relevant issues concerning the matters stated which I have been asked to address.
3. I have endeavoured to include in my report those matters, which I have knowledge of or of which I had been made aware which adversely affect the validity of my opinion.
4. I have indicated the sources of all information I have used.
5. I have not without forming an independent view included or excluded anything which has been suggested to me by others (in particular by instructing lawyers).
6. I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction of qualification.
7. I understand that:
 - (a) my report, subject to any corrections before swearing as to its correctness, will form the evidence to be given under oath or affirmation;
 - (b) I may be cross-examined on my report by a cross-examiner assisted by an expert;
 - (c) I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to

¹⁶ *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 at 81-2, which has since been applied by Stuart Smith LJ in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1995] 1 Lloyd's Rep 455 at 496 and Evans LJ in *Vernon v Bosley (No 1)* [1997] 1 All ER 577 at 601. Stuart-Smith LJ endorsed the formulation of Cresswell J "without hesitation" on appeal but added "One word of caution in relation to par 4: "That an expert should make it clear when a particular question or issue falls outside his expertise": [1995] 1 Lloyd's Rep 455 at 496.

¹⁷ *Op cit*, at p.143.

meet the standards set out above.

8. I confirm that I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome of the case.”

A variation on this declaration is proposed toward the end of this study¹⁸ and may be found in the summary at paragraph 1.10.

It is apparent from the answers to this question, and from others within the survey, that absence of neutrality on the part of expert witnesses¹⁹, is one of the most significant problems identified by Australia’s judges in relation to expert evidence. The challenge is to address the culture amongst experts prepared to do forensic work that has tolerated a preparedness among a percentage of experts to compromise their objectivity and neutrality. Then, conceding that the culture will never be entirely eliminated, the task is to create checks and balances within the functioning of the litigation system to counteract what survives of the culture.²⁰

4.4 Difficulties of Comprehension

Judges were asked about the frequency with which they encountered expert evidence that was difficult to understand (Question 2.2(ii)). The question was not specifically directed toward their own experience of difficulty but to the objective quality, as they perceived it, of the information coming before the courts. The reason for posing this question was the assertion advanced by many that certain kinds of expert evidence are too complex for lay fact-finders, particularly jurors, to evaluate adequately.

The issue relating to complexity and incomprehensibility of evidence has been raised in two criminal trial contexts in particular - trials involving significant amounts of accounting and commercial evidence beyond the normal experience of lay people and trials which are determined in good part on the basis of complicated scientific evidence such as DNA typing. The second National Research Council Report on DNA profiling squarely acknowledged the concern of United States scientists and lawyers about the accessibility of DNA evidence. It noted that:

“No research has as yet tested the reactions of triers of fact to the detailed presentations of evidence on DNA profiling that are encountered in the courtroom. We do know that people can make frequent and systematic errors in tasks that require them to assess probabilities or to draw inferences using probabilistic

¹⁸ See below at para 12.1.

¹⁹ Although many codes contain requirements that experts at all times be non-partisan and neutral. See I Freckelton, “Forensic Experts’ Codes of Ethics” ch 22 in I Freckelton and H Selby (ed), *Expert Evidence*, 5 volume looseleaf service, LBC Information Services, Sydney, 1993.

²⁰ Another option for the scientific area is the extension of the role of the National Institute of Forensic Science to monitor the functioning of government laboratories; see I Freckelton, “Institutionalisation of Forensic Expertise” in H Nijboer & W Sprangers, *Harmonisation in Forensic Expertise*, Amsterdam, 1999 (in press).

information²¹. Yet, despite this plethora of research into information processing in other contexts, we know very little about how laypersons respond to DNA evidence and how to minimize the risk that they will give the DNA evidence inappropriate weight²²

The authors of the Report argued that "research is needed on the appropriate way to instruct jurors adequately on the more sophisticated probabilistic concepts at issue when DNA evidence is presented at trial".²³ Australian decisions have been divided in their expressions of confidence in jurors' abilities to comprehend expert evidence. The High Court in *R v Chamberlain (No 2)*²⁴ explicitly endorsed a concern expressed at an earlier appellate level in the same case to a similar effect:

"Each of the [witnesses] was giving his opinion on matters of science within disciplines of which each was a master, and at a level of difficulty and sophistication above that at which a juror, or a judge, might by reasoning from general scientific knowledge subject the opinion to wholly effective critical evaluation."

The passage has since been often repeated in decisions determining the admissibility of scientific evidence. For instance, Justice Maurice of the Northern Territory Supreme Court in the bite mark case of *Lewis v R*²⁵ echoed the High Court's perception, noting that:

"Forensic (sic) evidence, especially if it goes to a vital issue implicating an accused person in the commission of an offence, may often have a prejudicial effect on the minds of a jury which far outweighs its probative value. The jury, being people without scientific training, may often be impressed by an expert's qualifications, appointments and experience and the confident manner in which he expresses his opinions. And yet it ought not be left to such matters alone to provide a foundation for the jury making an assessment of the probative value of forensic evidence, particularly where there are conflicts in expert testimony, or where it is acknowledged that other experts of more or less equal

²¹ Citing M Bar-Hillel, "The Base-Rate Fallacy in Probability Judgements" (1980) 44 *Acta Psychologica* 211; W Edwards and D Von Winterfeldt, "Cognitive Illusions and their Implications for the Law" (1986) 59 *Southern California Law Review* 225; D Kahneman, P Slovic and A Tversky, *Judgement Under Uncertainty: Heuristics and Biases*, Cambridge University Press, Cambridge, 1982; RM Hogarth and MW, *Behavioral Foundations of Economic Theory*, Uni of Chicago Press, Chicago, 1987; RE Nisbett, D Krantz, C Jepson and Z Kunda, "The Use of Statistical Heuristics in Everyday Inductive Reasoning" (1983) 92 *Psychological Review* 339; RE Nisbett and L Ross, *Human Inference: Strategies and Shortcomings of Social Judgment*, Prentice-Hall, Eaglewood Cliffs, 1980; M Palmerini, *The Illusion of Knowing*, John Wiley & Sons, Chichester, 1993; EC Poulton, *Bias in Quantifying Judgements*, Lawrence Erlbaum Associates, Hillsdale, 1989.

²² National Research Council, *The Evaluation of Forensic DNA Evidence*, National Academy Press, Washington DC, 1996, 6-32.

²³ *Ibid* at 6-33.

²⁴ (1984) 153 CLR 521 at 558 per Gibbs CJ and Mason J, citing Jenkinson J in the Federal Court.

²⁵ (1987) 29 A Crim R 267 at 271.

distinction are unlikely to agree."

In 1992, Hampel J of the Victorian Supreme Court in the DNA profiling case of *R v Lucas*²⁶ explicitly endorsed the comments in *Lewis*. He also noted the views expressed by the Royal Commissioner in the *Splatt* case²⁷ about the dangers of scientific evidence that expressed its opinions in terms of "consistency with."²⁸ Justice Hampel held that the DNA profiling evidence in the case was inadmissible on the basis that the technique was "widely regarded as extremely reliable and discriminating," but its limitations were not generally appreciated. In *Lucas*, widely discrepant scientific views had been expressed about the potential for false positive matching. As a result, the jury, according to Hampel J, was not in an adequate position after the prosecution and defence evidence to weigh the evidence effectively.²⁹ The key for this purpose is that the decision to exclude the evidence explicitly considered the judge's evaluation of popular assumptions about the particular kind of evidence, as well as the difficulties faced by the lay jury in understanding and weighing the evidence which they had heard in court.³⁰

Chief Justice Gleeson, in face of psychological evidence in *HG v the Queen* that he classified as speculative and outside the expert's area of expertise, commented that such opinions may carry a "spurious" appearance of authority, and legitimate processes of fact-finding may be subverted.³¹

In England, the Roskill Committee's Fraud Trials Committee Report in 1986 marks the most prominent expression of concern about the ability of jurors to discern adequately the bases and nature of experts' disagreement in the courtroom,³² the Committee recommending that complex fraud cases in the criminal area be tried

²⁶ [1992] 2 VR 109 at 115.

²⁷ For a review of the criticisms, see I Freckelton, "Judicial Attitudes Toward Scientific Evidence: the Antipodean Perspective" (1997) 30(4) *University of California Davis Law Review* 1137 at 1168-1162.

²⁸ Royal Commission, *Report Concerning the Conviction of Edward Charles Splatt*, South Australian Govt Printer, Adelaide, 1984.

²⁹ *R v Lucas* [1992] 2 VR 109 at 118.

³⁰ King CJ in *Runjanjic and Kontinnen v R* (1991) 53 A Crim R 362 at 369 acknowledged concerns about permitting expert evidence in relation to persons not suffering a recognised psychiatric illness because of the "risk that by degrees, trials, especially criminal trials, will become battle grounds for experts and that the capacity of juries and courts to discharge their fact-finding functions will be thereby impaired ..." Compare, however, *R v Decha-Iamsakun* (1992) 8 CRNZ 470 at 475-476 per Cooke P.

³¹ *HG v The Queen* (1999) 160 ALR 554 at 563-4.

³² Lord Roskill, *Fraud Trials Committee Report*, HMSO, London, 1986 at p 147. See, though, the proposals by J Thibaut and J Walker, "A Theory of Procedure" (1978) 66 *California Law Review* 541; J Monahan and L Walker, "'Social Science Research in Law: A New Paradigm" (1988) 43 *American Psychologist* 465; NG Poythress, "Procedural Preferences, Perceptions of Fairness and Compliance with Outcomes: A Study of Alternatives to the Standard Adversary Procedure" (1994) 18 *Law and Human Behavior* 361, C Havighurst, *Health Care Law and Policy*, Foundation Press, New York, 1988; S. Sugarman, "The Need to Reform Personal Injury Law Leaving Scientific Disputes to Scientists" (1990) 248 *Science* 823.

by a tribunal consisting of a judge and two lay members. While Australian judges have expressed concern about jurors' capacity to evaluate esoteric and complex information, as well as the impact of the impressiveness and professionalism of expert witnesses, their reactions have been highly variable. For example, Mullighan J in *Jarrett v The Queen*³³ emphatically declined to withdraw conflicting evidence from a jury on the basis that this was not part of the function of the trial judge "if of the view that the jury could not resolve the conflict or understand the evidence". He found such a practice to "denigrate the capacity and intelligence of jurors."

The Australian High Court too has latterly articulated a view that juries are essentially robust and responsive to judicial instructions. For instance, Mason CJ and Toohey J commented in *R v Glennon* that:

"The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. ... [I]n the past too little weight may have been given to the capacity of jurors to assess critically what they see and hear and their ability to reach their decisions by reference to the evidence before them."³⁴ (emphasis added).

The significance of this stance lies in its contrast with previous utterances of judges of the High Court and of Supreme Courts that have treated juries as fragile and in need of protection from influences that might sway their considerations.³⁵ Notably, the High Court in signalling this new orientation did not base its attitude in the work of psychologists or other empiricists, but simply appears to have substituted one assertion which is not based in evidence for another.

A further indication of the reasserted confidence in the abilities of the ordinary person to grapple with the challenges of the modern trial system was evident in the 1994 Victorian Full Court decision in *Higgins v R*.³⁶ In the context of reasserting confidence in the ability of jurors to evaluate extensive amounts of difficult data, the Court specifically referred to the dearth of material justifying assertions of juror incapacity. It did so in such a way as to acknowledge the relevance, in principle, of such information.

The highpoint of recent international expression of confidence in the intellect of juries came in the leading decision of the United States Supreme Court in *Daubert v*

³³ (1994) 73 A Crim R 160 at 175.

³⁴ (1992) 173 CLR 592 at 603.

³⁵ For instance, it can immediately be contrasted with the statement of Dawson J in *Murphy v R* (1989) 167 CLR 94 at 131 that "even though most juries are not prone to pay undue deference to expert opinion, there is at least a danger that the manner of its presentation may, if it is wrongly admitted, give to it an authority which is not warranted."

³⁶ Unreported, Supreme Court of Victoria, 2 March 1994 per Brooking, Byrne and Eames JJ.

Merrell Dow Pharmaceuticals.³⁷ The majority decision dismissed the concern that abandonment of the "general acceptance" criterion for the admissibility of expert evidence would result in a "free-for-all" in which befuddled juries would be confounded by expert evidence:

"In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury, and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

Given the sensitivities and controversies, therefore, the judicial responses to the question of the frequency with which they found evidence difficult of comprehension are important. Three quarters of responding judges (76.72%, n=178) said that "occasionally" they encountered evidence that was difficult to understand (Question 2.2(ii)). One in eleven said that they "never" had that experience (9.05%, n=21), while one in seven (14.22%, n=33) said that they found this phenomenon "often".

The picture painted therefore is of most judges encountering evidence that is problematic in respect of its comprehensibility from time to time, but not so regularly as to be a common problem. The associated issue is how much of a problem the difficulty in comprehending expert evidence is when it does occur. The figures were supported by comments that difficulties of comprehension were remediable by judicial intrusion to require explication of technical terms and clarification of confusions. Again, medical evidence was singled out as especially difficult to understand. It is not surprising that throughout the survey evidence by doctors was prominent within the comments given by judges. Personal injury, transport and workplace accidents form the staple of many court lists. In addition, there has been a significant increase in the amount of medical negligence litigation in recent years. By volume alone, medical practitioners represent the largest proportion of expert witnesses giving evidence in the courts.

One judge commented that the worst example of "expert speak" that he or she had encountered was in a case involving information technology. It required the judge frequently to intervene "to obtain clarification for myself and the jury". The judge's comment highlights the fact that remedial measures are often available in face of evidence that is particularly obfusc.

4.5 Experts Exceeding the Parameters of their Expertise

It has been asserted that expert witnesses, particularly medical witnesses, are too prepared to go outside their areas of expertise.³⁸ This has been argued to be a problem for accurate fact-finding, particularly for jurors, because the credentials of

³⁷ 125 L Ed (2d) 469; 113 S Ct 2786 (1993).

³⁸ See the criticisms of Professor Cameron's evidence in *R v Chamberlain* in M Findlay and P Duff, *The Jury Under Attack*, Butterworths, Sydney, 1988 at p.85.

experts may be such that their views on areas in which they are not, properly speaking, experts may be given respect and even deference.³⁹ This has the potential to contaminate the quality of the fact-finding process. In *HG v The Queen*,⁴⁰ for instance, Gleeson CJ commented that, "Experts who venture 'opinions' (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted." Lively differences within curial decisions have existed for some time about the propriety, for instance, of psychologists giving evidence of their diagnoses when the instruments that they employ are diagnostic manuals such as the DSM-IV or the ICD-10 or one or other of the editions of the American Medical Association's Guides to Permanent Impairment.⁴¹

Judges were asked about the frequency with which they had encountered the failure by expert witnesses to stay within the parameters of their expertise (Question 2.2(iii)). The answers were quite dramatic. More than three quarters of respondents (79.74%, n=185) reported that they encountered this phenomenon "occasionally", while approximately one in eight judges (12.93%, n=30) reported that they encountered it "often". One judge commented that the phenomenon was "most marked in criminal pleas where the expert offers opinions on sentencing options." Another asserted that the most frequent incidence of the problem was in criminal compensation hearings. Another said that family law hearings provided a ready forum for the problem, while another respondent maintained that in civil hearings "orthopaedic specialists will get into psychiatric fields", presumably adverting to the vexed questions of malingering and functional overlay. One respondent especially singled out psychologists who "are frequently called on pleas and presume to give evidence of a psychiatric nature."

The answers to the question establish that Australia's judges identify a problem in some experts being prepared to exceed the bounds of their expertise. The real problem with such a phenomenon is when it is not adequately exposed by cross-examination and results in witnesses appearing to be expert in areas where they are not.

³⁹ See the discussion in I Freckelton, *The Trial of the Expert*, Oxford University Press, Melbourne, 1987.

⁴⁰ (1999) 160 ALR 554 at 563-4; [1999] HCA 2 at para 44.

⁴¹ See on the one hand *R v MacKenney* (1983) 76 Cr App R 271; *R v Peisley* (1990) 54 A Crim R 42 at 52; *Klimoski v Water Authority of Western Australia* (1989) 5SR (WA) 148 at 150; *Hood v Crimes Compensation Tribunal*, unreported, Vic AAT, 24 March 1994; *Williams v Crimes Compensation Tribunal*, unreported, Vic AAT, 29 March 1994 and, on the other, *R v Whitbread* (1995) 78 A Crim r 452; *Nepi v. Northern Territory of Australia*, unreported, NT Sup Ct, 2 May 1997; for discussion of the authorities, see I Freckelton, "The Diagnostic Expertise of Psychologists" (1997) 4 (1) *Psychiatry, Psychology and Law* 73; I Freckelton, "Psychologists' Entitlement to Diagnose" (1998) 5(1) *Psychiatry, Psychology and Law* 163. Notably the Australian Psychological Society maintained in a "Position Statement on the Assessment and Diagnosis of PTSD" in August 1998 that "APS psychologists are qualified through their postgraduate training to assess, diagnose and provide expert opinions on PTSD in clinical, compensation and other medico-legal settings.": *In-Psych* (August 1998) at p.5.

4.6 Non-responsive Answering of Questions by Experts

An issue raised about the helpfulness of expert witnesses has been the propensity of expert witnesses to answer questions, and be permitted to do so, tangentially or non-responsively. This has the potential to be both unhelpful and, on occasions, deceptive. Judges were asked about the frequency with which they encountered expert witnesses being non-responsive to questions (**Question 2.2(iv)**). One in seven judges (14.17%, n=34) said they had “never” encountered this happening, three quarters (75.83%, n=182) said that they met this “occasionally” and one in ten (10%, n=24) said that this happened “often”. Inevitably, of course, where counsel and an expert witness are not on the same wavelength, answers from time to time will be “non-responsive”. The frequency of the phenomenon will be a product of the forensic experience and preparation of both experts and advocates, the existence of a confusing or esoteric discourse within an area of expertise being a further complicating factor.

A variety of comments accompanied the answers to this question. One respondent said that the problem was most prominent in personal injury cases “where there is a mighty clash of egos! The barrister thinks he or she is an expert, and the expert acts as an advocate.” Another noted that the problem is most prominent where the expert is closely aligned to one of the parties. The answers to the question and the judges’ responses established the existence of the phenomenon but did not give a clear indication of its seriousness.

4.7 Failure to Prove the Bases of Expert Opinions

Judges were asked about the frequency with which they encountered a failure to prove the bases of experts’ opinions (**Question 2.2(v)**). Technically, such evidence is probably inadmissible as breaching the basis rule⁴², save in jurisdictions where the Evidence Act 1995 (Cwlth) and the Evidence Act 1995 (NSW) apply, but the real difficulty is that when the building blocks of inferences are not properly established, the opinions themselves are of little probative value, although they may appear to be so.⁴³ The risk once again, therefore, is of oral evidence or of reports appearing to hold a value which they do not actually command. From time to time too no objection is taken to expert opinions whose bases are not proved - either for tactical reasons or out of ignorance of the rules of expert evidence.

Over two thirds of responding judges (68.78%, n=163) said that they had experienced this happening “occasionally”, while one in seven (15.19%, n=36) said that they had encountered this “often”, a similar number (16.03%, n=38) reporting that they had “never” encountered this.

A number of judges with experience in the valuation jurisdictions commented that the phenomenon was one that they met. One respondent asserted that the problem was only encountered in personal injury cases, another asserting that “for medical

⁴² See below para 9.1.

⁴³ In *Pantoja v The Queen* (1996) 88 A Crim R 554 at 577 Abadee J noted, “An expert opinion is only as persuasive as the facts upon which it is based.”

witnesses it is usually assumed 'not proved'. By contrast, another respondent noted that it was especially to the fore in criminal injuries compensation hearings and in sentencing hearings. A series of comments expressed the view that the adducing of expert evidence where the bases had not been properly proved was the fault of counsel, not so much of the witnesses.

Once again, therefore, it is apparent that the incidence of this problem for the evaluation of expert evidence in Australian trial courts is of some consequence but is not regarded by judges as of serious proportions.

4.8 Performance of Advocates

Judges were asked questions about the performance of advocates with a view to determining whether this variable in the quality of expert evidence as it ultimately reaches tribunals of fact is problematic. Research conducted for the English Royal Commission on Criminal Justice exposed many forensic scientists complaining about the quality of lawyers' performance in adducing expert evidence. An example quoted by Roberts and Willmore is the complaint from a forensic scientist that:

"There are occasions when you feel the prosecution counsel either haven't read it through thoroughly enough or haven't got to grips with it and therefore don't ask the questions you feel ought to be asked to provide a fair understanding of what has been found. Sometimes a bit more homework would pay off. ... Sometimes they go through your statement and leave out the conclusion, so you don't get the opportunity to say that."⁴⁴

They found that the problem with examination-in-chief so far as experts were concerned was particularly pronounced in criminal proceedings in relation to evidence adduced by the Crown.

The first question of this section concentrated upon the adequacy of questions being posed in examination-in-chief (**Question 2.2(vi)**). Often enough the questions posed and the answers given to the questions in examination-in-chief also influence what is asked in response in cross-examination. The depth and quality of such questioning in examination-in-chief reflect the advocate's understanding of the expert evidence, the time spent in conference between the advocate and the expert, and the advocate's skill in questioning and persuasion.

Over a third of the responding judges (35.87%, n=85) said that they "often" encountered a failure by the advocate to pose questions in examination-in-chief appropriately. Nearly two thirds of judges (60.34%, n=143) said that they had met the phenomenon "occasionally".

The other side to the coin is whether advocates are making experts accountable⁴⁵

⁴⁴ P Roberts and C Willmore, *The Role of Forensic Science Evidence in Criminal Proceedings*, HMSO, London, 1993 at p.124.

⁴⁵ Three respondents queried whether it was appropriate to speak in terms of an expert being made accountable by cross-examination, one stating that "Usually cross examination will involve

in the course of cross-examination (Question 2.2(vii)). The answers provide a window upon the effectiveness with which judges perceive advocates functioning as the fourth estate of the courtroom. Over half the responding judges (57.81%, n=137) encountered "occasional" failure by cross-examiners to make expert witnesses accountable and over a third said that they "often" (35.44%, n=84) came across the problem. One judge commented that in his or her experience "many counsel have no idea how to cross-examine an expert." Another noted, not surprisingly, that problems particularly occurred when the examiner or cross-examiner did not have an adequate grasp of the issue about which the expert had given opinions. "I find", wrote one judge, "that most barristers when faced with a charlatan are not prepared for a boots-and-all cross-examination".

Clearly enough, then, deficient advocacy was identified as a significant contributor to the problems posed by expert evidence for tribunals of fact, be they judges or juries. What was highlighted by respondents was that many different defects in advocacy can bring about the same unsatisfactory result.

4.9 Judges' Views of the Most Serious Problem with Expert Evidence

Judges were then asked which of the previous seven categories of problems is the "single most serious" (Question 2.3). Over one third (34.84%, n=85) of respondents ranked expert bias as the most serious problem, with failure to prove the bases of expert opinions (13.93%, n=34), failure by advocates to pose questions adequately (13.93%, n=34) and failure by advocates to cross-examine effectively (10.66%, n=26) the next most serious problems. These results are summarised in Table 1:

Table 1. Judges' Ratings of the Most Serious Problem with Expert Evidence

Problem	Frequency	Percent
Bias of expert	85	34.84
Failure to prove bases of expert opinions	34	13.93
Poor examination-in-chief	34	13.93
Poor cross-examination	26	10.66
Difficult language by expert	24	9.84
Other	15	6.15
Exceeding parameters of expertise	14	5.74
Non-responsiveness by expert to questions	12	4.92

Note: N=244.

When the views of judges principally sitting in criminal, civil and family law jurisdictions are separated, some matters which are distinctive to the Family Court

bringing as much coincidence between the experts and obtaining concurrence that if certain assumptions are not proved the thesis is not established."

become evident. Family Court judges were significantly more concerned about failure to prove the bases of experts' opinions and the quality of examination-in-chief and cross-examination than were judges in the criminal and civil jurisdictions. They also expressed less concern about expert bias than did their colleagues in the criminal and civil jurisdictions, although this finding was not as prominent as the others. The reduced level of concern about the issue may be a function of their not sitting with jurors.

The questions about advocacy elicited many comments. Some respondents were uncomfortable with isolating one "most serious problem"; others said that there was no significant problem. Various answers identified particular difficulties relating to medical, accounting and psychiatric evidence. One respondent commented, "the more an expert (whether medical or otherwise) becomes dependent on the giving of expert evidence as a full time occupation, the more that expert becomes biased towards the party that engages him or her. There is a dramatic difference between the evidence of a full time expert and an occasional one." Another found the most serious problem with expert evidence in the context of experts who advise insurers. Another located the problems within the adversary system generally and in particular with "party-retained experts."

The answers to this question confirm witness partisanship as the issue that most troubles Australian judges in relation to expert evidence but also highlights a concern on the part of judges about the quality of barristers' advocacy. Nearly a quarter of judges emphasised deficiencies in examination-in-chief and cross-examination in relation to questions posed of expert witnesses (24.59%, n=60).

4.10 Evidence Incomprehensible because of its Complexity

The sheer complexity of some kinds of expert evidence poses an impediment to sufficient understanding by lay decision-makers, be they judges or jurors. Coady has highlighted the temptation for experts "to the sin of advocacy in proportion as she realizes that the unadorned presentation of her scientific information is likely not to be understood and, indeed, to be misunderstood"⁴⁶. He also identified the risk that the more esoteric the expert's evidence becomes "the more authoritative it is likely to appear to the lay person. Not only is there a natural tendency in this direction but there are also cultural pressures in Western society towards according an honorific status to the scientific"⁴⁷. The danger, therefore, is that in face of unintelligible expert evidence jurors especially will lose concentration and make their decisions on the basis of irrelevant considerations such as witness articulateness or superficial impressiveness. Lord Woolf remarked specifically upon this in his report on *Access to Justice*, conceding that judges, never mind jurors, may, consciously or unconsciously, "be influenced by factors such as the apparently greater authority of one side's expert, or the experts' relative fluency and persuasiveness in putting

⁴⁶ CAJ Coady, *Testimony: A Philosophical Study*, Clarendon Press, Oxford, 1992 at p.280.

⁴⁷ Ibid.

across their arguments”⁴⁸.

Judges were asked whether they, as opposed to jurors, had encountered evidence which they had not been able to evaluate adequately because of its complexity (Question 2.4). Just over half (53.19%, n=125) said that they had not had such an experience, while just under a half (45.11%, n=106) said that they had “occasionally” met such a problem. Only four judges said that they encountered such a problem “often” (1.70%). The numbers of judges sitting in the family and civil law jurisdictions who said that they had “never” been unable to understand expert evidence was higher than in the criminal law area.

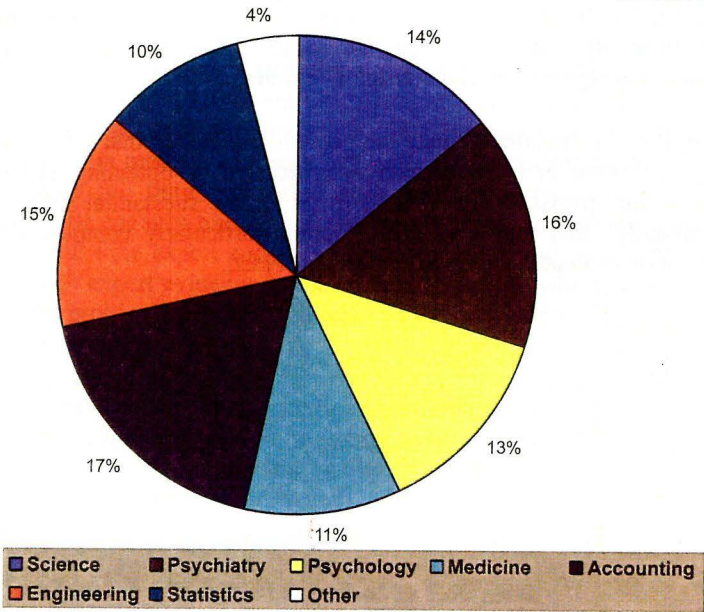
A series of respondents made the point in comments that they had the power to rectify the situation by demanding clarification or obtaining explanations. How effective such measures had proved to be for the substantial percentage who had “occasionally” had problems in evaluating particularly complex expert evidence could not be evaluated from the answers provided.

⁴⁸

Ibid, at p.138.

Those judges who said that they had encountered such a problem were asked which discipline the witness had come from (Question 2.5). The numbers were relatively evenly spread among disciplines, as shown in Figure 1:

Figure 1: Areas Identified by Judges as the Most Difficult for Them to Evaluate Adequately (Q2.5)



A series of comments also identified computer evidence as an area of difficulty encountered by judges. The fact that accounting evidence was regarded by judges as the most difficult for them to comprehend was perhaps not surprising, but the high rating given to engineering, ahead of science, for instance, raises important issues for the presentation of such evidence.

When the results were disaggregated amongst criminal, civil and Family Court judges, some differences became starkly apparent. Amongst judges sitting primarily in the criminal law area, the area providing most difficulty was psychiatry, followed equally by psychology and science. By contrast, the area of greatest difficulty for Family Court judges by a long way was accounting evidence. For judges sitting primarily in the civil jurisdiction, engineering was the most problematic discipline, followed by accounting, science and statistics. Psychiatry, psychology and medicine/surgery only figured in a handful of expressions of concern. Given the number of worries expressed about doctors with different plaintiff- or defence-oriented views, this was a surprising result, suggesting that though witness bias in the medical area is regarded by judges as relatively common, it is manageable.

4.11 Expert Reports

There can be a considerable difference between the expert reports that are drafted with input from lawyers and the oral evidence given by expert witnesses in courts and tribunals. On occasions, experts produce draft reports to be finalised only on the basis of feedback from the lawyers commissioning them.

Judges were asked to focus upon expert reports tendered before them to assess their "usefulness" (Question 2.7). The response was quite positive (and relatively uniform amongst judges sitting primarily in each of the criminal, civil and family jurisdictions) with a negligible cross-section of respondents being critical of reports but nearly half (48.83%, n=116) saying they were "reasonable", nearly four in ten saying they were "good" (37.92%, n=91) and just under one in nine (10.83%, n=26) saying they were "very good". Comments, although few in number, were provocative. One judge found that reports varied dramatically, ranging in quality between the "useless" and the "extremely helpful." Another found personal injury reports to be partisan, scientific reports usually to be of high quality and pre-sentence reports to be "full of self-serving material." It appears, in general, that judges' satisfaction with experts' written evidence is higher than their satisfaction with oral evidence by expert witnesses.

4.12 Lawyers Settling Expert Reports

Judges were asked about the involvement of lawyers in the settling of the content of expert reports (Question 2.8), a matter about which concerns have been expressed by Lord Wilberforce in England in *Whitehouse v Jordan*⁴⁹ who noted that the role of lawyers in the preparation of experts' statements may not always be salutary, especially if it is taken to extremes:

"While some degree of consultation between experts and legal advisers is entirely proper, it [is] necessary 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 the litigation."

Lord Denning in the Court of Appeal had been less charitable about the partisanship that excessive involvement by the experts in the legal process had brought about:

"[The] joint report suffers to my mind from the way it was prepared. It was the result of long conferences between the two professors and counsel in London and it was actually 'settled' by counsel. In short, it wears the colour of special pleading rather than an impartial report. Whenever counsel 'settle' a document, we know how it goes. 'We had better put this in', 'We had better leave this out' and so forth. A striking instance is the way in which Professor T's report was 'doctored'. The lawyers blocked out a couple of lines in which he agreed with Professor S that there was

⁴⁹

[1981] 1 WLR 246 at 256-7.

no negligence."⁵⁰

A cultural and training issue, so far as experts are concerned, pervades this analysis. Experts who are not well-accustomed to the legal process may be deferential to lawyers who seek involvement in the formulation and content of their reports. On occasions, such intrusion can be innocuous; on others it can genuinely interfere with the substance of the expert's views. In the latter instance, the lawyers' involvement is improper and has the potential to misrepresent the expert's professional opinions. Further training of experts in relation to their role, appropriate ethics and the demarcations in their relationships with lawyers and the parties to litigation has the potential to address the issue.

A notable response to the earlier question about the quality of expert reports had encapsulated the concern: "I have little faith in experts' reports which are really the work of solicitors/counsel." Judges were significantly divided in their responses to the question of whether it appeared to them that lawyers had played a role in settling the content of expert reports. This was a little surprising as it in effect constituted a subset of the questions posed about expert bias. A quarter of judges (25.85%, n=61) said that they "never" formed the view that lawyers had participated in the composition of reports, apparently concluding that they were in a satisfactory position to tell, while just over half of the responding judges (53.39%, n=126) said that they thought this happened "occasionally."

Nearly one in five judges (17.80%, n=42) on the other hand thought it happened "often", one respondent dryly commenting "I cannot imagine any other reality in an adversarial system of justice." Another respondent commented, "Sometimes I wish they had because one hopes that then some consideration would have been given to its impact, what was being proved by it, what was relevant etc." Many judges in the comment section indicated that they thought they were in a poor position to answer the question as they simply saw a product and were not equipped by what transpired in the course of the trial to know how the product came to be in its ultimate shape.

Those judges who expressed the opinion that lawyers at least occasionally participated in the settling of expert reports were asked about what this meant for their assessment of the weight to be given to such information (**Question 2.9**). A significant number of judges did not answer the question (only 179 responding) and the answers were very divided: 40.22 percent (n=72) said the process "helped"; 25.14 percent (n=45) said it "hindered" while 34.64 percent (n=62) said it made "no difference"⁵¹. One respondent commented that in medical cases, especially "some lawyers tend to influence medical witnesses who seem ready to border on dishonest behaviour."

Later in the survey instrument, judges were asked whether, when expert reports that appeared to them to have been settled by lawyers went before a jury, the participation by the lawyers had an effect on the probative value of the evidence

⁵⁰ *Whitehouse v Jordan* [1980] 1 All ER 650 at 655.

⁵¹ Over a quarter of respondents (26.64%) declined to answer the question.

(Question 5.9). Again many judges declined to answer the question. The responses from 132 judges were relatively evenly divided with equal numbers saying that the involvement of lawyers "hindered" (17.42%, n=23) as that it made no difference (17.42%, n=23). A slightly higher number indicated that the involvement of lawyers "helped" (25%, n=33), but the most prominent answer was that judges were not in a position to say because they could not tell what effect such lawyers' intervention had upon jurors' perceptions (40.15%, n=53). The question is a difficult one because the intervention of lawyers, if of a low order and not interfering with the general tenor of what experts wish to convey, may serve simply to make some complex matters more accessible and to focus particularly on the issues in dispute. However, at the other end of the spectrum there are occasions when experts virtually permit lawyers to draft their reports for them, or supply drafts for lawyers inviting them to settle the reports. In such circumstances the information in the reports and the views expressed become more the view of the lawyers/parties than of the professionals involved. The division of opinion amongst the judicial respondents may well reflect these different level of involvement played by lawyers in the settling of reports.

When the project surveys litigation lawyers, an attempt will be made to compare and contrast the lawyers' responses with these judicial responses.

4.13 Aspects of Expert Evidence Found Persuasive by Judges

Judges function both as finders of fact and as those who must summarise evidence to jurors, if they have been empanelled. They are therefore in a good position to form an opinion about the aspects of witnesses' evidence that make them particularly persuasive. However, as repeat and professional players in the fact-finding process, their perceptions are likely to be significantly different from those of occasional participants in the process such as jurors. In short, therefore, judges' perceptions about witness persuasiveness are valuable but need to be recognised as likely to be different from those of jurors and to be influenced by assumptions and attributions about juror characteristics. Juror research in the United States has suggested that:

- Jurors are more influenced by an expert's ability to convey technical information comprehensibly and to draw firm conclusions than by educational credentials;⁵²
- Jurors are impressed by an expert's reputation and educational credentials but clarity of presentation is the most important factor;⁵³
- Jurors want articulate experts, and to a lesser degree experts who draw firm conclusions;⁵⁴
- Jurors do not find experts who are very technical and complex especially

⁵² A Champagne, D Shuman and E Whitaker, "An Empirical Examination of the Use of Expert Witnesses in American Courts" (1991) 31 *Jurimetrics Journal* 375 at 388.

⁵³ DW Shuman, A Champagne and E Whitaker, "An Empirical Examination of the Use of Expert Witnesses in the Courts - Part II: A Three City Study" (1994) 34 *Jurimetrics Journal* 193.

⁵⁴ Ibid.

persuasive;⁵⁵

- Jurors pay careful attention to the evidence of experts but base their verdicts on all the facts in the case;⁵⁶
- Jurors with less management experience may be more suspicious of experts;⁵⁷
- Jurors are especially influenced by expert evidence given early in proceedings;⁵⁸
- Jurors may undervalue match probabilities in forensic science;⁵⁹
- Jurors' comprehension of complex information diminishes with the quantity of the information but is enhanced by repetition of the information;⁶⁰
- Jurors who are more educated may be less likely to accept the views of expert witnesses uncritically;⁶¹
- Jurors who are more educated are more likely to participate actively in juror deliberations;⁶²
- Jurors who are younger find psychologists and psychiatrists more credible than do older jurors⁶³ but jurors who are older tend generally to believe expert witnesses more readily than do younger jurors;⁶⁴
- While jurors are conscientious about their task, their enthusiasm and vigilance reduce in the course of the trial;⁶⁵
- Most jurors can understand and remember evidence from the trial where they

⁵⁵ Ibid.

⁵⁶ R J Simon and W Shackelford, "The Defense of Insanity: A Survey of Legal and Psychiatric Opinion" (1995) 29 *Public Opinion Quarterly* 411; see also NP Hans and V Vidmar, *Judging the Jury*, Plenum Press, New York, 1986; see also PC Ellsworth, "Some Steps Between Attitudes and Verdicts" in R Hastie (ed), *Inside the Juror*, Cambridge University Press, Cambridge 1993 at p 49.

⁵⁷ AD Austin, "Jury Perceptions on Advocacy: A Case Study" (1982) 8 *Litigation* 15.

⁵⁸ N Brekke and E Borgida, "Expert Psychological Testimony in Rape Trials: A Social-Cognitive Analysis" (1988) 55 *Journal of Personality and Social Psychology* 372.

⁵⁹ DL Faigman and AJ Baglioni, "Bayes' Theorem in the Trial Process: Instructing Jurors on the Value of Statistical Evidence" (1988) 12 *Law and Human Behavior* 1.

⁶⁰ TH Hones, M Levi and EA Charman, "Ivror Competence in Processing Complex Information: Implications for a Simulation of the Maxwell Trial" [1998] *Crim LR* 763.

⁶¹ MJ Saks and RL Wisler, "Legal and Psychological Bases of Expert Testimony: Surveys of the Law and Jurors" (1984) 2 *Behavioral Sciences and the Law* 361, 435.

⁶² R Hastie, SD Penrod and N Pennington, *Inside the Jury*, Harvard University Press, Cambridge, 1983 at p.137-8.

⁶³ RJ Saks and RL Wisler, "Legal and Psychological Bases of Expert Testimony: Surveys of the Law and Jurors" (1984) 2 *Behavioral Sciences and the Law* 361 at 445.

⁶⁴ Ibid.

⁶⁵ GM Stephenson, *The Psychology of Criminal Justice*, Blackwell, Oxford, 1992.

were empanelled a short while before;⁶⁶

- Jurors rely on fluency, vocal inflection and appearance to evaluate witnesses generally;⁶⁷
- Jurors who find evidence unduly complex tend to turn to factors such as appearance and communication skills to evaluate its value;⁶⁸
- Jurors may resolve differences amongst competent experts or experts offering contradictory or confusing opinions by relying on general impression of character and veracity;⁶⁹
- Jurors are suspicious of experts' impartiality if they learn that the experts have been paid by the lawyers representing the litigants;⁷⁰
- Male jurors tend to refer to abstract and rational concepts of fairness, whereas female jurors tend to refer to relationships and principles of affiliation and responsibility;⁷¹
- Male jurors tend to approach decision-making in a more binary fashion (guilty/not guilty) than do female jurors;⁷² and
- Jurors who have previously functioned as jurors in criminal cases may be more prosecution-oriented than first-time jurors.⁷³

Many of these research findings are open to criticism in terms of their methodology, their selection procedures, their cultural matrix, and the fact that most used mock, rather than real, jurors. Some of the findings, too, are hardly surprising. However, the results should not be dismissed out of hand. Researchers Shuman, Champagne and Whitaker sum up the state of empirical knowledge disturbingly:

⁶⁶ M Zander and P Henderson, "The Crown Court Study. Royal Commission on Criminal Justice, Study No 19, *Research Bulletin* No 35, Home Office, Research and Statistics Department, 1994. However, there are doubts about whether this is a correct interpretation of the data: see A Kapardis, *Psychology and Law*, Cambridge University Press, Cambridge, 1997, at p.142.

⁶⁷ P Rosenthal, "Nature of Jury Response to the Expert Witness" (1983) 28 *Journal of Forensic Science* 528.

⁶⁸ Ibid. See also RL Tanton, "Jury Preconceptions and their Effect on Expert Scientific Testimony" (1979) 24 *Journal of Forensic Science* 681. However, the Shuman et al study and the Champagne et al studies found that pleasant personality and attractive appearance were the least important factors to jurors in determining the credibility of an expert.

⁶⁹ N Vidmar, *Medical Malpractice and the American Jury*, Uni of Michigan Press, Ann Arbor, 1997, at p.172.

⁷⁰ See Shuman et al, op cit; Champagne et al, op cit.

⁷¹ AB Poulin, "The Jury: the Criminal Justice System's Different Voice" (1994) 62 *University of Cincinnati Law Review* 1377.

⁷² Ibid at 1396; see also LG Dooley, "Sounds of Silence on the Civil Jury" (1991) 26 *Val U L Rev* 405.

⁷³ R Hastie, SD Penrod and N Pennington, *Inside the Jury*, Harvard University Press, Cambridge, 1983, at p.143.

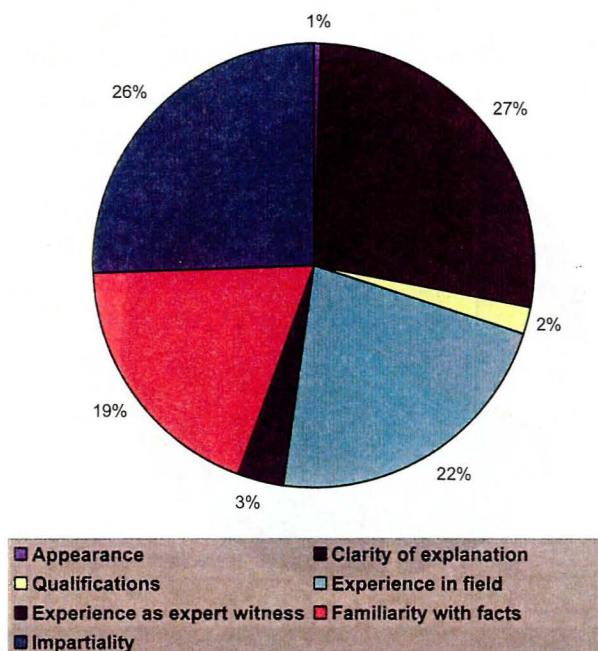
"The typical juror forms impressions of experts stereotypically, based on the occupation of the experts, and superficially, based on the personal characteristics of the experts. ... This image of jurors is troubling not only because it questions the capacity of the majority of the populace, but also because it flies in the face of 200 years of experience with the jury system. Our retention of the jury system with only minor tinkering over this time is an affirmation of our belief that the jury usually gets it right."⁷⁴

One of the aims of the Australian judicial survey was to ascertain whether judges endorsed concerns arising from the North American mock juror research.

Judges were asked to indicate the three factors which they considered to be the most persuasive when an expert is giving oral evidence (**Question 2.10**). One hundred and ninety four ascriptions out of 706 (27.48%) were to "clarity of explanation", while 181 (25.64%) were to "impartiality". "Prior experience in the field" (22.38%, n=158), followed by familiarity with the facts (18.84%, n=133) were next but prior experience as an expert witness (3.12%, n=22), witness appearance (0.57%, n=4) and witness publications (0.14%, n=1) scarcely rated:

⁷⁴ DW Shuman, A Champagne and E Whitaker, "Juror Assessments of the Believability of Expert Witnesses: A Literature Review" (1996) 36 *Jurimetrics Journal* 371 at 382.

Figure 2: Persuasive Factors When Experts Give Oral Evidence (Q2.10)

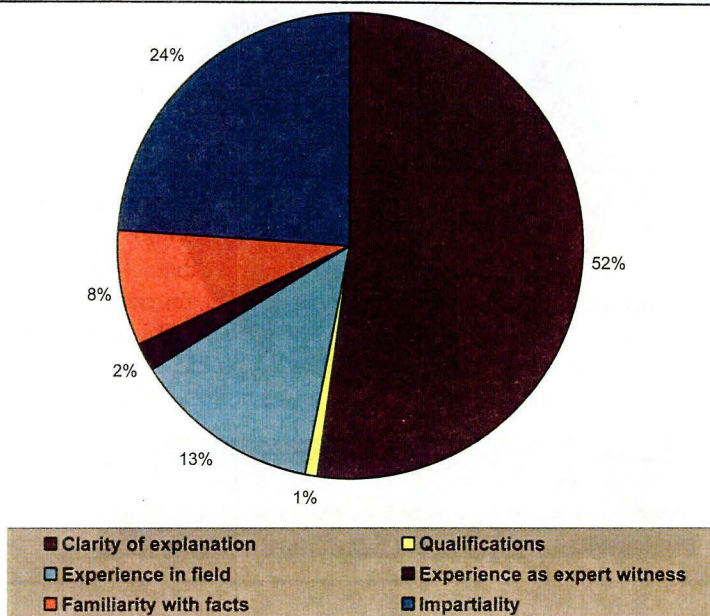


The answers may be affected by the obligation upon judges to provide reasons and so be affected by a consequential appreciation of lucidity which can be translated into ready summary within a statement of reasons. However, it might also be said that for any finder of fact clarity of explanation would be of assistance.

Judges were asked to identify the single most persuasive factor when an expert is giving expert evidence (**Question 2.11**). The rankings confirm those provided in answer to the previous question. "Clarity of explanation" was the most common answer by some distance with over half of respondents nominating it (51.91%, n=122). It was followed by "impartiality" (23.83% n=56).

Other answers showed considerable variation, with only "prior experience in the field" (13.19%, n=31) being of any real consequence:

Figure 3: Single Most Persuasive Factor When an Expert Gives Oral Evidence (Q2.11)



Many comments can be made about these responses. Most prominent in terms of what the respondents identified was the wish to have opinions delivered by witnesses that were clear and comprehensible. In addition, they set little store by appearance, prior experience as a witness, the level or extent of witnesses' educational qualifications and any publications that they had authored. The message for advocates appears to be that judges will be little interested in a lengthy exegesis of a witness' tertiary qualifications or whether they have previously given evidence in various different courts. What overwhelmingly matters to judges, say the judges, is whether the evidence can be assimilated, whether the witness is in command of the facts upon which he or she is giving an opinion and whether they bring an objective, non-partisan mind to bear on the issues.

The findings in this survey of judges can instructively be compared with results from a United States survey of lawyers and experts. Champagne, Shuman and Whitaker found the following characteristics to be considered advantageous by Dallas County lawyers when employing expert witnesses:

Table 2. Expert Characteristics Considered Advantageous by Dallas Lawyers

Rank	Characteristic	Percent
1	Qualification/expertise	54
2	Appearance/demeanour	31
3	Honesty/integrity	30
4	Knowledge	26
5	Articulate/persuasive	21
6	Support for lawyer's position	21
7	Cost	14
8	Credibility	13
9	Preparation	10
10	Strength of opinion	10
11	Impartiality	7
12	Availability	4
13	If other side uses experts	4

Respondents were allowed to adopt more than one category.

They found lawyers to regard the following characteristics as “distressing”:

Table 3. Expert Characteristics Considered “Distressing” by Dallas Lawyers

Rank	Characteristic	Percent
1	Tentative	34
2	Lack good courtroom demeanour	30
3	Lack integrity	29
4	Charge high fees	27
5	Inarticulate	20
6	Lack presentability	9
7	Can't be depended upon to be loyal	9

These were contrasted with the characteristics that the researchers found judges to regard as important:

Table 4. Expert Characteristics Considered Advantageous by Dallas Judges

Characteristic	Very great importance	Some importance	Unimportant
Experience	80	20	0
Educational credentials	70	30	0
Publications	0	50	40
Previous expert testimony	10	10	70

Unfortunately, the United States judicial questionnaire in this respect did not touch on factors such as clarity of explanation, impartiality and familiarity with the facts.

Australian judges identified these as the key issues when experts are giving oral evidence. When pressed to name one factor as the most important, overwhelmingly they identified the expert's clarity of explanation, namely, the expert's capacity to make understandable what might otherwise not have been clear for the tribunal of fact. The judges' answers highlight how important communication skills are for the expert witness.

PART FIVE: THE ROLE OF ADVOCATES¹

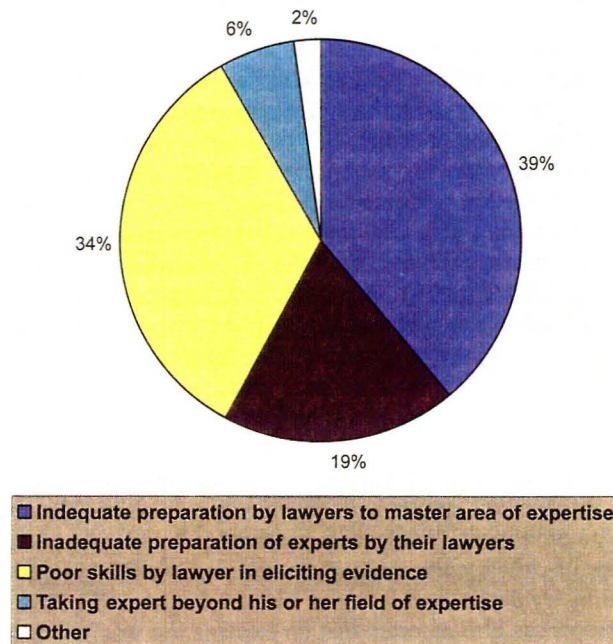
5.1 Performance of Advocates in Examination-in-Chief

Judges were asked a series of questions in relation to the performance of lawyers eliciting evidence-in-chief and cross-examining in respect of evidence from expert witnesses. First, they were asked how effective they regarded most advocates before them in adducing expert evidence of facts and opinions - that is to say, the performance of advocates in examining experts in-chief (**Question 3.1**). The responses were a modest endorsement of the quality of lawyers' advocacy, two thirds of judges saying that the job was done "reasonably" (67.93%, n=161). Roughly equal numbers expressed the view that it was done "well" (16.88%, n=40) and "poorly" (13.92%, n=33). A number of respondents made the point that relatively little evidence is adduced orally from witnesses in their jurisdictions as reports constitute all or the greater part of examination-in-chief. The view expressed by the judiciary cannot be said to be a ringing endorsement of the quality of examination-in-chief advocacy nor a complete condemnation of it.

Judges were asked about what led to the difficulties that they had encountered in the eliciting of experts' answers in examination-in-chief (**Question 3.2**). Three responses were prominent. "Inadequate preparation by lawyers to master the area of expertise" was the most commonly given explanation (38.97%, n=166), but "poor skill in eliciting evidence-in-chief" was also highlighted (33.80%, n=144). Nearly one in five responses also asserted that an explanation was "inadequate preparation of the expert by their advocate" (18.78%, n=80). Four hundred and twenty six responses were provided by 226 respondents so on average judges cited two reasons for the difficulties they encountered in the examination-in-chief process:

¹ This Part deals with questions in Part Three of the survey instrument

Figure 4: Difficulties Encountered by Judges in eliciting Experts' Answers in Examination-in-Chief (Q3.2)



5.2 Performance by Advocates in Cross-Examination

Judges were also asked about their views on the quality of cross-examination in making expert witnesses accountable (**Question 3.3**). A number of respondents, not surprisingly, made the point that the performance of advocates was highly variable. A number of judges also identified the multiple objectives of advocates in cross-examining experts.

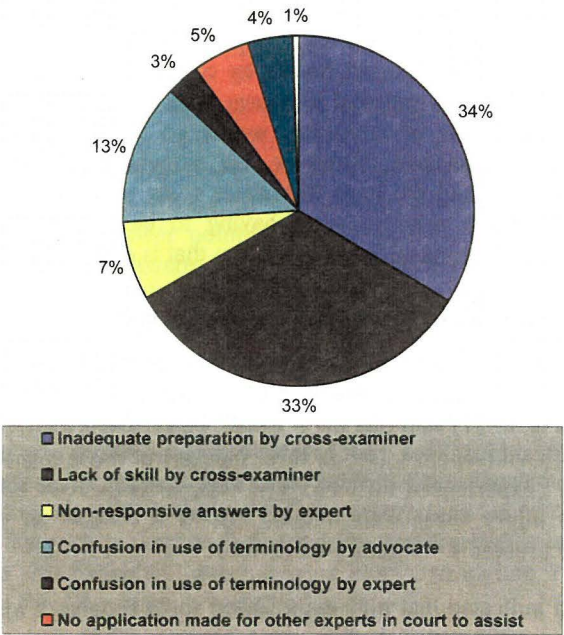
In general, the judges' views were similar to those provided in relation to examination-in-chief, although marginally they suggested that advocates' performance in cross-examination was superior to their performance in examination-in-chief. This is not a great surprise as cross-examination often commands a higher prestige amongst advocates than examination-in-chief, although not for good reason. Nearly two thirds of respondents (61.97%, n=145) assessed the effectiveness of advocates as "reasonable", one in five (20.94%, n=49) maintaining that advocates did "well", while one in seven (14.96%, n=35) said that they did "poorly".

Of those who answered the question, the overwhelming majority indicated that the failure to make expert witnesses accountable constituted a significant problem for the fact-finding process (69.40%, n=127) (**Question 3.4**). A much smaller percentage, under a quarter, (24.59%, n=45) expressed the view that it was

unimportant. Many judges indicated that they sought to remedy the deficiency by themselves asking the unasked questions, others saying that the problem could become of real consequence when the advocate was below par in spite of the judge's efforts.

Judges were asked what were the three most significant reasons for inadequate cross-examination (**Question 3.5**). The reasons ascribed by judges for inadequacy of advocate performance in relation to cross-examination were similar to those in relation to examination-in-chief; approximately a third of the 585 responses ascribed the problem to "inadequate preparation by the cross-examiner" (33.50%, n=196) and approximately the same number to "lack of skill by the cross-examiner" (33.16%, n=194). This latter figure is to some degree augmented by the next highest response, which could also be said to indicate a poverty of skill, or perhaps preparation: "confusion in use of terminology by the advocate" (13.16%, n=77). A smaller percentage of judges ascribed the failure to an application not being made to have experts present when other expert witnesses gave their evidence (5.30%, n=31). This answer was more prominent amongst Family Court judges than amongst those practising principally in the criminal and civil areas.

Figure 5: Reasons for Inadequate Cross-Examination of Expert Witnesses (Q3.5)



When judges were pressed to ascribe a single reason for unsatisfactory cross-examination (**Question 3.6**), "inadequate preparation" emerged as the most

significant contributor to poor advocate performance, with more than a half of the 244 judicial respondents (52.07%, n=126) maintaining it was the most significant reason. The only other answer of consequence was "lack of skill by the cross-examiner" which was cited by over a half of respondents as the most significant reason (34.71%, n=84).

The comments of the judges were instructive. One expressed concern about advocate diffidence, stating that "most barristers when faced with a charlatan are not prepared for a boots-and-all cross-examination." The judge said that this made it "very difficult" for the presiding judge to reject the opinions offered. A number of respondents highlighted the failure by advocates to challenge the assumptions made by experts in their drawing of inferences from data and to examine the premises upon which the experts based their opinions. Concern was also expressed about advocates' awareness of the limits of experts' expertise and a propensity on their part to allow witnesses to go beyond them. These concerns all relate to the adequacy of advocates' mastery of the area in respect of which they should be cross-examining, a problem principally a function of the extent of their preparation. The judges' answers should be considered in conjunction with the responses to admissibility rules and exclusionary rules discussed in Parts Seven and Eight of this Report.

One respondent identified a fundamental problem - that "experts and lawyers have different parameters and objectives. They live in different worlds and don't always recognise it. This is distorted further by court process." By and large, the answers, though, suggest that remedial measures such as improved preparation and enhanced skills on the part of advocates would go a considerable distance to addressing the judges' concerns. However, the exigencies of late briefing, the unpredictability of cases and the need to contain costs when negotiations suggest that disputes may resolve prior to cases having to be run in court mean that inadequate preparation by counsel is not a problem that is easily solved.

5.3 Judicial Difficulty in Evaluating Expert Evidence

Judges were asked about their personal experience of evaluating different expert opinions (**Question 3.7**). The answers to this question are illuminating. A fifth of respondents (21.61%, n=51) said that they "often" experienced difficulties. This was a candid and significant response. Nearly three quarters of those responding said that they "occasionally" experienced difficulty (70.34%, n=166). Real estate valuations and also personal injury cases were singled out by a number of respondents as responsible for the problems that they experienced.

Judges who had indicated that they experienced some problems were asked what it was to which they attributed such difficulties (**Question 3.8**). Just over half of the respondents (55.00%, n=121) identified simple irreconcilability of expert views as the key. Approximately one in five judges identified the complexity of the expert evidence as responsible for the difficulties (19.55%, n=43). The importance of these answers lies in the isolating of the two characteristics of irreconcilability of views and complexity of subject matter as the key factors, rather than the quality of the work done by the lawyers or the quality of the communication by the witnesses. It is

a statement that there are some subject areas that have not proved amenable to easy evaluation. All too often in the past the acceptance that there is no one answer has not been acknowledged sufficiently in the law's positivist search for definitive answers. The judges' response to this issue may be seen as demonstrating a consciousness of both the diversity of approaches and views in relation to many areas of expertise, and a cognizance that a number of fields of expert endeavour, when examined in detail, are significantly complicated. There is little that procedural reform or improved training can do to address this reality. The judges' perceptions are fundamental to any assessment of other approaches to receiving and evaluating expert evidence, such as the use of assessors and referees - discussed in Part Eleven below.

5.4 Taking Experts Out of Play

It is said by some, generally as a criticism of the adversary system, that key experts are commissioned for reports by parties in civil litigation, not in a genuine attempt to obtain their views about an issue that may be in dispute, but in order to take them out-of-play and to make them unavailable or less available for the other party. Although there is no "property in an expert", it is rare for parties to subpoena an expert or even seek to procure a report from an expert who has already been commissioned for the other side.

In addition, experts can encounter a number of ethical difficulties in terms of the information to which they are made privy if they in effect provide reports to both sides on the basis of different information.

Judges were asked about whether they had heard cases in which they formed a view that a key expert had been retained by one side just to make the expert less available as a witness for the other side (**Question 3.9**). Most judges who responded to the question (70.39%, n=164) said that they had never encountered this, although many who gave this answer pointed out that they would not expect from their position ever to become aware of such tactics. However, over a quarter of judges said that they were of the view that this happened "occasionally" (28.76%, n=67). A number of judges noted in their comments that they had done this themselves as solicitors or knew of it occurring when they were barristers, but that they were in no position to "know" of such a "ploy" as a judge.

The judges' comments are important as they confirm what many litigators have known in practice and what many commentators have suspected - that as a matter of tactics where there is a particularly respected expert, they are sometimes retained not out of a genuine wish to procure their views but principally in order to make it less likely that the side to which their views are known to incline will be less likely to have access to their assessments and their evidence.



PART SIX: TRAINING OF EXPERTS AND ADVOCATES¹

6.1 Further Training for Expert Witnesses

Criticisms have been made of experts in some high profile cases that their practices as experts in terms of methodologies, knowledge of the legal process, impartiality and communication skills have been responsible for poor performance and in due course for erroneous decisions by courts. Prominent in this regard are suggestions about the *Chamberlain* case that experts failed to confine themselves to their own areas of real expertise and for reasons of desire for kudos or prominence expressed views on matters with which they were not sufficiently expert². Others have suggested that ignorance by experts of the legal process has led them to adapt poorly to their forensic role. It has been said too that some highly credentialed experts are poor communicators in a courtroom, perhaps expert within laboratories or the halls of academia, but not as skilled as they need to be in explaining complex concepts to lay persons.³

One solution to such difficulties is to improve the training of experts. This was proposed by Lord Woolf in his report on *Access to Justice*: "Training courses and published material should provide expert witnesses with a basic understanding of the legal system and their role within it, focusing on the expert's duty to the court, and enable them to present written and oral evidence effectively. Training should not be compulsory."⁴

As yet there is a limited amount of such training, organisations such as the Australian Medical Association, the National Institute of Forensic Science, the Australian and New Zealand Association of Psychiatry, Psychology and Law, the Australian and New Zealand Forensic Science Society, and environmental protection agencies, however, providing some amount of such skills enhancement. Other institutions such as large accountanting firms and forensic science facilities regularly organise internal training for their practitioners. Bodies such as the Institute of Occupational Hygienists have recently done the same.

In an Issues Paper within its reference on the adversary system, entitled "Rethinking Legal Education and Training", the Australian Law Reform Commission asserted that, "There is no training provided for expert witnesses within courts or tribunals"⁵. Whether such bodies are appropriate forums for generating

¹ This Part deals with questions in Part Four of the survey instrument

² See P Gerber "Playing Dice with Expert Evidence: The Lessons to Emerge from *R v Chamberlain*" (1987) 147 *Medical Journal of Australia*; P Wilson, "Miscarriages of Justice in Serious Cases in Australia" in K Carrington, M Dever, R Hogg, J Bergen and A Lohrey, *Travesty! Miscarriages of Justice*, Pluto Press, Sydney, 1991, at p10. For a review of the criticisms, see I Freckelton, "Judicial Attitudes Toward Scientific Evidence: the Antipodean Perspective" (1997) 30(4) *University of California Davis Law Review* 1137, 1162-1169.

³ See eg K Crispin, *The Crown Versus Chamberlain*, Albatross Books, Sydney, 1987, at p. 350.

⁴ Ibid at p.152.

⁵ Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Legal Education and Training*, AGPS, Canberra, 1997, at p.42

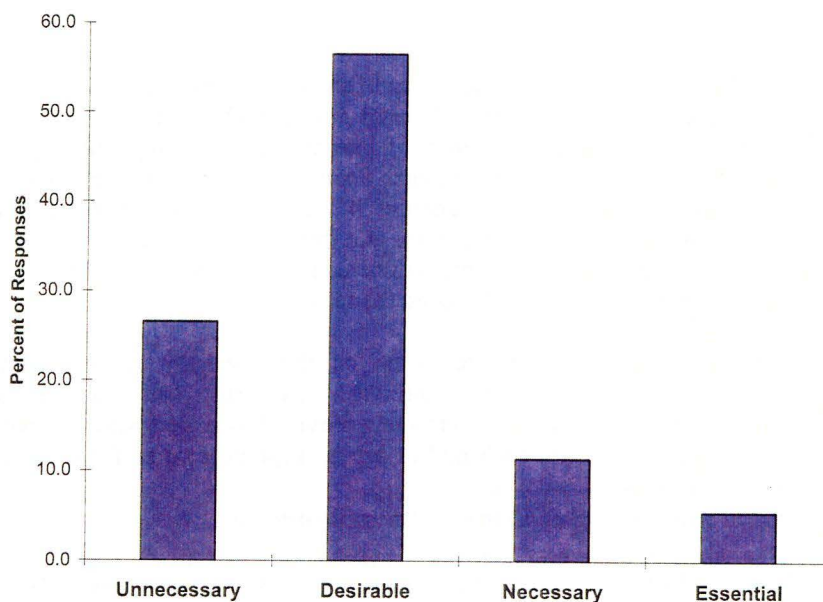
such training is a question that flows from such an observation.

Judges were asked about their views in relation to the need for further training of experts about their forensic function (**Question 4.1**). One judge commented that,

“I consider that because of inadequate forensic training experts often express themselves more guardedly and less succinctly than they would if provided with adequate training. It is often not that they have doubts about the particular matter; it is simply that in a court situation they are reluctant to express their true views because of potential criticism.”

Just over a quarter were of the view that training was “unnecessary” (26.58%, n=63) but over a half of the judges responding said that they thought it was “desirable” (56.54%, n=134). One in six judges expressed the view that such training was “necessary” (11.39%, n=27) or “essential” (5.49%, n=13). The answers to this question can be divided into two basic approaches, about a quarter saying that further training was not needed and nearly three quarters saying that it would at least be advantageous.

Figure 6: Necessity for Further Training of Experts in Their Forensic Function (Q4.1)



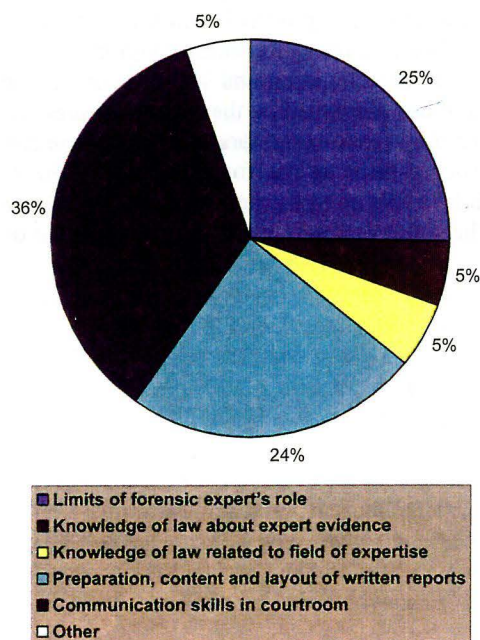
Comments were various, one respondent stating that, “The best experts are the ones who don’t want to come to court” and highlighting the potentially counter-

productive effects of “training”: “Those who put on a show would put on more of a show and the sound but reluctant expert would become even more reluctant.” This comment was echoed by concern that such assistance may engender “professionalism” amongst experts in respect of presentation rather than substance, a phenomenon that was identified as undesirable. The irony is that, on the one level, there is a concern about the presentational skills of expert witnesses being inadequate, and, at another level, about the skills being of too high an order and resulting in the risk of jurors being overborne by “witness performance”.

One judge commented that he or she had run moots for university engineering and environmental science students on giving expert evidence: “Feedback suggests that they found them helpful.”

Those judges who had maintained that training was at least desirable were asked what they thought would be helpful in this regard (**Question 4.3**). Their answers were diverse. The answer attracting highest support related to training to “communication skills” (35.10%, n=53) but other answers to attract support included training about the limits of “forensic expertise” (25.17%, n=38) and preparation and content of reports (23.84, n=36)). This latter area was particularly recommended by judges sitting in the Family Court.

Figure 7: Areas Identified as Most Helpful in Training Experts (Q4.3)



There was a wide range of comments from judges in relation to this question. Many advocated emphasising the need for experts to become impartial in the process of arriving at their views and in delivering them to courts in written or oral form. A number of suggestions also highlighted the need for experts to have a rudimentary understanding of the legal context in which they were asked to provide their views. For example, "Sometimes experts do not appreciate the difference between the legal tests for causation and scientific proof. Accounting evidence is often poorly presented (usually the fault of counsel)." Another judge commented that in the family law area "Psychiatrists are always advocating putting children with one parent for a trial period. That is a total No No in family law."

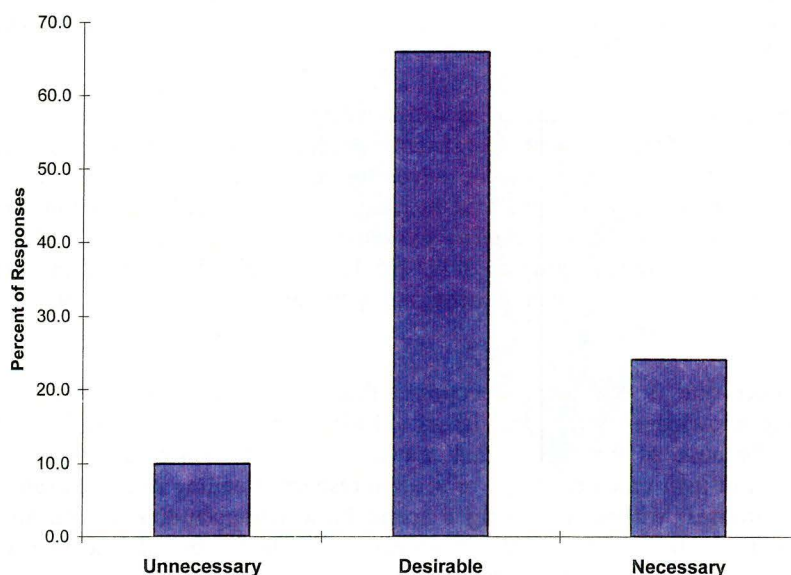
The apparent message from the judiciary is that focussed training of expert witnesses has much to commend it. There were few responses that suggested that it should be compulsory but generally a recognition that such training has the potential to improve the capacity of expert witnesses to communicate their views effectively to the courts.

6.2 Further Training for Advocates

Lawyers have often been prepared to blame inadequacies in the evidence given by experts for miscarriages of criminal and civil justice. However, there has been a noticeable disinclination by legal commentators to assume responsibility on behalf of lawyers for the failure of advocates to expose flaws in scientific and medical procedure and in adherence to proper protocols and methodology. At a more subtle level, cross-examination can also have as its realistic aim the eliciting of concessions about the legitimacy of other interpretations of data or the appropriateness of methodologies other than those employed by the expert witness. Where such matters are not effectively traversed by cross-examiners, they constitute failure on the part of advocates to function successfully as the fourth estate of the courtroom. Cross-examination too often fails to live up to its rhetoric as the crucible within which poor quality expert evidence becomes recognisably different from that of real quality.⁶

⁶ See I Freckelton, "Wizards in the Crucible" in J Nijboer & J Reijntjes, *Proceedings of the First World Conference on Criminal Investigation and Evidence*, Leiden, 1997.

Figure 8: Necessity for Further Training of Advocates in Calling and Cross-Examining Experts (Q4.4)



Judges were asked for their views about whether advocates required further training in calling and cross-examining experts (**Question 4.4**). The question was posed in the realisation that limited training exists for advocates in this area of their functioning, the exceptions being a small component of barrister training schemes and also workshops conducted by the Australian Advocacy Institute.⁷

The judges' response was overwhelming, perhaps surprisingly so given the somewhat equivocal indication that they had given in earlier answers about their perceptions of the quality of advocates' performance in examination-in-chief and cross-examination. Just under ten percent of judges said they did not think that such training was necessary (9.91%, n=23) but nearly two thirds of respondents opined that it was "desirable" (65.95%, n=153) and nearly a quarter expressed the view that it was "necessary" (24.14%, n=56). In all, the overwhelming majority (90.09%, n=209) of respondent judges said that they thought that further advocacy training in respect of expert witnesses was "desirable" or "necessary". A clearer message about the need for further advocacy training could not have been given by the Australian judiciary. One judge's comment appeared to sum up the general view about the utility of training: "Those advocates who have undertaken courses in advocacy conducted by the Australian Advocacy Institute or by the various Bar Associations are clearly better equipped than inexperienced advocates who have not perhaps the

⁷ See also chapters 2, 3 and 4 of I Freckelton and H Selby (ed), *Expert Evidence*, 5 volume looseleaf service, LBC Information Services, Sydney, 1993- , on "Examination-in-Chief of Expert Witnesses", "Cross-Examination of Expert Witnesses" and "Re-Examination of Expert Witnesses".

understanding of such courses/workshops. Should be a requirement for all advocates.”⁸ The challenge now is to translate the judges’ views into a preparedness on the part of Australian lawyers to engage in ongoing advocacy training - at least in respect of their skills in handling expert evidence.

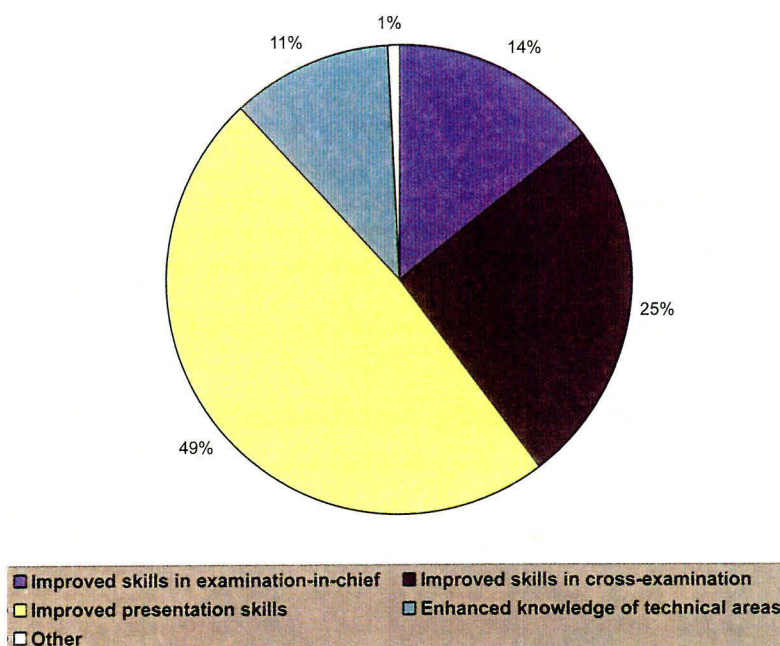
Judges were asked about the areas within which they thought that such training would be useful (**Question 4.5**). Consistent with the earlier responses in relation to the poverty of preparation by some advocates, the most common answer about training was that it could be helpful in relation to "improved preparation skills" (48.31%, n=114). About a quarter of judges also suggested that training should focus upon improving cross-examination skills (25.42%, n=60) while a smaller number proposed that the training should concentrate upon improving skills in examining-in-chief (14.41%, n=34).

Just over one in ten judges proposed that the training should focus upon enhancing knowledge of technical issues (11.02%, n=26). This was an interesting response because of the reality that lawyers cannot do a sound job on either preparation of their case generally⁹, or at all in respect of calling or cross-examining expert witnesses, without achieving a sound basic understanding of the area of expertise in question. However, this is no easy task, the number of available works on the many areas of forensic expertise being very limited and often not being available in solicitors' and barristers' libraries.

⁸ Of course, “training” is not a panacea. One judge commented that it “will not give counsel the necessary insight and intuition needed.” Another maintained that “By and large, the advocates know what they should do. The problems arise because often they do not do it.”

⁹ One respondent commented, “Preparation is the foundation of the other matters mentioned.”

Figure 9: Areas Identified as Most Helpful in Training Advocates in Calling and Cross-Examining Experts (4.5%)



It has also been noteworthy that lawyers have been slow to acknowledge that the acquisition of additional knowledge about areas of expertise relevant to their field of practice constitutes a competitive advantage. Practising lawyers' membership of interdisciplinary organisations such as the Australian and New Zealand Forensic Science Society, the Academy of Forensic Sciences, and the Australian and New Zealand Association of Psychiatry, Psychology and Law and to a somewhat lesser degree Medico-Legal Societies, has consistently been disappointingly low. In addition, with changing methods of research, many experienced lawyers are adapting slowly to new means of obtaining information about areas of expertise relevant to their cases via the internet or via service providers on-line. What is necessary is a change to legal culture to recognise that cross-disciplinary knowledge will assist in the discharge of both solicitors' and barristers' functions. It is notable that increasing numbers of undergraduate and postgraduate courses in forensic science for lawyers, medicine for lawyers and psychiatry, psychology and law are not only being established by Australian law faculties but are proving popular.

PART SEVEN: JUROR PROBLEMS WITH EXPERT EVIDENCE¹

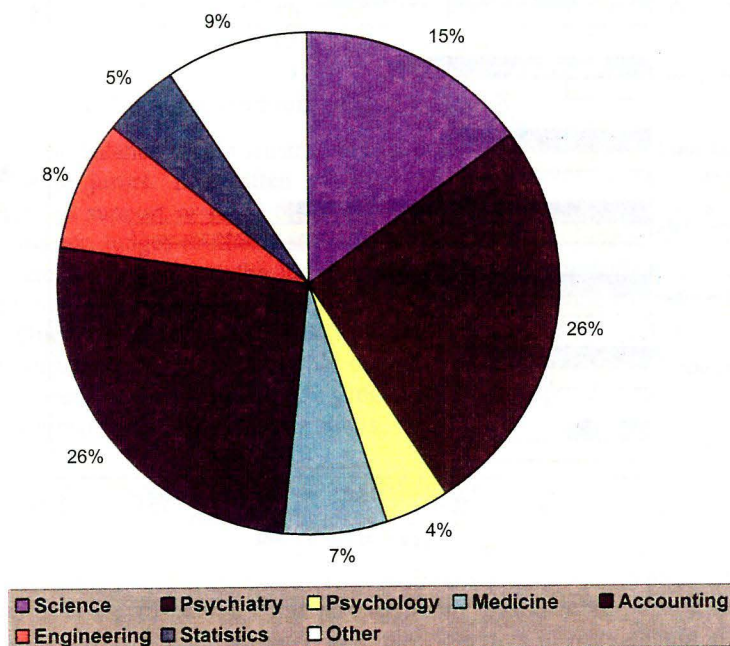
Only those judges who had presided over jury trials were asked to answer questions in this Part.

7.1 Juror Problem Areas Identified by Judges

Judges were asked about their views of the areas of expertise that have presented the most difficulty for jurors to comprehend (**Question 5.1**). Not surprisingly, the most common answer from respondents was that they “did not know” (28.99%, n=49) by reason of the limited feedback which they received from jurors.

However, the areas assessed as most problematic for jurors were most interesting:

Figure 10: Areas identified by Judges as the Most Difficult for Jurors to Comprehend (Q5.1)



A range of problem areas other than those specifically listed were mentioned by judges in their comments - pharmacology, corporate and commercial transactions, corporate structures and planning, accident reconstruction, information technology

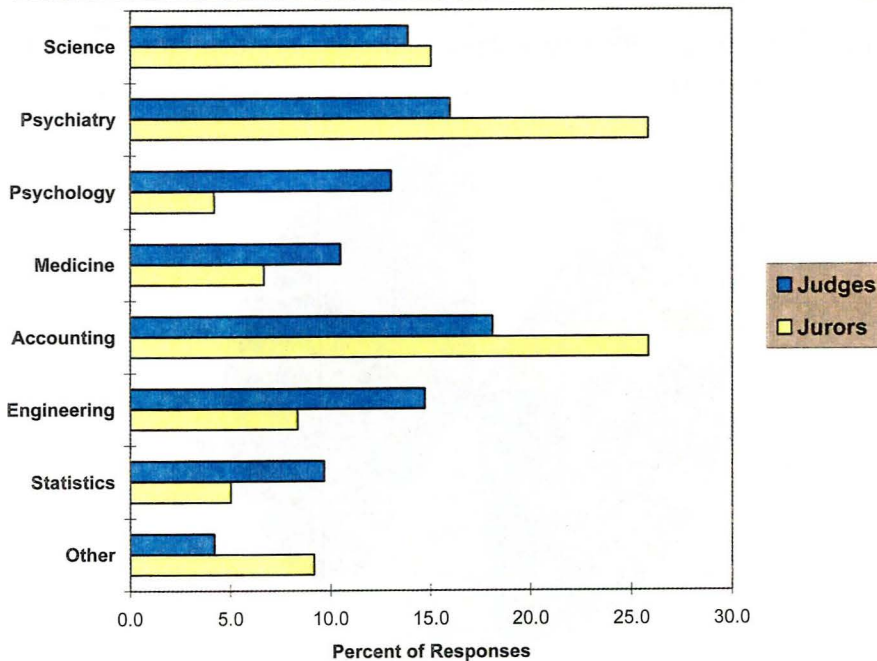
¹ This Part deals with questions in Part Five of the survey instrument

and computer evidence.

As shown in Figure 10, judges nominated psychiatry (25.83%, n=31) and accounting (25.83%, n=31) as the most difficult areas for jurors to deal with, followed by science (15%, n=18), engineering (8.33%, n=10) and medicine (6.67%, n=8).²

It is important to contrast the judges' answers in respect of what they found the most difficult areas to comprehend to their answers in respect of the jurors they considered the most difficult for jurors to comprehend:

Figure 11 Comparison of Judges' Perceptions of Difficult Areas of Expert Evidence for Judges and Jurors (Q2.5 & Q5.1)



The important aspects of this comparison are that judges appear to consider that it is considerably more difficult for jurors than for judges to deal with psychiatry and accounting and that judges say that they have more difficulty in grappling with psychology than do jurors. Judges' comments to the questions give little indication of the reasons for these discrepancies. The difference in their evaluations of the difficulties posed between psychiatry and psychology evidence is surprising, particularly given the overlap between evidence given by practitioners in these

² These figures were calculated by factoring out the "No response" and "I do not know" responses.

fields.

7.2 Judges' Views of their Capacity to Evaluate Expert Evidence

Judges were asked about their views in relation to their ability to evaluate expert evidence, as against the ability of jurors to undertake the task (Question 5.2). The response was very clear, with over three quarters of judges responding to the question stating that they thought that judges could perform the task better than jurors because of their training and experience (76.13%, n=118). Only one in nine judges thought they could not do better (11.61%, n=18) while a significant percentage declared that they were not in a position to know (12.26%, n=19). The comments reflected a significant division of opinion between those who respected the acuity of jurors and those who were apprehensive about the ability of jurors to discern the histrionic skills of expert witnesses and comprehend the complexities of expert evidence.

One judge expressed the view that he or she was better able to evaluate expert evidence than jurors, but that if advocates' skills in eliciting such evidence in a manageable form improved this would not remain the case. One judge maintained that jurors could pick the "hired gun" while another dryly observed that, "It may be a matter of intelligence. Jury members are not chosen for their IQs."

7.3 The Impact of Judges' Summing Up of Expert Evidence

A key check and balance within Australian trial procedure is the judge's summing up of evidence to jurors. It is often assumed, although there is no empirical Australian study to support or rebut the assumption, that the summing up is very influential. However, judges routinely stress to jurors that while judges function as the judges of the law, jurors are the judges of the facts. Respondents were asked whether they thought that jurors had comprehended the expert evidence before their summing up (Question 5.3). Many judges (n=92) did not answer the question on the basis of being unable to say, again possibly owing to lacking sufficient feedback to give a valid answer. However, of the 152 judges who did respond to the question, there was an interesting diversity of perceptions.

Nearly a quarter of those judges who answered the question (22.37%, n=34) were of the view that jurors comprehended the expert evidence before their summing up "occasionally", meaning perhaps that they thought that jurors placed store in the way in which the presiding judge synthesised the material and directed them as to the use that they could make of it. The answer seems to postulate a poor level of understanding by many jurors³. However, over three quarters of respondents in total expressed the view that jurors "often" (71.71%, n=109) or "always" (5.92%, n=9) comprehended the expert evidence prior to the judge's summing up. This response is more typical of the optimistic view of jurors' abilities and capacity to cope with complex and conflicting evidence expressed in a number of recent Australian

³ Duff et al in a survey of Hong Kong jurors found many jurors expressing reservations about their levels of comprehension of evidence: see P Duff, M Findlay, C Howarth and C Tsang-Fai, *Juries: A Hong Kong Perspective*, Hong Kong University Press, Hong Kong, 1992 at p.85.

decisions.⁴

Judges were asked whether they thought that their summing up assisted jurors to understand and evaluate the expert evidence before them (**Question 5.4**). Many judges expressed the hope that it did and most who answered the question (n=146) said that they thought it did "often" (43.84%, n=64) or "always" (21.92%, n=32).⁵

7.4 Withdrawal of Trials from Jurors

Judges were asked the sensitive question of whether certain kinds of complex and conflicting expert evidence should be withdrawn from juries and determined by judges alone or by some other means. The question arises in the context of the Roskill Committee⁶ recommending the removal of criminal fraud trials from juror determination. It was posed in respect of accounting (**Question 5.5**), scientific (**Question 5.6**) and medical evidence (**Question 5.7**), the three categories of data which are conventionally said to be the most difficult for lay decision makers to grapple with.⁷ The question needs to be seen in the context of judge-alone criminal trials existing in a number of jurisdictions within Australia - at the initiation of the accused. In addition, most civil matters are now determined without juries. The answers to the question are no doubt flavoured by the existence of such judge-alone trials. The views are expressed in Figure 12.

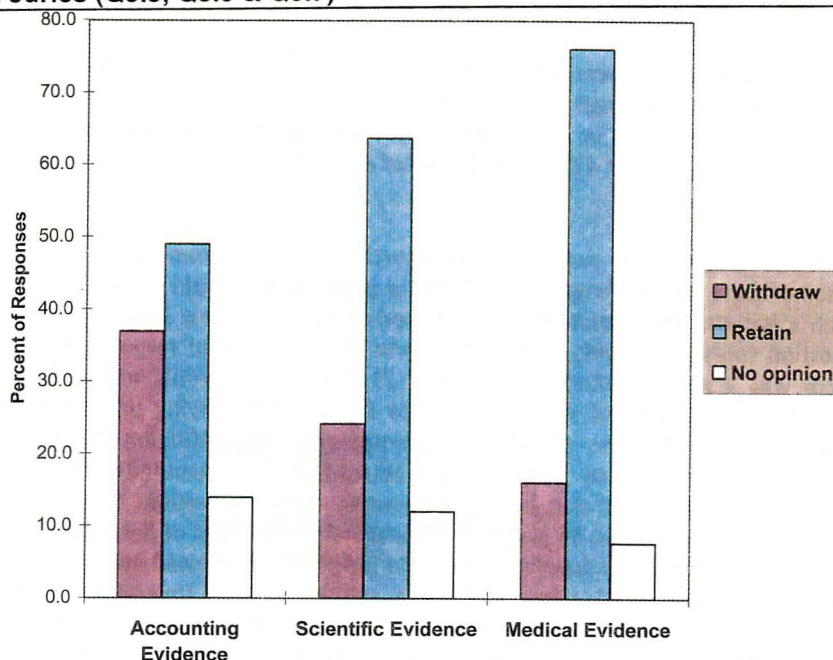
⁴ See above.

⁵ About a half of the judges answering the question said that they thought it assisted "occasionally" (33.56%, n=49). It is significant that 98 of the 244 respondent judges (40.16% overall) declined to answer the question, the primary comment to the question being one of hope rather than certainty.

⁶ Lord Roskill, *Fraud Trials Committee Report*, HMSO, London, at p 147.

⁷ The results of the survey suggest that to this category engineering evidence should be added.

Figure 12: Judges' Opinions Regarding Withdrawal of Expert Evidence from Juries (Q5.5, Q5.6 & Q5.7)



It is important to note that large percentages of respondents overall declined to answer the trio of questions - 35.66% (n=87) in relation to the accounting and scientific questions and 36.48% (n=89) in relation to the medical question. The reason for this low rate of response is not apparent from the large number of comments, and it is not possible to extrapolate whether the non-respondents were in favour of retention of the use of juries or not in such matters. It should be noted that the questions as posed did not distinguish between the removal of civil and criminal trials from jurors in the relevant areas. As comparatively few civil matters are currently now tried before juries in Australia, the answers to the question are of more significance in the criminal context than in the civil.

The trio of questions prompted dozens of comments. A significant number of judges who offered comments proposed retention of juries in criminal trials, but not in civil matters. Several proposed trial by a judge and two assessors; some proposed trial by one or three judges. One respondent commented: "If it is an object of our criminal trial system that we should seek out the truth, then in the field of expert evidence (at least) our system fails. There is no simple answer to an alternative [to trial by jury]. The best short answer is trial by a panel of three judges."

Another respondent maintained that a case could be made out

"for identifying potentially difficult accounting problems where the intention of an accused can be separated out from the decision making process. This could be decided as a discrete issue by the

judge and remaining issues decided by the jury - in civil litigation the judge should exercise his power and declare the matter inappropriate for trial by jury.”

Other suggestions were made also - use of referees, and use of a tribunal, like a medical tribunal, although one respondent asserted strongly that this had proved an unsatisfactory solution in workcover cases. Another respondent focussed upon the cost of trial by juries as a factor in favour of discarding them in certain categories of cases.

Those judges who proposed withdrawal of matters from juries were asked whether there was a change to procedure or practice that would obviate the need for such a withdrawal (**Question 5.8**). Disappointingly, very few judges answered the question (only 62 of 244), but of those who did a quarter of respondents said that there was a need to change procedure (25.81%, n=16), while nearly two thirds (59.68%, n=37) seemed to be resigned to the situation, saying that there was no solution to the problems posed by the complexity and conflicting nature of some forms of expert evidence. Very little can be read into the quantitative results to this question but many of the judges' comments were interesting. One respondent proposed an explanation by judges at the start of proceedings of the nature of expert evidence and the jury's function. The same judge also advocated more use of visual aids and explanation of technical terms. A number of other suggestions maintained that better performance by current players in the courts - experts and advocates - should ease the burden for jurors. Various judges proposed as answers or partial answers the use of

- expert observers;
- expert assessors;
- referees;
- special juries*; and
- court-appointed experts.

There was no clear preference, though, for any one of these measures. They were asked a number of questions specifically about these matters later in the questionnaire.

7.5 Judges' Views of the Most Persuasive Factors for Jurors

Judges were asked about their perceptions of the most persuasive factors for jurors when experts give oral evidence (**Questions 5.10 and 5.11**). The answers to

* See generally on the issue JC Oldham, "The Origins of the Special Jury" (1983) 50 *University of Chicago Law Review* 137. See also C Jones, *Expert Witnesses*, Clarendon Press, Oxford, 1994; S Landsman, "Of Witches, Madmen and Products Liability: An Historical Survey of the Use of Expert Testimony" (1995) 13 *Behavioral Sciences and the Law* 131; EH Ackernecht, "The Early History of Legal Medicine" in CR Burns (ed), *Legacies in Law and Medicine*, Science History Publications, New York, 1977; JS Cecil and TE Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence 706*, Federal Judicial Center, Washington DC, 1993.

the questions make an interesting contrast with the answers given by the judges about what they themselves found persuasive.

Figure 13: Comparison of Judges' Opinions of Persuasive Factors when Experts give Oral Evidence (Q2.10 & Q5.10)

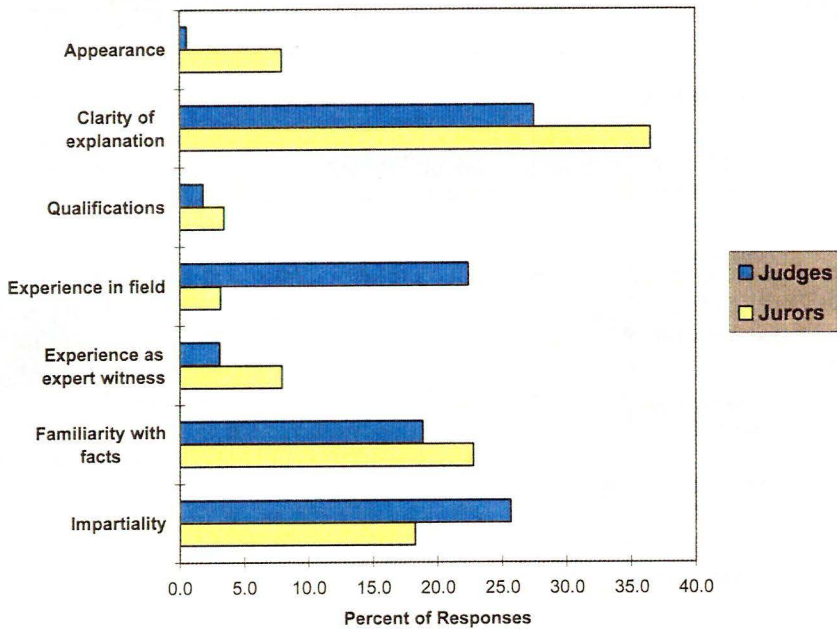
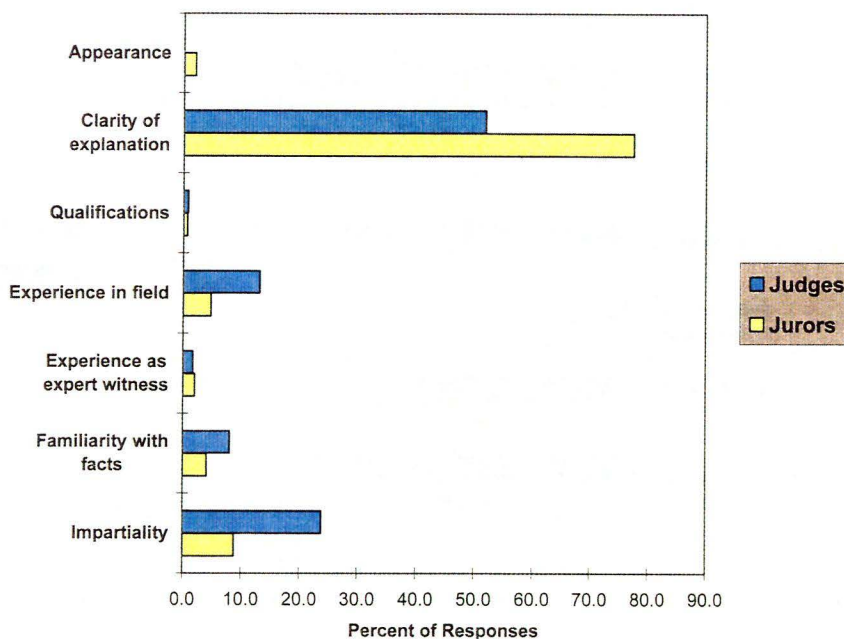


Figure 14: Comparison of Judges' Opinions of Single Most Persuasive Factor when an Expert gives Oral Evidence (Q2.11 & Q5.11)



It is apparent that a small percentage of judges thought that jurors would be more affected by the "appearance" of expert witnesses than would judges (7.9% as against 0.6%). Judges also thought that while jurors would be persuaded by "impartiality" of expert witnesses, they were themselves more preoccupied with the issue (25.6% judges as against 18% jurors), presumably because of their experience as repeat players in the fact-finding process and so in a better position from multiple exposures to particular witnesses to gauge their impartiality or otherwise. By contrast, a small percentage of judges were of the view that jurors would be more persuaded than judges by expert witnesses' prior experience as witnesses (7.9% judges as against 3.1% jurors). Overwhelmingly, it was clarity of explanation that was identified by judges as the most persuasive factor in expert evidence - for themselves, and even more so for jurors.

7.6 Trial by Statistics

Arising out of the facts of a recent English Court of Appeal case dealing with Bayesian interpretations of DNA profiling results⁹, judges were asked whether they agreed with the English decision which found that a trial judge had erred in permitting the defence to lead expert evidence about Bayes' Rule (**Question 5.12**). In

⁹ *Adams v The Queen* [1996] 2 Cr App R 467.

Adams v The Queen, Rose LJ found that evidence presented in Bayesian terms “trespasses on an area peculiarly and exclusively within the province of the jury, namely the way in which they evaluate the relationship between one piece of evidence and another.”¹⁰ He dismissed the attempt to determine guilt or innocence on the basis of a mathematical formula, applied to each separate piece of evidence as

“...simply inappropriate to the jury’s task. Jurors evaluate evidence and reach a conclusion not by means of a formula, mathematical or otherwise, but by the joint application of their individual common sense and knowledge of the world to the evidence before them.”¹¹

The view of the judges responding to the questionnaire was overwhelming in its orientation when asked whether they agreed with the approach of the English Court of Appeal (**Question 5.12**). However, it should be noted that overall about a third of judges (36.07%, n=88) declined to answer the question. The vast majority of those responding to the question (91.03%, n=142) indicated that they agreed with the English approach. This is a clear indication of a comparable inclination on the part of the Australian judiciary to reject “trial by statistics.”¹²

¹⁰ [1996] 2 Cr App R 467 at 481.

¹¹ Ibid.

¹² See the views of Professor Rose in relation to the role of numerical evidence and the risk of misunderstanding of such evidence: N Rose, “Dangerousness” (1998) 5(2) *Psychiatry, Psychology and Law* 177. For an important explanation and analysis of a Bayesian approach, see B Robertson and GA Vignaux, *Interpreting Evidence*, Wiley, Chichester, 1995.

PART EIGHT: ADMISSIBILITY ISSUES¹

8.1 Expert Evidence Exclusionary Rules

Judges were asked a number of questions about their application of the rules and discretions of expert evidence. The questions were posed in the aftermath of the introduction of the Evidence Act 1995 (Cwlth) and the Evidence Act 1995 (NSW) which reshaped the rules of expert evidence by substantially abolishing the common knowledge and ultimate issue rules and omitting the area of expertise and basis rules.² Other jurisdictions within Australia have indicated an intention to implement the Commonwealth reforms which were based on reports of the Australian Law Reform Commission.³

8.2 The Voire Dire Procedure

Judges were asked about their use of the *voire dire*⁴ procedure to determine the admissibility of expert evidence, this providing an opportunity outside the confines of the presentation of evidence proper, to determine the admissibility of evidence (Question 6.1). Anecdotal information suggested that *voire dire*s are comparatively rarely used in Australia to determine expert evidence admissibility,⁵ attempts to adduce questionable expert evidence being less common than in the United States, and relatively few objections to admissibility being taken in borderline cases. This impression was confirmed by the judges' responses, nearly a quarter of judges responding to the question (24.15%, n=57) reporting that they had never determined expert evidence admissibility by a *voire dire* and nearly two thirds indicating that they only did so occasionally (63.98%, n=151).

8.3 Reliability as a Condition Precedent to Admission

One of the emerging controversies for Australian and New Zealand expert evidence law for some time has been whether at common law there is an "area of expertise" rule, be the rule determined by the majority of views within the expert area,⁶ or upon a criterion such as reliability.⁷ Bernstein has correctly pointed out that, "Australia has had perhaps the most vociferous debate over scientific evidence

¹ This Part deals with questions in Part Six of the survey instrument

² See generally I Freckelton and H Selby (ed), *Expert Evidence*, 5 volume looseleaf service, LBC Information Services, Sydney, 1993; I Freckelton and H Selby, *The Law of Expert Evidence*, LBC Information Services, Sydney, 1999.

³ Australian Law Reform Commission, *Interim Report on Evidence*, ALRC 26, AGPS, Canberra, 1985; Australian Law Reform Commission, *Evidence*, ALRC 38, AGPS, Canberra, 1987.

⁴ The spelling "*voire*" is used as more correctly approximating to the Latin "*vere*", as distinct from the French "*voir*" from which the term is not descended.

⁵ It appears that the *voire dire* procedure is even less commonly used in England to determine expert evidence admissibility.

⁶ *Frye v United States*, 293 F 1013 at 1014 (1923).

⁷ *Daubert v Merrell Dow Pharmaceuticals*, 125 L Ed (2d) 469; 113 S Ct 2786 (1993); (1994) 2(1) *The Judicial Review* 37; see also *Kumho Tire Co Ltd v Carmichael*, unreported, United States Supreme Court, 23 March 1999.

outside the United States"⁸. A series of disuniform judgments, from time to time determined in ignorance of key decisions, has suggested that an exclusionary condition precedent may form part of Australian law, save perhaps in Victoria,⁹ in relation to whether expert evidence falls within an area of expertise. However, the issue has not been finally determined by the highest courts in Australia or in New Zealand and it is unclear whether, if such a rule exists, its criterion is determined by the preponderance of expert opinion or by resort to the criterion of reliability. The articulation of principle thus far has primarily been from single judges and has been very limited. There has been repeated mixing of concepts and the consequences of unreliability of expert evidence have been highlighted but never clearly explicated. By contrast with the United States Supreme Court decision of *Daubert v Merrell Dow Pharmaceuticals* which has construed reliability in terms of a series of criteria,¹⁰ grounds have not been adumbrated by Australian cases to explain what

⁸ D Bernstein, "Junk Science in the United States and the Commonwealth" (1996) 21 *Yale Journal of International Law* 123; see further I Freckelton, *The Trial of the Expert*, Oxford University Press, Melbourne, 1987; P Gerber, "Playing Dice with Expert Evidence: The Lessons to Emerge from R v Chamberlain" (1987) 147 *Medical Journal of Australia* 243; I Freckelton, "Novel Scientific Evidence: the Challenge of Tomorrow" (1987) 3 *Australian Bar Review* 243; OP Holdenson, "The Admission of Expert Evidence of Opinion as to the Potential Unreliability of Evidence of Visual Identification" (1988) 16 *Melbourne University Law Review* 521; P Giugni, "*Runjanjc v R*" (1992) 14 *Sydney University Law Review* 511; I Freckelton, "Science and the Legal Culture" (1993) 2 *Expert Evidence* 107; G Samuels, "Is This the Best We Can Do?" (1993) 25 *Australian Journal of Forensic Sciences* 3; A Ligertwood, *Australian Evidence*, 2nd edn, LBC Information Services, Sydney, 1993; I Freckelton, "The Area of Expertise Rule" in I Freckelton and H Selby, *Expert Evidence*, LBC Information Services, Sydney, 1993; J Bourke, "Misapplied Science: Unreliability in Scientific Test Evidence (Pt 1)" (1993) 10 *Australian Bar Review* 123; I Freckelton, "Expert Evidence and the Role of the Juries" (1994) 12 (1) *Australian Bar Review* 73; CR Williams, "Evidence and the Expert Witness" (1994) 26 *Australian Journal of Forensic Sciences* 3; SJ Odgers and J Richardson, "Keeping Bad Science out of the Courtroom - Changes in American and Australian Expert Evidence Law" (1995) 18 *University of New South Wales Law Review* 108; I Freckelton, "Judicial Attitudes Toward Scientific Evidence: An Antipodean Perspective" (1997) *University of California Davis Law Review* 1137; G Edmond and D Mercer, "Keeping 'Junk' History, Philosophy and Sociology of Science Out of the Courtroom: Problems with the Reception of *Daubert v Merrell Dow Pharmaceuticals Inc*" (1997) 20 *University of New South Wales Law Review* 48; G Edmond and D Mercer, "The Secret Life of (Mass) Torts: The Bendectin Litigation and the Construction of Law-Science Knowledge" (1997) 20 (3) *University of New South Wales Law Journal* 666; A Ligertwood, *Australian Evidence*, 3rd edn, Butterworths, Sydney, 1998, para 7.35; I Freckelton and H Selby, *The Law of Expert Evidence*, LBC Information Services, Sydney, 1999. See also *Black v Lipovac*, unreported, Federal Court, 4 June 1998 at para 84; *GJO General Ltd v Harpley*, unreported, ACT Supreme Court, unreported 22 September 1998 per Miles CJ.

⁹ See *J v The Queen* (1994) 75 A Crim R 522.

¹⁰ Four criteria have been specified to guide the determination of evidentiary reliability:

- (1) whether the theory or technique can be or has been tested - is it falsifiable, refutable or testable?;
- (2) whether the theory or technique has been subjected to peer review and publication as a means of increasing the likelihood that substantive flaws in methodology will be detected;
- (3) the known or potential error rate and the existence and maintenance of standards controlling the technique's operation;
- (4) whether a technique or theory has gained general acceptance within the scientific community.

See further *Kumho Tire Co v Carmichael*, Unreported, United States Supreme Court, 23 March 1999, 131 F 3d 1433 (1998) revised.

constitutes "reliability" of scientific evidence under Australian or New Zealand law.

Eleven years before the seminal case of *Frye v United States* held that a criterion for reception of novel scientific evidence was whether it had emerged from the experimental to the demonstrable, a determination to be arrived at by reference to whether theory had gained general acceptance within the scientific community,¹¹ a Victorian case traversed the issues of when dactyloscopy (fingerprinting), a then newly emerging area of scientific expertise, ought to be treated as of significantly probative value, and reached a similar result (albeit not on the question of admissibility):

"We are asked to accept the theory that the correspondence between two sets of finger-prints is conclusive evidence of the identity of the person who made those prints as an established scientific fact, standing on the same basis as the propositions of Euclid or other matters vouched for by science and universally accepted as proved. *If this finger-print theory were generally recognized by scientific men as standing on this basis, there would be no more to be said.*"(emphasis added)¹²

The criterion for according the evidence substantial probative value, therefore, appears to have been whether there was general recognition of the theory of dactyloscopy within the scientific community.¹³ Ironically, Madden CJ was troubled by another aspect of the evidence, its potential unreliability. His concerns about the issue were highlighted by his advertence to the peculiar character of such scientific evidence, so far removed from the experience of people's ordinary lives:

"This is that kind of evidence that is particularly dangerous, for it carries with it a savour of mystery, as in this case the detective swears that no two men's markings are alike, and it is assumed not only that no two men's markings are alike, and it is assumed not only that that is true, but that there is some mysterious brand implanted on man's hand for some definite purpose of characterizing him physically."¹⁴

Little has changed since under Australian and New Zealand law in respect of the debates surrounding the criteria for the admissibility of novel areas of scientific evidence. What is discernible is a continuing overlap between decisions based upon the preponderance of opinion within the expert community and an investigation into the reliability of the evidence, its soundness, gauged by criteria which are not generally articulated.

In a number of cases the general acceptance criterion has been hinted at¹⁵ or

¹¹ 293 F 1013 (1923).

¹² *R v Parker* [1912] VLR 152.

¹³ Compare just a few years later the New Zealand decision of *R v Krausch* (1913) 15 GLR 664.

¹⁴ At 154-5; see also *R v Castleton* (1909) 3 Cr App R 74.

¹⁵ *R v Gilmore* [1977] 2 NSWLR 935; *R v McHardie* [1983] 2 NSWLR 733; *Carroll v The Queen*

expressly applied.¹⁶ In New Zealand, by contrast two decisions of the High Court¹⁷ have purported to apply the United States Supreme Court decision in *Daubert v Merrell Dow Pharmaceuticals*.¹⁸

It is unclear whether all superior courts in Australia, if pressed, will unequivocally adopt a criterion such as the *Frye* general acceptance criterion for determining whether new scientific or psychological theories and techniques should be admitted as evidence. A number of key cases have combined, conflated or confused the general acceptance and reliability tests.

An integral part of the debate about an area of expertise rule is the role of "reliability" as a condition precedent to admissibility of expert evidence. Judges were asked whether it should be (Question 6.2). There was a significant split of judicial opinion with approximately a quarter of the judges responding (25.44%, n=58) saying that "reliability" should be a precondition to admissibility, just over a half (57.46%, n=131) saying that it should not and a significant percentage (17.11%, n=39) indicating that they did not have an opinion on the subject. Many judges who responded to the question by way of comment said that they either did not understand the question or thought that reliability should be a jury question, this being an indicator of the probative value that should be attached to expert evidence. One denounced the *Daubert* test as sounding like "legal gobbledegook."

Judges were asked about whether "falsifiability" should be a criterion for determining reliability as a condition precedent to admissibility of expert evidence in Australian courts (Question 6.3). This explicitly raised the issue of whether Australia should follow the apparent tendency in New Zealand and focus upon criteria such as Popperian refutability as a key to whether scientific evidence should be admitted as evidence. The responses are interesting. Nearly one in five of those judges responding (17.73%, n=39) said that "falsifiability" should be a criterion, while nearly half of the responding judges (45%, n=99) said that it should not. A substantial percentage of judges answering the question indicated that they did not have a view on the subject - over a third (37.27%, n=82). The extent to which those judges advocating the employment of the United States *Daubert* test, or something akin to it, did so in the awareness of the difficulties that have emerged in application of the test in that country is not known because it was not the subject of a specific question.

(1985) 19 A Crim R 410; *R v Lewis* (1987) 29 A Crim R 267; possibly *R v Harris* [1990] VR 310 at 318 and *Eagles v Orth* [1976] Qd R 313 at 320; see also *Casley-Smith v FS Evans & Sons Pty Ltd and District Council of Stirling (No 1)* (1988) 49 SASR 314 at 328.

¹⁶ *Runjanjic and Kontinnen v The Queen* (1991) 56 SASR 114; 53 A Crim R 362; *Pantoja v The Queen* (1996) 88 A Crim R 554.

¹⁷ *R v Calder*, unreported, High Court of New Zealand, 12 April 1995 per Tipping J; *R v Brown*, unreported, High Court of New Zealand, 19 September 1997; for a discussion of these cases, see I Freckelton, "The Area of Expertise Rule", para 9.275 in I Freckelton and H Selby (ed), *Expert Evidence*, 5 volume looseleaf service, LBC Information Services, Sydney, 1993.

¹⁸ 125 L Ed (2d) 469; 113 S Ct 2786 (1993); (1994) 2(1) *The Judicial Review* 37. See further *Kumho Tire Co v Carmichael*, Unreported, United States Supreme Court, 23 March 1999, 131 F 3d 1433 (1998) revised.

Gatowski et al¹⁹ have persuasively highlighted difficulties than can arise when concepts are translated from one jurisdiction to another, without the background and surrounding jurisprudence being adequately appreciated. The risk is that there will be a confused application of some aspects of a determination and that the context in which the overseas decision was arrived at will not be understood in the country to which it is translated. This and factors of cultural difference create a potential for misunderstanding. This may well have been responsible for the confused application of *Daubert* in New Zealand²⁰. It may be that consciousness of the risks of cross-jurisdictional borrowing of so difficult a concept as “falsifiability” as a criterion for “reliability” also played a role in judges’ responses to the question.

A number of comments confirm the limits to the significance that should be attributed to the judges’ answers. A series of respondents commented that they did not understand the concept of “falsifiability”, this not being particularly surprising as it emanates from the area of epistemological discourse and, until *Daubert*, not forming part of evidentiary jurisprudence. One judge commented:

“I am strongly of the view that Australia should follow the trend in the USA and stop allowing the ‘soft’ sciences, particularly psychologists, to express opinions when those opinions have no clinical basis, have never been tested and, in reality, amount to nothing more than academic publication, often repeatedly, of some theory or other. I do not allow them in my jury trials. I ignore them in civil cases.”

Another judge, though, argued that the question was a threshold one: “The falsifiability of a proposition is what makes it scientific.”

8.4 Courtrooms as Forums for Evaluation of Reliability

As a further question exploring the issues surrounding the assessment of reliability in the forensic context, judges were asked whether they thought the courtroom was a forum in which the reliability of expert theories and techniques is adequately evaluated (**Question 6.4**). Thus the question addressed current practice. The matter is controversial in the United States in the wake of the Supreme Court decision in *Daubert v Merrell Dow Pharmaceuticals*, some commentators expressing the view that judges are ill-equipped to engage in the complex process of gauging the scientific status of theories, techniques and methodologies. Others have lauded the initiative in *Daubert* of removing from the legal system its insufficiently questioning deference to the preponderance of expert opinion.

Only a few respondents failed to answer the question. More than a half of those responding maintained that the courtroom is a forum allowing adequate evaluation of theories and techniques (55.22%, n=127) but nearly a third took the opposite view

¹⁹ S Gatowski, SA Dobbin, JT Richardson, and GP Ginsburg, “The Globalization of Behavioural Science Evidence About Battered Women: A Theory of Production and Diffusion” (1997) *Behavioral Sciences and the Law* 285.

²⁰ *R v Brown*, unreported, High Court, New Zealand, 19 September 1997 per McGeche J; *R v Calder*, unreported, High Court of New Zealand, 12 April 1995 per Tipping J.

(30.87%, n=71). This constitutes a noticeably split perspective on the part of judges in Australia that courts effectively separate the good from the bad of expert evidence and that advocates do a sufficiently proficient job to enable lay decision-makers to evaluate competing opinions that they hear in the course of civil and criminal trials. Many of the judges suggested that the courts afford an adequate forum for evaluation of expert evidence qualified their answers, a number commenting that the courtroom *can be* an acceptable forum for such a purpose, and some noting that this depends upon the calibre of the advocates. One respondent argued, though, that "The experts can more readily test theory and technique between themselves. Lawyers often miss the subtle distinctions."

8.5 Representativeness of Expert Witnesses

A further question which addressed judges' views as to the quality of expert evidence coming before them posed the question of whether they considered that most experts giving evidence before them were representative of the views of their discipline (**Question 6.5**). One of the concerns often enunciated about the adversary system's mode of bringing expert evidence before the courts is that it does not rely upon the most eminent or even those representative of learned colleges and associations but upon those found by parties, which have vested interests, the experts being promoted, rightly or wrongly, as authoritative. The risk is that lay decision-makers, especially jurors, will form erroneous views about the extent to which experts called by the parties are advancing views consonant with those held by the preponderance of their colleagues.

Nearly three quarters of responding judges (73.57%, n=167) said that most experts in their courts were representative of the views of their profession, the more significant figure probably being that only approximately one in 20 responding judges had the opposite view (5.29%, n=12). This suggests, at least from the responding judges' points of view, that the iconoclastic, idiosyncratic expert does not play a major role in Australian litigation. It is not to say that from time to time such an expert is not influential in particular cases and it says little about the effectiveness of advocates in unmasking such unrepresentativeness.

Of the small number who either indicated that most experts called were not representative of the views of their discipline or that they did not have a view about the matter, roughly even numbers indicated that they thought that it was a significant problem for the quality of fact-finding in their court (**Question 6.6**: 34.48%, n=20 that it was; 43.10%, n=25 that it was not). One respondent commented that, "In Workcare there are medical witnesses who are little more than prostitutes, known for their availability - to express the extreme views for which they are notorious." Given that only a small number of judges had said previously that experts were not representative of their colleagues and so were eligible to answer the question (76.23%, n=186), general conclusions cannot be drawn from these findings.

8.6 Partisanship of Experts

Judges were asked about the frequency with which they encountered the same expert witnesses appearing for the same side in litigation (**Question 6.7**). The

question raised in another form one of the issues that pervaded judges' responses to the survey: bias. It is no new issue, an important aspect of partisanship on the part of expert witnesses having been recognised as long ago as 1877 to lie within the route by which experts are selected to give their evidence, Lord Jessel commenting that:

"A man may go, and does sometimes, to half-a-dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one."²¹

However, it should be observed that the mere fact that a doctor, for instance, regularly appears for insurers in litigation does not necessarily mean that he or she is biased. It may simply be that the expert's views are known to incline in a certain direction, for instance, on the subject of the connection between stress and heart disease or on fibromyalgia or on soft tissue injuries generally. There are different schools of thought within every profession and every subspecialisation of every profession and it is no surprise, nor any indictment of witnesses on this ground alone, that experts are selected as report writers and witnesses on the basis of their known allegiance to particular schools of thought. The forensic difficulty exists if the school of thought which the expert/s called by one party adheres to is very much a minority one, and if this is not brought home to the trier of the fact.

The judges responding to the survey indicated that it was generally their experience that they encountered the same witnesses appearing with regularity before them (71.73%, n=170). As already observed, this does not necessarily indicate widespread bias, simply that witnesses' diversity of views is well known. However, the connection between experts regularly appearing for the same side in litigation and their being biased was made in a number of the comments provided to respondents' answers. A typical example is the *cri-de-coeur*: "In the ordinary run of personal injury work and to a lesser extent in other work, the expert witnesses are so partisan that their evidence is useless. Cases then have to be decided on probabilities as best one can."

Judges were also asked about their experience of partisanship in expert witnesses (Questions 6.8 and 6.9). Their answers were interesting. Nearly nine in ten of the judges answering the question said that they had encountered bias (Question 6.8: 87.76%, n=208) but a slender majority of that number said that they did not think that this was a significant problem for the quality of fact-finding in their court (Question 6.9: 52.38%, n=110). Perhaps more significant in terms of the potential for erroneous fact-finding is that nearly a half of the respondents who had encountered partisanship said that it was a significant problem for fact-finding in their court (Question 6.9: 46.67%, n=98). The point was made by one respondent

²¹ *Thorn v Worthing Skating Rink Co* (1877) 6 Ch D 415n.

that a distinction had to be drawn between the problem being prevalent, as against its being significant. Others indicated that the "foibles" or inclinations of certain witnesses become known to judges ("You soon get to know the professional witnesses") so the issue is more of a problem where juries are empanelled. These answers highlight a concern on the part of a large cross-section of judges responding to the survey that the bias in witnesses whom they commonly encounter may be having a deleterious impact upon the determination of cases, both civil and criminal, in particular where jurors are the triers of fact. The answers provided do not permit an analysis of whether this is more of a problem in civil or criminal cases, but they do emphasise an important concomitant of the functioning of the adversary system of justice.

8.7 Experts' Presence in Court

It is standard in most Australian courts for judges, upon application, to make an order for witnesses to remain beyond the hearing of the court. However, application can always be made for an expert to remain in court. "Convenience" has been isolated as a pertinent factor in the making of such orders²². Fundamentally, though, the decision generally depends upon the balance between the assistance to be derived from the presence of the expert and the potential for contamination of the evidence otherwise to be given by the witness²³.

Judges were asked their views about expert witnesses being in court to hear the evidence of other expert witnesses (Question 6.10). The responses were surprisingly uniform in light of the comparative rarity of experts remaining in court. Overwhelmingly, the respondents indicated that they thought that the practice was helpful (84.26%, n=198), only 11 judges (4.68%) suggesting that the presence of experts during others' evidence was counterproductive to the fact-finding process.

A number of judges in their comments used the answer as a vehicle to propound their view that the bigger issue raised was the need for experts to consult one another prior to court and arrive at an agreed statement of their positions. One judge argued that such a practice "helps to narrow down the area of dispute and eliminate misconceptions between them." Some comments suggested that the chief advantage of having experts present while opposing experts were examined and cross-examined was one of efficiency - that is, saving time.

The willingness of judges to have experts hear each others' views as expressed in court, as well as their support for the need to crystallise early what constitute expert opinions in dispute between the parties, sits somewhat anomalously with their very limited use of court-appointed experts, assessors and referees.²⁴ It may be that the

²² *R v Tait* [1963] VR 520 at 523; *R v Bassett* [1952] VLR 535 at 539; *R v Bicanin* (1976) 15 SASR 20 at 26; *Arnotts Ltd v Trade Practices Commission* (1990) 97 ALR 555 at 589; R Munday, "Excluding the Expert Witness" [1981] *Criminal Law Review* 688; see also *Tomlinson v Tomlinson* [1980] 1 All ER 593 at 596.

²³ *R v Tait* [1963] VR 520 at 523.

²⁴ See Part Eleven.

pressure for judges to monitor efficiency and to promote the cost-effective dispensing of prompt justice will lead more into experimenting with models of expert evidence provision and resolution that sit slightly outside the adversarial framework.

PART NINE: THE COMMON LAW EXCLUSIONARY RULES¹

9.1 Rules of Expert Evidence

Judges were asked a series of questions about their practices in applying the exclusionary rules of expert evidence. First, they were asked how they classified the knowledge of the rules of expert evidence on the part of the advocates appearing before them (**Question 7.1**). Two thirds of judges (66.67%, n=160) found the knowledge by advocates to be “reasonable” while roughly equal numbers found advocates’ knowledge to be “poor” (14.17%, n=34) and “good” (16.25%, n=39). One judge maintained that some examples of advocates’ knowledge in this regard were “poor and an embarrassment to the profession”; another commented, “I have never heard of “rules of expert evidence.”

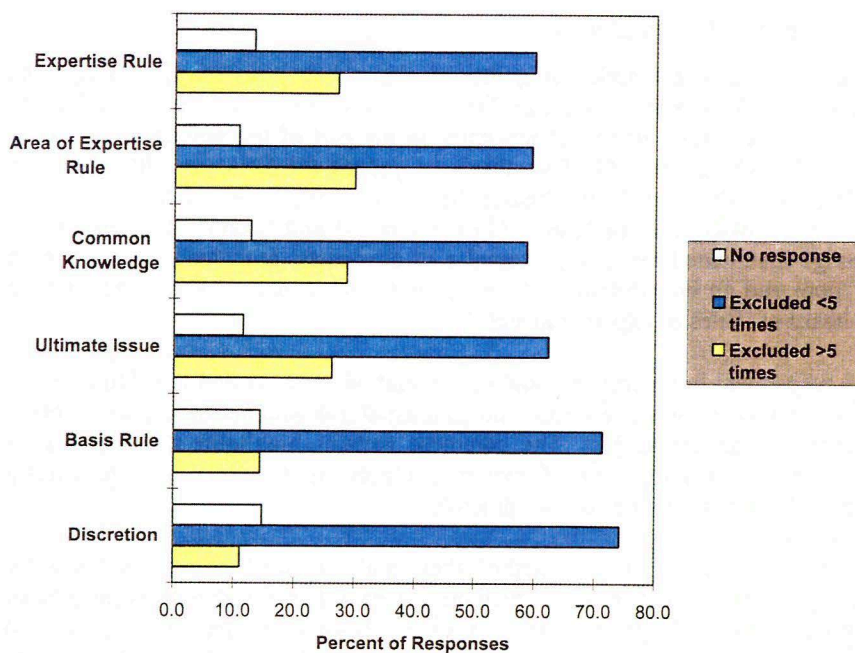
One respondent in a comment pointed out that when “I studied law, Phipson had 15 pages on this opinion of experts” and contrasted that with multi-volume materials now available on the subject. The comment perhaps highlights the comparative recency of the identification of expert evidence as a crucial and previously inadequately recognised area of trial practice.

Judges were asked about whether they had excluded expert evidence by application of the “expertise rule” which prescribes that an expert witness must be an expert (**Question 7.2(a)**); by the area of expertise rule (see above para 8.3) (**Question 7.2(b)**); by the common knowledge rule, which prescribes that experts may not give evidence on matters within the ken of lay decision-makers (**Question 7.2(c)**); by the ultimate issue rule, which proscribes the giving of opinions upon the major issues to be determined by the tribunal of fact (**Question 7.2(d)**); by the basis rule, which provides that evidence must be adduced of the bases of an expert witness’ opinion (**Question 7.2(e)**); and by the exercise of the prejudice/probative discretion, which allows expert evidence to be excluded where its value in terms of proving a matter in dispute is slight but its prejudicial value is high (**Question 7.2(f)**).

The results to each of the questions were surprisingly similar, approximately two thirds of respondents saying that they had not excluded expert evidence more than five times by any of the mechanisms. However, it is significant that considerable numbers of judges had utilised each of the rules and the discretionary exclusion mechanism to exclude expert evidence, albeit on fewer than five occasions. The responses give a perspective on the living application of the exclusionary rules:

¹ This Part deals with questions in Part Seven of the survey instrument

Figure 15: Judges' Patterns of Exclusion of Expert Evidence (Q7.2)



A number of interpretations of the data are possible:

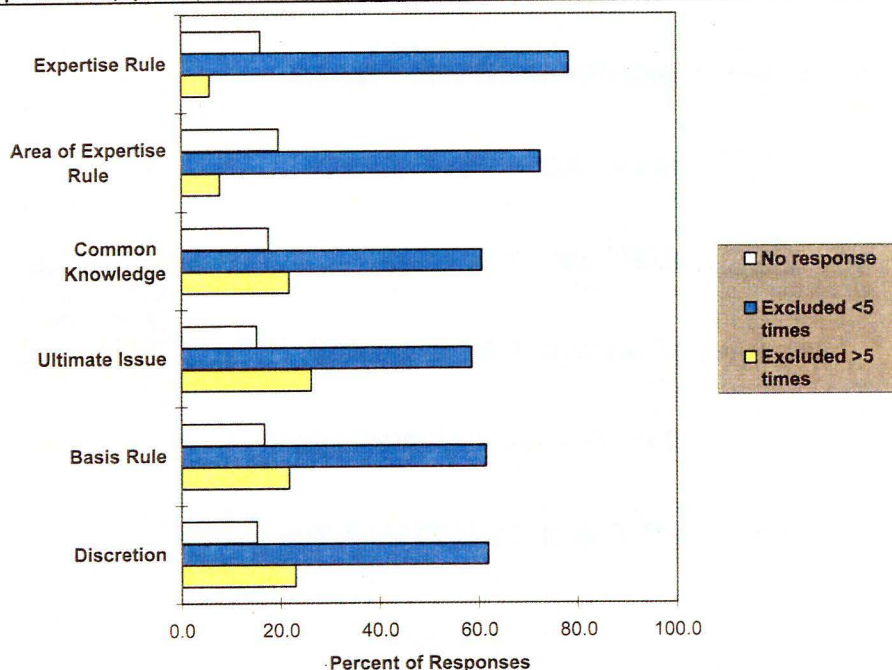
- advocates are not sufficiently aware of the rules to make admissibility objections in relation to expert evidence;
- it is comparatively rare for parties to seek to adduce evidence that is technically inadmissible; and
- the general approach by judges is to allow the evidence to be admitted and to allow the decision-maker, be it themselves or jurors, to allocate what probative value to the evidence is deemed appropriate.

The judges' answers to the question about advocates' knowledge of the exclusionary rules shed little light on the extent of lawyers' awareness of the rules. We suspect that the answer lies in a combination of all three factors. Often enough counsel's knowledge of technical grounds for evidentiary objection is limited. In addition, Australia's legal system is not structured in a way that encourages the entrepreneurialism and risk-taking that is more common in the United States. The absence of formal contingency arrangements for solicitors, the more modest levels of damages in negligence and other civil actions, the scarcity of legal aid even for funding criminal trials, and the fact that costs are generally awarded against the losing party in civil litigation, all militate against the usage of witnesses whose views may be iconoclastic or open to significant dispute. This means that there is

less of an incentive for lawyers to seek out inexperienced or fringe witnesses whose opinions may readily be impugned. Similarly, there is less of an inducement for experts to put themselves forward as authoritative in areas on which they may in fact be inexperienced. It is also germane that there is also a much smaller pool of diversity of expert opinion in Australia than in the United States upon which it is easy for parties to draw.

Judges were also asked about whether they had excluded expert evidence of their own motion, without advocates having formally taken objection under one of the exclusionary rules (**Question 7.3**). Their responses may be seen below:

Figure 16: Exclusion of Expert Evidence by Judges (Without Party Application) (Q7.3)



Clearly enough, judges from time to time have intervened to exclude evidence, without the taking of objection. Comments suggested that they may have so intervened where parties were unrepresented or incompetently represented. By and large, though, judges appear to wait for the taking of objection by competent counsel.

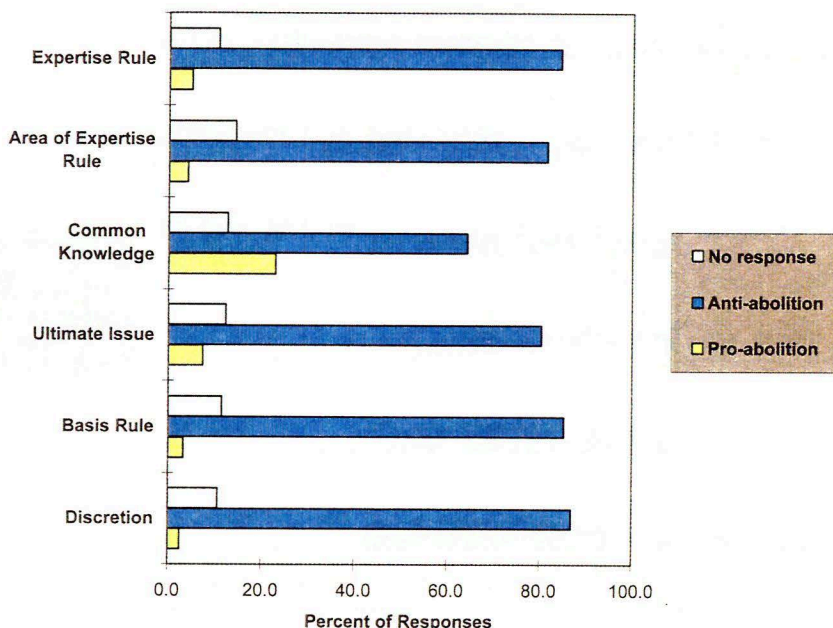
9.2 Retention or Abolition of Exclusionary Mechanisms

Judges were asked their views about whether they were in favour of reform of the common law rules of evidence (**Question 7.4(a)-(f)**), the abolition or modification of

the rules having been a subject canvassed during the Australian Law Reform Commission's reference on Evidence during the 1980s and the judiciary having been actively consulted on the subject during that period.

The judges' responses were markedly in favour of retention of the common law status quo, although it must be conceded that the alternative given was the bald one of abolition of the rules, *seriatim*:

Figure 17: Judges' Views on Abolition of Common Law Exclusionary Rules of Expert Evidence



The only substantial body of support in favour of change to the common law status of the rules (and that only 22.9%) was in the context of the ultimate issue rule, a rule that has been subject to considerable judicial and academic criticism. Probably the most strident condemnation of permitting experts to express views that trespass upon the fact-finding responsibilities of the judge or jury is that of Neville J in *Joseph Crosfield & Sons Ltd v Techno-Chemical Laboratories Ltd*²:

“But the waste of time is not the whole of the mischief, for the admission of the opinion of eminent experts upon the issues leads to the balancing of opinions and tends to shift responsibility from the bench to the witness box. The evil of this becomes apparent when one considers that, whereas the expert witnesses called for them almost invariably take a strong view in his favour on each

² (1913) TLR 378 at 379.

and all of the issues in the action, the expert witnesses for the defendant are equally confident the other way."

The rule remains alive in Australia, the subject of differing formulations and of unpredictable but ongoing application³. However, the rule has been criticised by many commentators and law reform bodies. Stoebach, for example, commented that, "the mist the gods drew about them on the battlefield before Troy was no more dense than the one enshrouding the origins of the [ultimate issue] rule".⁴ Wigmore described the rule as "simply one of those impossible and misconceived utterances which lack any justification in principle" and its justification as avoiding usurpation of the function of the jury as a "mere bit of empty rhetoric". Morgan termed it "sheer nonsense"⁵ and McCormick maintained it to be "unduly restrictive" and "pregnant with close questions of application", "often unfairly obstruct[ing] the party's presentation of his case."⁶ The Law Reform Commissions of Australia,⁷ Ontario,⁸ Scotland,⁹ and South Australia,¹⁰ the Federal/Provincial Task Force of Canada,¹¹ and the Law Commission of New Zealand¹² have all recommended the abolition of the rule.

The judicial responses to the question about their inclination in respect of abolishing the ultimate issue rule demonstrates that the preparedness on the part of Lindgren J in *All State Life Insurance Co v Australia and New Zealand Banking Group Ltd*¹³ to construct an ongoing existence for the ultimate issue rule is not on its

³ See *R v Hally* [1962] Qd R 214 at 229; *Interlego v Croner Trading* (1993) 111 ALR 577 at 619; *R v Tonkin* [1975] Qd R 1 at 42-3; *Grey v Australian Motorists and General Insurance Co Pty Ltd* [1976] 1 NSWLR 669 at 675-6; *R v Palmer* [1981] 1 NSWLR 209. There is some suggestion that the rule may have some limited continuing life even after its abolition by s80 of the Evidence Act 1995 (Cwlth) and Evidence Act 1995 (NSW): *Pepsi Seven-Up Bottlers Perth Pty Ltd v Federal Commissioner of Taxation* (1995) 132 ALR 632 at 643; *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (1996) 137 ALR 138 at 142.

⁴ Stoebach, "Opinions on Ultimate Facts: Status, Trends and a Note of Caution" (1964) 41 *Dev LJ* 226.

⁵ Morgan, EM, *Basic Problems of Evidence*, American Law Institute, 1962.

⁶ McCormick, CT, *Handbook of the Law of Evidence*, 3rd edn, West Publishing, 1984.

⁷ Australian Law Reform Commission, *Evidence*, Report No 36, AGPS, Canberra, 1988.

⁸ Ontario Law Reform Commission, *Report on the Law Reform Commission*, Govt Printer, Ontario, 1976.

⁹ Scottish Law Commission, *Law of Evidence*, Memo No 46, Edinburgh, 1983.

¹⁰ South Australian Criminal Law and Penal Methods Reform Committee, *Court Procedures and Evidence*, Report No 3, Govt Printer, Adelaide, 1975.

¹¹ Federal Provincial Task Force on Uniform Rules of Evidence, *Report*, Carswell Co, Toronto, 1982.

¹² New Zealand Law Commission, *Evidence Law: Expert Evidence and Opinion Evidence*, Preliminary Paper No 13, New Zealand Law Commission, Wellington, 1991.

¹³ (1996) 137 ALR 138 at 142: by finding that s.80, by using the words "only" and "about" leaves untouched the fundamental common law principle that precludes legal opinion evidence as intruding upon the essential judicial function and duty. He also found that the expression "an ultimate issue" does not catch "the ultimate issue".

own¹⁴. While a modest percentage of judges agree with the many criticisms of the rule, the overwhelming majority would prefer the rule to remain in existence so that opinions which trespass upon the domain of the fact-finder would thereby become inadmissible.

¹⁴ See also *Pepsi Seven-Up Bottlers Perth Pty Ltd v Federal Commissioner of Taxation* (1995) 132 ALR 632 at 643; *Westpac Banking Corp v Jury*, unreported, New South Wales Supreme Court, 17 October 1995 per Rolfe J.

PART TEN: COMMONWEALTH AND NSW EVIDENCE ACTS¹

10.1 The Reforming Legislation

In 1995 the Evidence Act 1995 (Cwlth) and the Evidence Act 1995 (NSW) came into force. In respect of the provisions dealing with expert evidence, they implemented, in identical form, the proposals of the Australian Law Reform Commission in its 1985 and 1987 reports on the reform of evidence law. The Commission made major substantial criticisms of the technicalities and uncertainties surrounding the exclusionary rules of expert evidence.

10.2 Impact of the Federal and New South Wales Evidence Acts

The Commonwealth and New South Wales evidence legislation considerably simplifies expert evidence law. It expressly abolishes the substance of the common knowledge and ultimate issue rules by providing that evidence is not inadmissible by reason that it relates only to a matter of common knowledge or an ultimate issue.² In addition, it fails to provide for the basis and area of expertise rules with the result that it is probable that they no longer form part of the law where the Federal and New South Wales Evidence Acts apply.³ However, the absence of proof of the bases of an expert's opinions, or the fact that the theories or techniques upon which an expert proposes to give evidence, are either unfalsifiable or are not the subject of general agreement within the relevant area, may well still be germane to the exercise of the probative value-prejudicial effect discretions under s135 and s137 of the legislation.⁴

Section 79 of the Commonwealth and New South Wales Evidence Acts 1995 provides that, "if a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge". An important question exists as to the degree to which this provision will function effectively as a

¹ This Part deals with questions in Part Eight of the survey instrument.

² However, for an ongoing preclusion on evidence about ultimate issues see *O'Brien v Gillespie* (1997), 41 NSWLR 549-551 per Levine J. See also *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd* (1996) 137 ALR 138 at 142-4 per Lindgren J. concluded that the new provisions meant that the area of expertise rule no longer existed. The High Court expressly refrained from deciding the issue in *Osland v The Queen* (1998) 73 ALJR 173.

³ For a strong view that the rule does not apply under the legislation, see Einstein J in *Perpetual Trustee Co Ltd v George*, unreported, Supreme Court of New South Wales, 19 November 1997.

⁴ The Australian Law Reform Commission in its proposal which forms the basis for the legislation commented, "The courts need to be able to exclude evidence because of the prejudicial effects that it may have, its questionable reliability, and its tendency to mislead, confuse or require undue time and cost. On balance, the discretionary provisions are the best solution and a positive means of expediting court proceedings in clear cases should the necessary concern about the effects of the evidence arise. They provide a safeguard to meet the challenge of new scientific theories and inventions that parties will be seeking to bring before the courts. Should the scientific evidence be repetitive and cumulative in purpose, it could be excluded. Should it be liable irrationally or incorrectly to affect court assessment of the evidence, the court could also rule it to be inadmissible: Australian Law Reform Commission, *Interim Report on Evidence*, ALRC 26, AGPS; Canberra, 1985, para 748.

filter for expert evidence. Gleeson CJ in *HG v The Queen*⁵ has commented that, "...the provisions of s79 will often have the practical effect of emphasising the need for attention to requirements of form. By directing attention to whether an opinion is wholly or substantially based on specialised knowledge based on training, study or experience, the section requires that the opinion be presented in a form which makes it possible to answer that question".

Judges familiar with the Federal and New South Wales jurisdictions were asked a series of questions about the impact of the new provisions. In assessing the significance of the findings, though, it must be acknowledged that at the time of the survey being answered the reforming legislation was still only in its early days. There is always a doubt, at least in the early aftermath of law reform, as to the extent of its practical implementation - whether the changes sought to be introduced are actually functioning. There can be a tendency, until appellate decisions provide guidance, for old ways to prevail in spite of an apparent wish to the contrary on the part of legislative drafters. The new expert evidence provisions were introduced to remove a series of technical bars to the admission of expert evidence and were anticipated to some degree to ease the passage of a number of forms of such evidence. However, it was not anticipated that they would result in dramatic amounts of expert evidence being admitted that had previously been excluded.⁶ Whether this will be their impact will take some time to gauge.⁷

An important development in interpretation of the rules may well be the High Court decision of *HG v The Queen*⁸ in which Chief Justice Gleeson held that it was appropriate, in evaluating the admissibility of allegedly expert opinions, to assess whether a field of expertise exists in the first place and then whether a proposed witness expresses opinions deriving from specialised knowledge in turn based upon the witness' training, study or experience. Thus, three issues need to be proved before expert evidence can be adduced: the legitimacy of the field of expert endeavour, the relationship between the opinions and the specialised knowledge, and the person's training, study or experience.⁹

Judges were asked whether the new provisions had made a difference to the

⁵ (1999) 160 ALR 554 at 562; [1999] HCA 2 at para 39.

⁶ See, eg, Australian Law Reform Commission, *Interim Report on Evidence*, ALRC 26, AGPS, Canberra, 1985, at para 743.

⁷ An early response of the courts was the analysis of Hill J in *Pepsi Seven-Up Bottlers Perth Pty Ltd v Federal Commissioner of Taxation* (1995) 132 ALR 632 at 643: "No doubt the 1995 Act operates to widen the circumstances in which expert testimony may be proffered. With both the common knowledge and the ultimate issue rule abolished, there would seem to be but two obstacles to the admission of words as used in a statute. These would be (assuming the evidence is properly to be characterised as within the opinion rule enunciated by s 76) whether the testimony is relevant to the issue to be determined . . . and whether the witness does have specialised knowledge based on training, study or experience to support the opinion evidence he or she is to give."

⁸ (1999) 173 ALJR 281; See I Freckelton and T Henning, "Speculation, Uncorroborated Opinions and Forensic Expertise" (1999) 6 (1) *Psychiatry, Psychology and Law* (in press).

⁹ See also *Quick v Stoland* (1998) 157 ALR 615.

exclusion of expert evidence in the hearings over which they had presided (**Question 8.1**). A number of judges noted their limited experience of applying the legislation when they responded to the survey. The significance of their answers needs to be discounted accordingly.

Nearly two thirds of the respondents who answered maintained that the new provisions had made no difference (61.95%, n=70). In effect, this appears to bear out the expectations of the Australian Law Reform Commission, as set out above. One judge drily responded that: "Where expert evidence was not previously allowed, I have generally disregarded the expert evidence allowed only by the Evidence Act 1995." The indication from the respondents who thought that the changes had made a difference was that more expert evidence was now being admitted (62.50%, n=20) (**Question 8.2**). The most general view was that the changes to the admissibility rules for opinion evidence had made no real difference to the quality of the fact-finding process (76.643%, n=82) (**Question 8.3**). Similarly, the application of the provision in s177 of the Acts for proof of expert opinions by the use of a certificate and no actual appearance by the expert unless called for by the opposing party was regarded by most respondents as having made no real difference (86.14%, n=101) (**Question 8.4**). A number of judges in their comments said that they had not yet encountered its use.

By and large judges indicated that they were applying the prejudice/probative discretion in criminal cases as they had been prior to the 1995 evidence legislation (35.56%, n=32), although some of respondents answering the questions (11.11%, n=10) maintained that they were applying the discretion more often (**Question 8.5**). The responses were even clearer in relation to non-criminal cases, over three quarters of judges replying saying that the provisions had made no difference (83.84%, n=83) (**Question 8.6**).

Australian caselaw gives little guidance on the factors to be taken into account when a judge decides whether expert evidence is more prejudicial than probative. It may be that reliability factors such as those articulated in *Daubert v Merrell Dow Pharmaceuticals*¹⁰, namely falsifiability, existence of peer reviews, presence of controls, and general acceptance of theories and techniques, have a role to play in fleshing out the discretion. Judges were asked whether they regarded the reliability of expert theories and techniques as a relevant criterion in their application of the discretion (**Question 8.7**). Approximately half of the responding judges said that they regarded reliability as relevant (49.51%, n=51), although a quarter of those responding said that they "did not know" (23.3%, n=24). It is not possible to extrapolate from the answer how important a factor reliability is viewed as being, beyond being simply one of the factors to be taken into account in the exercise of the discretion.

¹⁰ 125 L Ed (2d) 469; 113 S Ct 2786 (1993); (1994) 2(1) *The Judicial Review* 37.

PART ELEVEN: COURT-APPOINTED EXPERTS, ASSESSORS AND REFEREES¹

11.1 Other Sources of Expert Evidence

The functioning of the adversary system, as it has evolved, lies at the heart of many aspects of the role of expert witnesses which were identified in the early parts of the survey. Australia's system of criminal and civil justice is predominantly adversarial in the sense that the responsibility for adducing evidence and asking questions of witnesses, expert and lay, is that of the parties. The judge functions primarily as a ring-keeper, ensuring that trials run fairly and adhere to the rules of the contest.

Some solutions to the difficulties posed by expert evidence lie within the performance of advocates and experts within the adversary system. For instance, further training and sensitisation have the potential to improve the discharge of their roles. However, more radical solutions are also propounded by some, including use of alternative sources of expert knowledge for the decision-maker, and also having expert decision-makers, such as "special juries".

A number of decisions have articulated the advantages of court appointed experts. Sir Thomas Bingham MR, for instance, in *Abbey National v Kay Surveyors*² noted that:

"It was argued that appointment of a court expert was pointless, since, it merely meant the instruction of an additional expert whose opinion would carry no more weight than any other. We feel bound to say that in our opinion this argument ignores the experience of the court over many years. For whatever reason and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend, if called as witnesses at all, to espouse the cause of those instructing them to a lesser or greater extent, on occasion becoming more partisan than the parties. There must be at least a reasonable change that an expert appointed by the court, with no axe to grind but a clear obligation to make a clear and objective valuation, may prove a reliable source of expert opinion. If so, there must be a reasonable chance at least that such an opinion may lead to settlement of a number of valuation issues."³

Lord Woolf in 1996 particularly stressed the utility of having one source of expert information for courts in civil cases "wherever the case (or the issue) is concerned

¹ This Part deals with questions in Part Nine of the survey instrument

² [1996] 1 WLR 1534 at 1547.

³ To similar effect, Graham Fricke, a former County Court judge in Victoria, argues that one of the lessons of the *Chamberlain* case is the advisability of setting up a panel of court-appointed experts: "That would overcome the spectacle of parties shopping around for experts who will support one side or the other": G Fricke *Tales from the Courts*, Lothian Books, Melbourne, 1999, at p.17.

with a substantially established area of knowledge and where it is not necessary for the court directly to sample a range of opinions.”⁴ He argued that this had a range of collateral advantages in terms of crystallising issues in dispute, reducing the length of hearings, saving money for the parties and the functioning of the court system and “levelling the playing field between parties of unequal resources”⁵. However, he gave little indication of when this would be the situation, what the criteria would be for so classifying it or how it could be predicted in advance. This aspect of his proposals was conceded by him to have elicited little support in England and Wales. He proposed the following in his final report into *Access to Justice*:

“(1) As a general principle, single experts should be used wherever the case (or the issue) is concerned with a substantially established area of knowledge and where it is not necessary for the court directly to sample a range of opinions;

(2) Parties and procedural judges should always consider whether a single expert could be appointed in a particular case (or to deal with a particular issue); and, if this is not considered appropriate, indicate why not;

(3) Where opposing experts are appointed they should adopt a co-operative approach. Wherever possible this should include a joint investigation and a single report, indicating areas of disagreement which cannot be resolved;

(4) Expert evidence should not be admissible unless all written instructions (including letters subsequent upon the original instructions) and a note of any oral instructions are included as an annex to the expert’s report;

(5) The court should have a wide power, which could be exercised before the start of proceedings, to order that an examination or tests should be carried out in relation to any matter in issue, and a report submitted to the court;

(6) Experts’ meetings should normally be held in private. When the court directs a meeting, the parties should be able to apply for any special arrangements such as attendance by the parties’ legal advisers.”⁶

The Federal Court of Australia in 1997/98 gave lengthy consideration to proposals for reforming the use of experts in technical cases⁷. Amongst the proposals raised for consideration within the Court were that:

⁴ Lord Woolf MR, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, London, 1996, at p.141. See also A Speaight, “Court Experts” (1998) 148 *New Law Journal* 1770.

⁵ Ibid, at p.142.

⁶ Ibid at p.152.

⁷ See JE Cooper, “Federal Court Expert Usage Guidelines” (1998) 16(3) *Australian Bar Review* 203; AA de Fina, “Experts in the Australian Context” (Spring 1998) *The Expert* 14.

- Experts should be given clear guidance that, when preparing or giving evidence, their first responsibility is to be open and truthful to the court;
- Any report prepared for the purpose of giving evidence should be addressed to the court;
- Such a report should end with a declaration by the expert that the expert has made inquiries which the expert believes are appropriate and that the matters of significance which the expert regards as materially relevant have not, to the expert's knowledge, been withheld from the expert or by him or her to the court;
- If experts instructed by the parties meet at the direction of the court, it would be improper for an expert to be given or to accept instructions not to reach agreement;
- Once an expert has been instructed to prepare a report for the use of a court, any communication between the expert and the client should not be privileged;
- Codes of practices providing guidance as to the practice in relation to experts should be drawn up jointly by the appropriate professional bodies representing the experts and the legal profession;
- Expert evidence should be adduced at the conclusion of all other evidence in the case^{*}.

As of 15 September 1998 the Practice Direction entitled "Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia" came into force. It sets out that an expert witness has a general duty to the Court. This is stated to have three defining aspects:

- an expert witness has an over-riding duty to assist the Court on matters relevant to the expert's area of expertise;
- an expert witness is not an advocate for a party; and
- an expert witness' paramount duty is to the Court and not to the person retaining the expert.

Under the Direction, legal practitioners are required to provide any expert witnesses they intend retaining for a case, with a copy of the Practice Direction.

Amongst other things, the Practice Direction requires expert witnesses to qualify findings in their reports (where they believe their report may be incomplete or inaccurate without some qualification), and to give reasons for their opinions. This latter requirement, while not appearing to be of any particular consequence, has the potential to make a major change to the character of many expert reports. Reports in

^{*} See Cooper, *op cit*, at 210.

many areas tend to err on the cryptic side, stating assertions and conclusions without overtly reasoning them through. Under the Practice Direction, such an approach is unacceptable.

Expert witnesses are now also required to disclose all instructions given to them which define the scope of their report, and to disclose the facts, matters and assumptions upon which their report proceeds. Expert witnesses must now also disclose if their opinions are not fully researched because they consider that insufficient data are available, and if a particular question or issue falls outside their field or expertise. In another major change, the Practice Direction provides that if expert witnesses retained by parties in a case meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement in that meeting. The Direction instructs that if the expert witnesses cannot reach agreement on matters of expert opinion, they must provide reasons for this to the Court.

Practitioners are expected to give a copy of the following Guidelines to any expert witness they propose to retain for the purpose of giving a report and giving evidence in a proceeding. The Federal Court Guidelines are stated not to be intended to address exhaustively all aspects of an expert's duties:

"General Duty to the Court

An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.

An expert witness is not an advocate for a party.

An expert witness's paramount duty is to the Court and not to the person retaining the expert.

The Form of the Expert Evidence

An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.

All assumptions made by the expert should be clearly and fully stated.

The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and give details of the qualifications of the person who carried out any such test or experiment.

Where several opinions are provided in the report, the expert should summarise them.

The expert should give reasons for each opinion.

At the end of the report the expert should declare that " I [the

expert] have made all the inquiries which the I [the expert] believe are desirable and appropriate and that no matters of significance which I [the expert] regard as relevant have, to my [the expert's] knowledge, been withheld from the Court."

There should be attached to the report, or summarised in it, the following:

- (i) all instructions (original and supplementary and whether in writing or oral) given to the expert which define the scope of the report;
- (ii) the facts, matters and assumptions upon which the report proceeds; and
- (iii) the documents and other materials which the expert has been instructed to consider.

If, after exchange of reports or at any other stage, an expert witness changes his or her view on a material matter, having read another expert's report or for any other reason, the change of view should be communicated in writing (through legal representatives) without delay to each party to whom the expert witness's report has been provided and, when appropriate, to the Court.

If an expert's opinion is not fully researched because the expert considers that insufficient data is available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one.

Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.

The expert should make it clear when a particular question or issue falls outside his or her field of expertise.

Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.

Experts' Conference

If experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement.

If, at a meeting directed by the Court, the experts cannot reach agreement on matters of expert opinion, they should specify reasons for being unable to do so."

The Federal Court Practice Direction is likely to prove influential in many other

jurisdictions.

The Australian Law Reform Commission has also raised for consideration whether the procedure employed by the Australian Competition Tribunal could be used more widely:

- The Tribunal directs all experts to prepare expert reports;
- Each expert gives an oral exposition of his or her expert opinion after both parties have tendered all their evidence;
- Each expert in turn expresses his or her opinion about the opinions expressed by other experts;
- Lawyers then cross-examine the experts with questions put to each expert in turn in the customary trial fashion, or to all or any one of the experts, one after the other in respect of a particular subject.”⁹

Respondents to the survey were invited to offer general comments in relation to matters raised within the survey. One judge drew pointed attention to the potential breadth of an analysis of the role of the expert within the trial system, maintaining that: “It is the *role* of experts in litigation that should be looked at. Experts have to be lifted out of the adversarial battle and provide impartial information to litigants (who will probably settle in the light of it) and courts. By the time it gets to ‘evidence’, the damage is done.” (emphasis added) The comment raises a series of the issues that lie at the heart of both the problems identified by the judicial responses to the survey instrument and the solutions suggested by many of the respondents.

This comment was not on its own, a number of judges arguing for changes to be made to the procedure of civil and criminal trials. One judge, for instance, maintained that:

“Experts should be allowed, subject to judicial control, to raise problems directly with other experts in the courtroom. The evidence should be more discursive and less formal. The judge should be able to seek explanations, raise difficulties and seek assistance from experts to assist his understanding of the evidence. Experts should be able to provide clear, precise explanations and to provide examples and illustrations of abstract principles on their application.”

These are views which are at odds with our pure adversarial tradition, but are quite consonant with those who seek more judicial intervention, a stronger quest for

⁹ A process used in *Re Queensland Independent Wholesalers Ltd* (1995) ATPR 41-438 at 40,295; see Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking Family Law Proceedings*, ALRC IP 22, AGPS, 1997, at p.90; Cooper, op cit, at 210-211.

truth, and a shift towards an inquisitorial model.

A series of questions posed by the survey instrument focussed upon the role of court-appointed experts, assessors and referees as suppliers of information and assessments instead of, or in addition to, evidence from party-called experts.

11.2 Court-Appointed Experts

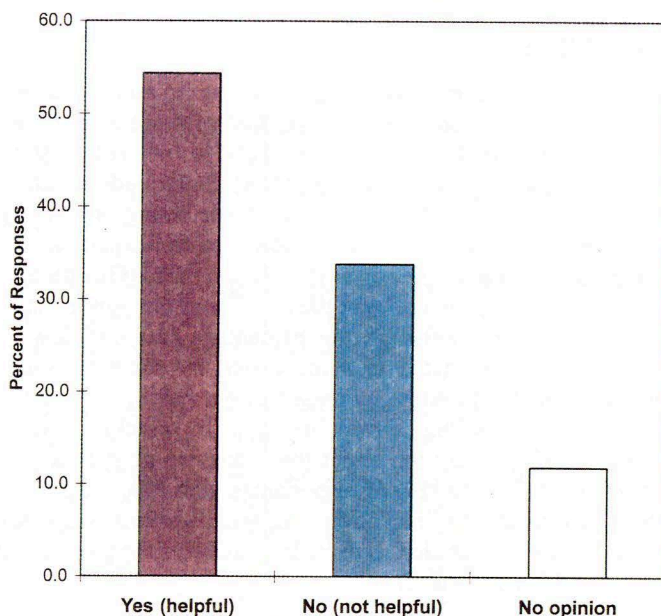
Judges were asked about their powers to call expert witnesses to assist them in the evaluation of expert evidence (**Question 9.1**). Just over half of those answering the questionnaire indicated that they had such a power (52.97%, n=116), a slightly smaller number indicating to the contrary (47.03%, n=103). Fewer judges sitting in the criminal area stated that they had such a power than those sitting principally in other areas. Overwhelmingly, those possessed of the power to call expert witnesses maintained that they had not exercised their power (81.88%, n=122) (**Question 9.2**). Higher numbers of Family Court judges said that they had used the power than did judges sitting in other jurisdictions, although the percentage was still low. The figures appear to have been contaminated to some extent by some respondents technically ineligible to answer the question, by reason of not having said that they had such a power, nonetheless providing a response to it. In principle, only 116 judges were eligible to answer the question about their exercise of such a power. However, it may be that the 10.25% (n=25) of respondents who failed to provide a response to the question on whether they had power to appoint experts bolstered the numbers of those responding to the question as to their exercise of the power, a total of 149 judges responding to the latter question.

At any rate, the trend of responses is very clear. Only a very small percentage of judges had appointed an expert witness themselves in the past five years. One in twenty answering the question (4.70%, n=7) said that they had appointed an expert once in the last five years; 8.05% (n=12) said that they had done so between once and five times, and 5.37% (n=8) said that they had done so more than five times within that period. Judges were asked about why they had failed to appoint expert witnesses if they had the power to do so (**Question 9.3**). The most common answer from those responding to the question (n=164) was that it had not been "necessary" (41.46%, n=68). This answer was particularly prominent amongst those Family Court judges who had not appointed experts. Other answers included the response that no party had requested the judge to exercise the power (34.76%, n=57). A smaller number of judges (15.85%, n=26) maintained that they had declined to appoint an expert on the basis that such measure would be contrary to the adversary process. This answer was most frequently advanced by judges sitting primarily in the criminal jurisdiction.

Of those who had appointed an expert, most judges found that the exercise had been "helpful" (69.23%, n=27) or "very helpful" (28.21%, n=11) to the fact-finding process. Only one judge, who apparently had had an adverse experience with the appointment of a court expert, indicated that the experience had been "unhelpful".

Judges were asked whether they were of the view that more use of court-appointed experts would be helpful to the fact-finding process (Question 9.5).

Figure 18: Judges' Views Regarding Use of Court-Appointed Experts (Q9.5)



Roughly half of the judges answering the questionnaire expressed the opinion that it would be "helpful" (54.34%, n=119), with about a third expressing the contrary view (33.79%, n=74). About one fifth of judges either did not have a view (11.87%, n=26). Family Court judges particularly expressed the opinion that more use of experts appointed by the Court would be helpful. The answers can therefore be seen as a significant, although hardly an overwhelming, endorsement of the use of more extensive court-appointed expert witnesses.

The questions in relation to court-appointed experts prompted a high volume of commentary. One judge noted that "I have on numerous occasions directed that experts confer and report to this court the true areas of disagreement. This is very helpful in resolving cases." In addition a judge of the Family Court noted that within that Court psychiatrists are "very frequently" appointed by the Court and valuers "less frequently." This occurs under Order 30A of the Family Law Rules, both on application of a party and of the Court's own motion. In addition, Family Court Counsellors "are in a sense court appointed experts."¹⁰ It was also noted that in the Chelmsford Private Hospital litigation, after consultation with the parties, the trial judge appointed a court expert in each of the 15 cases. The trial judge indicated that

¹⁰ Family Law Rules, 555 A (2); Family Law Act 1975 (Clth) s 629g.

he had found considerable utility in this process, although the parties either called their own experts in addition to the court-appointed expert or indicated that they proposed to do so prior to the matter being resolved by settlement.

Some judges indicated that they had never even contemplated trespassing into the arena of litigation to such an extent as to appoint an expert. The extent to which such a measure might be regarded at a purist level as inconsistent with the traditional role of the judge as ring-keeper under the adversary system is captured by the response of one judge: "It has never occurred to me to do so and I have no idea how I would go about it." Other judges were troubled by the practicalities of such a course, one commenting that it was more trouble than it was worth and another identifying "problems: (i) Who will pay the expert?; (ii) What opportunity do the parties have to influence the court expert's advice to the judge?" Other judges noted that the procedure of the court appointing experts could have ramifications for courts' budgets unless parties are prevailed upon to pay. This has the potential to work unfairness. A number of judges noted that in certain compensation areas the court "has the benefit of Medical Panel certificates." By and large, they indicated satisfaction with the process but in the same context one judge noted, "I believe I would have been assisted if I had exercised a power and called doctors in some instances."

Interestingly, the judicial comments were not characterised by a concern that court-appointed experts would exercise overmuch sway over the decision-making process, even if that task was the province of jurors. The issue has been expressed as a concern on occasions by involvement by courts in selecting and questioning witnesses but was rejected as a significant problem by researchers in 1991 who concluded that "fears that a court-appointed expert would overwhelm and unduly influence the jury are largely unsupported."¹¹

The comments in relation to the utility of greater use of court-appointed experts provided something of a qualification upon the support otherwise given by the judges' answers. A series of respondents supported the more frequent appointment of experts by courts provided that the process was carefully case-managed. One judge indicated that:

"The idea has a superficial appeal but: (1) The court-appointed expert acquires a status that is not warranted. (2) In cases of controversy between experts, it is usually because they come from different schools. Any court expert is likely also to come from one of the 2 'schools' (3) A court expert is not needed usually to identify flaws in the opinions of the experts called. It would be of value and save costs if parties do not have an expert and can agree on one to be appointed by the court. They would also have to agree on the briefing given to the expert."¹²

¹¹ NJ Brekke, PJ Enko, G Clavet and E Seclau, "Of Juries and Court-Appointed Experts" (1991) 15 *Law and Human Behavior* 451 at 469-470.

¹² The comment is reminiscent of the equivocal support for such a procedure given by Lord Denning MR in *Re Saxton* [1962] 1 WLR 968 at 972: "It is said to be a rare thing for it to be

The results of the survey of Australian judges are similar to the results obtained by Cecil and Willging in their survey of United States federal district court judges¹³. In that study, of the 86 judges who had availed themselves of the power to appoint experts (20% of the overall number), 255 appointments had been made. Fifty of the 86 judges who had made appointments replied that they perceived the appointment of court-appointed experts to be an extraordinary action:

"The importance of reserving appointment of experts for cases involving special needs was especially apparent in the responses of the judges who had made only a single appointment. Thirty-two of the forty-five judges who had appointed an expert on a single occasion indicated that they had not used the procedure more often because the unique circumstances in which they employed the expert had not arisen again. They simply had not found another suitable occasion in which to appoint an expert."

Similarly, in the Cecil and Willging study, 87 percent of the judges indicated that court-appointed experts are likely to be helpful in at least some circumstances¹⁴. In other words, they manifested the same in-principle support for more extended use of court-appointed experts but shared their Australian cousins' diffidence about exercising their powers. Cecil and Willging concluded that this was attributable primarily to the difficulty of accommodating court-appointed experts in a court system that values and generally anticipates adversarial presentation of evidence.¹⁵

Australian judges' support in principle for further use of court-appointed experts raises a number of practical challenges if it is to be implemented. Principal amongst these are how such experts are to be chosen and how they are to be paid. If such a process has the potential to add yet another layer of costs to an already expensive litigation process, it has little to commend it. Other questions raised by the responses include the following. If courts are to appoint experts, and the parties cannot agree upon the appointee, should the court have recourse to a list of appropriate experts? If so, who is to formulate the list? If it is the relevant professional association that credentials experts available for court-appointment, how chilling an effect upon non-mainstream approaches will this have, and is it a price worth paying?

done. I suppose that litigants realise that the court would attach great weight to the report of a court expert, and are reluctant thus to leave the decision of the case so much in his hands. If his report is against one side, that side will wish to call its own expert to contradict him, and then the other side will wish to call one too. So it would only mean that the parties would call their own experts as well. In the circumstances, the parties usually prefer to have the judge decide on the evidence of experts on either side, without resort to a court expert."

¹³ JS Cecil and TE Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence*, 706, Federal Judicial Center, Washington DC, 1993.

¹⁴ See also the small and inconclusive study on the subject by A Champagne, DW Shuman and E Whitaker, "The Problem with Empirical Examination of the Use of Court-Appointed Experts: A Report of Non-findings" (1996) 14 *Behavioral Sciences and the Law* 361.

¹⁵ JS Cecil and TE Willging, *Court-Appointed Experts: Defining the Role of Experts Appointed Under Federal Rule of Evidence*, 706, Federal Judicial Center, Washington DC, 1993 at p.5; see also JM Sink, "The Unused Power of a Federal Judge to Call His Own Expert Witness" (1956) 29 *Southern California Law Review* 195.

If the parties are not in a position to bear the cost of a court-appointed expert jointly, who is to pay, and how much? Are court-appointed experts as feasible in criminal matters as in civil or family? Legal aid funds are unlikely to be available for such a procedure. Should a special budget be allocated to the courts to cover the costs of paying such experts, and if so how likely is a government to countenance this kind of additional burden on the public purse?

11.3 Assessors

Assessors have been used in a number of jurisdictions, in particular in the admiralty jurisdiction, to assist judges by the supply of information to promote informed evaluation of expert evidence called by the parties¹⁶. The better opinion appears to be that:

"To treat . . . any assessor, as though he were an unsworn witness in the special confidence of the judge, whose testimony cannot be challenged by cross-examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence."¹⁷

However, the use of assessors has been controversial because of ongoing uncertainties about the proper extent to which assessors can influence judges' decision-making processes without the substance of their analyses being available for scrutiny to the parties¹⁸.

A terminology problem needs to be acknowledged because it may have affected some of the answers provided by judges. It applies in at least one jurisdiction in Australia. The traditional assessor is an expert who sits with the judge and promotes better understanding of complex issues. However, under the Land and Environment Act 1979 (NSW), assessors, as well as sitting to assist and advise the Court¹⁹, may also sit as "commissioners" or "referees", themselves holding "inquiries"²⁰. This

¹⁶ See *Owners of SS Australia v Owners of Cargo of SS Nautilus* [1927] AC 145 at 150, 152; *The Magna Charta* (1871) 1 Asp MLC 153 at 154; *The Beryl* (1884) 9 PD 137 at 141.

¹⁷ *Richardson v Redpath, Brown & Co Pty Ltd* [1944] AC 62 at 70; see further *The Tovarich* [1931] AC 121.

¹⁸ See *Adhesives Pty Ltd v Aktiesselskabet Dansk Gaeringindustri* (1936) 55 CLR 523 at 580; *The Ship Sun Diamond v The Ship Erawan* (1975) 55 DLR (3d) 138 at 144.

¹⁹ Land and Environment Act 1979 (NSW), s37(2).

²⁰ Land and Environment Act 1979 (NSW), s35(1). Assessors under the Act are qualified for appointment if in the opinion of the Minister they have (a) special knowledge of and experience in the administration of local government or town planning; (b) suitable qualifications and experience in town or country planning or environmental planning; (c) special knowledge of and experience in environmental science or matters relating to the protection of the environment and environmental assessment; (d) special knowledge of an experience in the law and practice of land valuation; (e) suitable qualifications and experience in architecture, engineering, surveying or building construction; (f) special knowledge of and experience in the management of natural resources or the administration and management of Crown lands, lands acquired under the Closer

conflation of roles is confusing.

Judges were asked whether they had power to appoint an assessor to help them in relation to the evaluation of expert evidence (**Question 9.6**). Their answers were similar to those in relation to the appointment of experts. About half of the judges answering the question said they had the power to make such an appointment (50.23%, n=108), a similar number saying that they did not (49.77%, n=107).²¹ Very few judges, however had utilised the power (**Question 9.7**). In fact nine in ten of judges with the power to appoint an expert had not done so (90.09%, n=100), three judges having done so once, five between one and five times and three more than five times.²² Of the 13 judges who had used assessors, three said it had been "unhelpful", five said it had been "helpful" and five said it had been "very helpful".

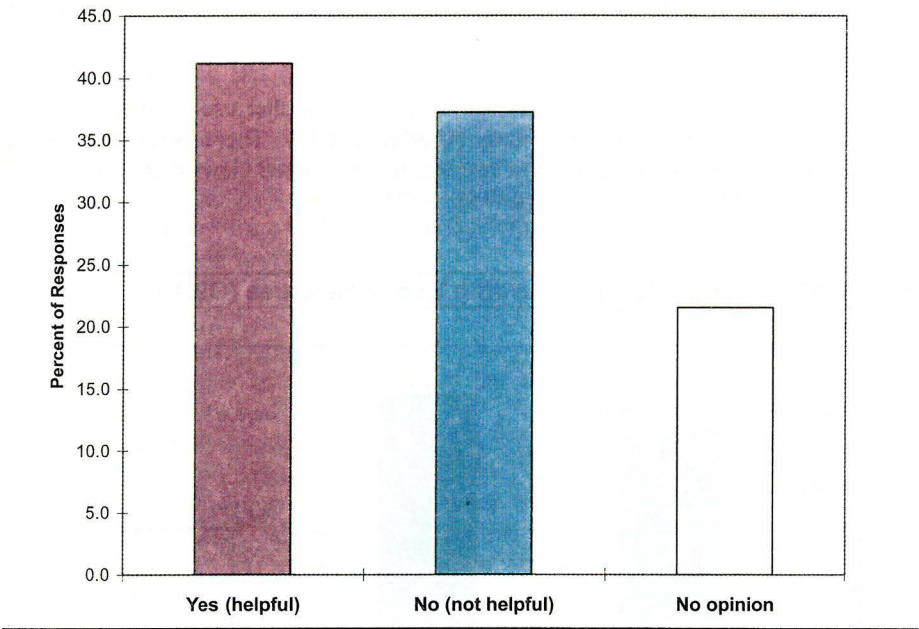
Settlement Acts and other lands of the Crown; or (g) suitable knowledge of matters concerning land rights for Aborigines and qualifications and experience suitable for the determination of disputes involving Aborigines."; s.12(2).

²¹ Eleven percent of judges (11.89%, n=29) failed to respond to the question, perhaps indicating a degree of uncertainty in their minds about possession of the power.

²² Responses to the appointment question were more congruent with the power question in relation to assessors, than they were with the court-appointed expert questions. While 108 judges said that they had the power to appoint assessors, 111 judges who should have equated to the 108 subset answered the question about appointment frequency.

Judges were asked about their views about the utility of more frequent appointment of assessors (**Question 9.9**). The slightly predominant view was that more use of assessors would enhance the fact-finding process (41.18%, n=84), a slightly smaller number holding the contrary view (37.25%, n=76). A substantial percentage of judges indicated that they either did not have a view (21.57%, n=44).

Figure 19: Judges' Views Regarding Use of Assessors (Q9.9)



Judges made relatively few comments in relation to the assessor questions in the survey instrument. One respondent said that he or she had raised the question of using assessors in a long case and had been told in submissions that there were so many disciplines involved in the case that using assessors would be unworkable. It was also put to the judge that the parties had assembled world-recognised experts and that the only experts that could be assembled by the court would be of an inferior level of expertise. The respondent said that “Reflection satisfied me that [it would have been unworkable]. Managing attendance of assessors in a ... long case would have been very difficult.” Other judges queried the cost effectiveness and fee arrangements for the use of assessors.

Another judge summed up the challenge if assessors are to be used more often: “There is much work to be done to lay down some rules of practice for this.”

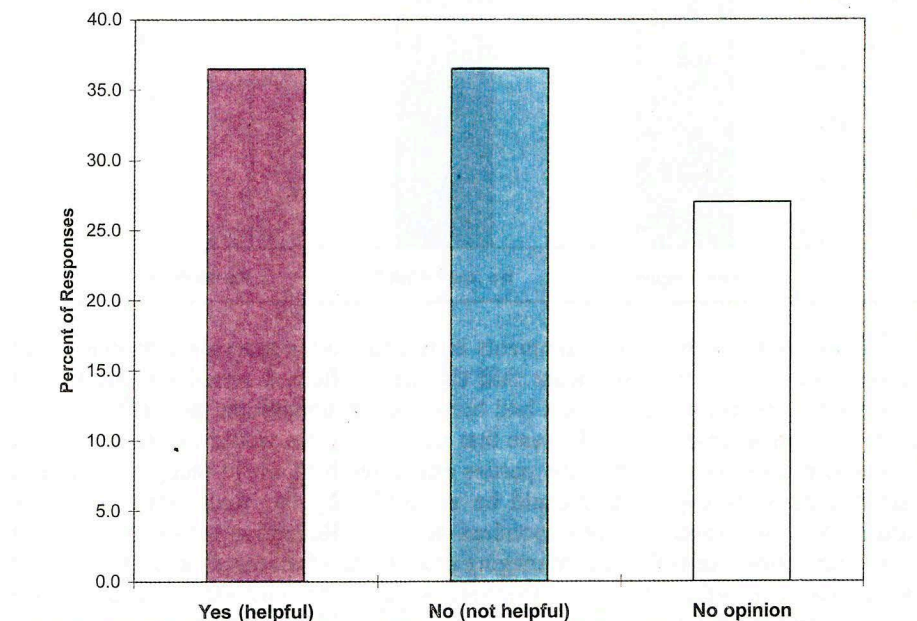
11.4 Referees

As the final subset of questions within the category, judges were asked about whether they had power to appoint referees to make determinations in relation to technical issues (**Question 9.10**). A slight preponderance of those answering the

question indicated that they possess such a power (52.61%, n=111)²³. Again the overwhelming response from judges with the power to appoint referees was that they had not exercised it (68.97%, n=80) but this time a small number of judges (5.17%, n=6) indicated that they had exercised the power once in the past five years, and a larger percentage (16.38%, n=19) said that they had used it between one and five times, a slightly smaller number that they had used it more than five times (9.48%, n=11) (**Question 9.11**). Of the judges who had said that they had appointed referees, two thirds said that the process had been “helpful” from the point of view of the fact-finding process (66.67%, n=24), while a quarter said that it had been “very helpful” (25%, n=9).

Judges were asked about whether they thought that further use of referees would be helpful for the fact-finding process (**Question 9.13**). There was considerable division of opinion. Equal numbers of respondents expressed views that it would and would not be helpful (36.50% each, n=73).

Figure 20: Judges' Views Regarding Use of Referees (Q9.13)



It was noted by a number of respondents that an advantage of a referee's report was its potential to provide a basis for settlement but it was conceded that, in the short term at least, referees are expensive. However, one judge registered a strong dissent:

²³ 40.98% (n=100) said they did not have such a power, while 13.52% of judges (n=33) did not respond to the question, again raising the possibility of some uncertainty on their part about having the power.

“(1) Referees are expensive. (2) They do not advance settlement prospects. (3) They are reluctant to depart from court procedures. (4) There are great difficulties in formulating the question for the referee. (5) It often happens that after the referee has published the report, the unsuccessful party amends to escape its effect in the litigation.”

11.5 Other Procedures

Judges were also asked whether they had used procedures in relation to expert evidence, other than court-appointed experts, assessors and referees, to assist the fact-finding process (Question 9.14). One in seven of those answering the question (14.93%, n=30) said that they had. The comments in explanation were various.

Many respondents argued in favour of a procedure for crystallising the issues in dispute between the parties' experts. One version of this process is known as the “hot tub procedure” whereby examination and cross-examination of experts is conducted in a free-form fashion, as would happen in a panel discussion involving counsel, experts and the fact-finder²⁴.

A number of different procedures were reported, including compulsory pre-trial conferences of experts; pre-trial mediation between experts; and at least exchange of expert reports prior to trial, provided that the reports contained an adequate statement of the factual and other bases for the expert opinions. The advantage identified in such procedures was that the issues actually in dispute could be separated out from those upon which there was consensus, thereby saving court time and money. This approach was consistent with recommendations advanced in England by the Royal Commission on Criminal Justice where Viscount Runciman of Doxford argued that, especially in cases involving scientific evidence:

“the pre-trial phase should be used to sort out and define as many scientific issues as possible... the objective should be to ensure that, before the issues are presented to the jury, everything possible has been done to clarify the scientific evidence and to identify the extent of agreement between the expert witnesses on matters of scientific fact and interpretation, or at least to narrow the differences between them.”²⁵

There was also some support for the preparation of joint reports. One respondent expressed the view that what is

“Critical in most cases is a need for the experts to confer and to prepare a joint report. Such a report not only states the material facts and the views the experts share. It must also state, clearly and concisely, the points of difference and the reasons for them. In this way, the tribunal of fact is assisted in discovering why the experts

²⁴ See the description of the procedure in *Re Queensland Independent Wholesalers Ltd* (1995) ATPR 41-438 at 40,925.

²⁵ Royal Commission on Criminal Justice, *Report* (Chairman: Viscount Runciman of Doxford), HMSO, London, 1993 at p.156.

disagree. Are they, for example, relying on different facts, or is the difference founded on differing interpretations and inferences and, if so why and what are they? See eg Practice Note (1992) 66 ALJ 861-2; Supreme Court of Queensland, Practice Direction 15 of 1996, Annexure B, para 7."

A judge of the Family Court argued that the provision of opinion evidence in family reports by Court Counsellors or psychiatrists or psychologists commissioned by the Court "has worked very well, most experts being familiar with the task and well qualified. The other area is valuers and accountants in property matters. The preparation of joint statements is very helpful here. Most problems seem to be genuine differences in method or judgement."²⁶ A series of other judges from the same jurisdiction expressed satisfaction with the processes of the Family Court²⁷.

Judicial intervention in relation to procedures for the calling of witnesses was championed by a number of respondents. It varied in style and extent. A number of judges indicated that they did their own research on matters of expertise, including one stating that he or she "searched the Internet and informed counsel of this." Another stated that in the planning and environment jurisdiction the judge had used informal "practice directions", including the following:

"(1) Limiting the time for oral evidence-in-chief (encouraging written statements and reports); (2) Experts to prepare schedules showing comparison of reports of 'opposing' experts on (a) areas of no disagreement; (b) areas of disagreement minor and major; (c) summary of argument as to why their views were to be preferred; (3) Insisting experts make their reports more 'user-friendly' - pagination, index, cross-reference, detail in Appendices."

Another judge advocated the calling of more than one expert at the one time, a solution previously employed and advocated in the civil context by Justice Rogers²⁸:

"In one matter, I swore two psychiatrists at once and took their evidence as a discussion of the patient's problem. I controlled the topics and kept the discussion to the point, but counsel asked the questions. It was a useful technique in the particular circumstance,

²⁶ See Australian Law Reform Commission, *Review of the Adversarial System of Litigation: ADR - Its Role in Federal Dispute Resolution*, ALRC IP 25, AGPS, Canberra, 1998, at p.31.

²⁷ The Australian Law Reform Commission recommended in its joint report with the Human Rights Commission, *Seen and Heard: Priority for Children in the Legal Process*, AGPS, Canberra, 1997, para 16.41-16.47, recommendation 144, that more use should be made of Order 30A of the Family Court Rules which provides latitude to the Family Court in hearing evidence about matters in dispute.

²⁸ For an account of this, see I Freckelton, *The Trial of the Expert*, Oxford University Press, Melbourne, 1987 at p.234-5, in particular in relation to the procedure adopted in *Spika Trading Pty Ltd v Royal Insurance Australia Ltd*, unreported, Supreme Court of NSW, 3 October 1985. See also the procedure adopted in *Police v Isobel Phillips*, unreported, Northern Territory Court of Summary Jurisdiction (no 1529-30 of 1982) where Murphy SM allowed 4 senior Aboriginal women to give evidence together to determine applicable Aboriginal customary laws.

but not (I think) of general application.”²⁹

In many jurisdictions, it is the norm for examination-in-chief of the expert to be primarily or exclusively the tendering of the expert witness’ report. This too was observed to have its limitations if the report is flawed in its disclosure of the data upon which its views are based or in its explanation of its reasoning processes.

Different attitudes were evident toward the utility of medical panels to which reference can be made in some jurisdictions. One respondent commented that he or she rarely made such a reference “as it is best simply to decide the issue. If the issue is relatively simple it takes little time to decide. If it is difficult, the parties usually seek the decision of the court in any event, as it is better to decide it at once on the competing medical evidence.”

Another means of improving the lot of the decision-maker is to improve the quality of the communication of facts and opinions. A number of suggestions from judges related to the inadequate use made of courtroom aids. One judge, for instance, noted that, “Presentation of accounting information usually requires tracing of items through records from primary documents and with bank accounts. The use of charts, overhead projectors and books and documents for the use of the judge/jury can simplify the entire process, but if some such technique is not used, the judge and/or jury will soon find the evidence difficult to follow.”

²⁹ The procedure has its risks, though. The High Court commented adversely on the “panel system of cross-examination” in *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13 at 35.



PART TWELVE: THE FUTURE

12.1 Changing Expert Culture

Many judges who responded to the survey identified partisanship or bias on the part of expert witnesses as an issue about which they were concerned and in respect of which they thought that there needed to be change. They did so directly in their answers to questions and also in their comments about experts' lack of objectivity. Many raised the issue more than once in their responses. The picture painted by a significant cross-section of respondents was one of worry about an unacceptable culture in sectors of disciplines providing report-writers and witnesses to the courts. The culture, they asserted, does not adequately value and put into practice independence, objectivity or transparency of opinions.

The 1998 Federal Court Practice Direction concerning expert evidence is an important development in prescribing how experts should write their reports and give their evidence. The Direction is likely to prove influential with other Australian courts and tribunals, not just in dictating explicitly that the expert's primary responsibility is to the court or tribunal, but in regulating the quality and style of the information provided by experts. Especially important in this regard are the extensive obligations of disclosure by experts and the requirement that they explicitly assign reasons to the opinions that they express. The Direction has the potential to make a significant difference to the expectations of experts' contributions and in due course to the contributions themselves.

Amongst expert witnesses and within the judiciary in England, in particular, recent years have seen a recognition of the need to develop codes of ethics and practice for forensic experts which will consolidate for them an expectation and practice of objectivity. There is much to be said for the standardised making of a declaration by an expert which embraces the principles of independence and sound practice embraced by the expert report writer or witness. Symbolically, such a declaration is eloquent in terms of the ideals expressed. In time, such a declaration is likely to forge a culture of obligation on the part of expert witnesses primarily to the courts, rather than to the parties paying their fees. Finally, the presence of such a declaration articulates values departure from which is likely to lead to little weight being placed upon the defaulting expert's views. Building upon the Federal Court Practice Note and recent initiatives in England, we propose that the following declaration be mandated of witnesses permitted to give opinion evidence as experts:

I,, DECLARE THAT:

1. I recognise that my overriding duty in writing reports and in giving evidence is to the Court/Tribunal, rather than to the party commissioning me and/or paying my fees.
2. I have used my best endeavours to produce my report in sufficient time to enable proper consideration of it.
3. I have made myself reasonably available for discussion of the contents of my report with professional representatives of all parties involved in the

litigation.

4. I have provided within my report
 - (a) details of my relevant qualifications;
 - (b) details of the literature and other significant material that I have used in arriving at my opinions;
 - (c) identification of any person, and their qualifications, who has carried out any data selection, data inspection, tests or experiments upon which I have relied in compiling my report; and
 - (d) details of any instructions (whether in writing or oral, original or supplementary) which have affected the scope of my report.
5. I have used my best endeavours in my report, and will endeavour in any evidence which I am called to give,
 - (a) to confine myself to expressing opinions as an expert within those areas in which I am specially knowledgeable by reason of my skill, training or experience;
 - (b) to distinguish among the data upon which I have relied, the assumptions which I have made, the methods that I have employed, and the opinions at which I have arrived;
 - (c) to indicate those data, assumptions and methods upon which I have significantly relied to arrive at my opinions;
 - (d) to give succinct reasons for each of the opinions which I express;
 - (e) to be objective and unbiased;
 - (f) to make the opinions which I express clear, comprehensible and accessible to those not expert in my discipline;
 - (g) to be scrupulous in terms of accuracy and care in relation to the data upon which I rely, my choice of methods, and the opinions which I express arising from those data;
 - (h) to indicate whether I have been provided with all the data necessary for me to arrive at the views which I have expressed and whether I need further information.
 - (i) to indicate whether I have been apprised of any data or choice of method which might entail opinions which are inconsistent with the opinions which I have expressed; and

- (j) to indicate whether I have been unable for any reason to employ the methodology which I would prefer to use before expressing an opinion.
- (6) If I become aware of any error or any data which impact significantly upon the accuracy of my report, or the evidence that I give, prior to the legal dispute being finally resolved, I shall use my best endeavours to notify those who commissioned my report or called me to give evidence.
- (7) I shall use my best endeavours in giving evidence to ensure that my opinions and the data upon which they are based are not misunderstood or misinterpreted by the Court/Tribunal.
- (8) I have not entered into any arrangement which makes the fees to which I am entitled dependent upon the views I express or the outcome of the case in which my report is used or in which I give evidence.

12.2 Roads Toward Effective Evaluation

However, practice directions and mandatory witness declarations can only go so far in addressing issues identified by the respondent judges as problematic. They can make opinions more readily susceptible of evaluation and they can go some way toward breaking down inappropriate affiliations between parties and experts, but they can do very little to facilitate expert accountability in the courtroom. For a trier of fact to be able to evaluate expert evidence effectively, a number of preconditions must be met.

Included amongst such requirements is the capacity of triers of fact to assess the reliability of expert evidence. Whether this be by reference to the preponderance of opinion within the relevant intellectual marketplace or by reference to a concept such as falsifiability, or by the existence of controls and peer-reviewed publications on the subject, the reliability of expert evidence is, and will remain, a threshold issue for triers of fact. However, in Australia the role of reliability as a condition precedent to admissibility has yet to be determined finally.

Professional organisations have a constructive role to play in credentialling expert witnesses who can speak on their behalf. Representatives of medical colleges have advocated this concept for some time. Such a system would not preclude the commissioning of persons from outside such a regulated professional accreditation system but it would provide a significant impediment in the way of the use of experts whose views are ill-regarded by their colleagues. The onus in a practical sense would shift onto the party calling a non-accredited expert to explain the need for, and the legitimacy of, such a step.

Another role for such accredited experts may be for them to act more regularly as referees and assessors to advise courts on how experts agree and disagree, the bases for their disagreements and where mainstream opinion lies. An advantage of such an approach is that examination-in-chief and cross-examination would be more likely to focus upon issues actually in dispute, rather than upon misunderstandings of what these might be. While the usual practice is for judges in civil matters to accept a

referee's report as resolving the relevant matter in dispute, another option is for there to be much more widespread use of referee reports but to extend to the parties the opportunity, subject to the potential penalties of costs orders, to test referee's reports and to go beyond them.

Implicit in the contentions of those who favour more use of referees, and often of those who support greater use of court-appointed experts and assessors, is recognition of the utility of more pre-trial involvement by courts in crystallising issues in dispute and the making of orders designed to improve the efficient case-management of the expert evidence component of trials. There is much to be said for early involvement by trial judges in order to make possible innovative initiatives in relation to expert evidence which cease to be viable when trials are part-heard. For instance, there are cases where it is apparent from the outset that communication of complex concepts will present problems. In such cases, early exercise of judicial control can facilitate the leading of demonstrative evidence, which eases the burden of the trier/s of fact, once the relevant evidentiary foundations are established.

The judges who responded to the survey questionnaire expressed strong support for the provision of further training to both experts and advocates in relation to report-writing and the giving of evidence. The benefits of such training have been disappointingly little recognised as yet in many quarters. Most prominently, they are the enhancement of communication skills on the part of expert witnesses and the honing of interdisciplinary knowledge and capacity for focused cross-examination on the part of advocates. The judges' identification of clarity of explanation as the single most important factor in the oral delivery of evidence highlighted the importance of expert witnesses developing communication skills of a high order if they are to supply to decision-makers information with which they are able to deal adequately. For some witnesses these skills are natural; for most they take time and training to reach a high level of proficiency. With the increasing volume and sophistication of specialist evidence coming before the courts in the form of both reports and oral evidence, there is a growing need for advocacy that can grapple with such complexities and intricacies. This too demands a challenging cultural shift - for the legal profession to learn more about other areas of professional expertise so that they can both present such evidence effectively in examination-in-chief and then ask the questions that should be asked in cross-examination.

What emerges clearly from the diversity of response to the survey instrument in relation to the problems with expert evidence identified by respondent judges is that no single answer will address all the difficulties. Some of the problems are relatively intractable - complexity and conflict within non-legal areas of endeavour are unlikely to dissipate to any dramatic extent. Probably they will become more pronounced. While the law yearns for absolute answers to complex questions, most disciplines have within them significant, legitimate differences of approach. The best that the courts can do to ease the lot of the trier of fact is to intervene early to delineate issues of expert endeavour that are genuinely in dispute and to make rulings that facilitate the comprehensibility of evidence. In this regard it is likely that the courts' traditional preoccupation with oral presentation of evidence, including expert evidence, will diminish. The use of tendered expert reports as at least the

basis of examination-in-chief is still not uniform in Australia. There is much to be said for its becoming so. Where reports are determined to contain inadmissible material, they can be edited at court direction in the same way as police interviews in the criminal context are edited and transcripts adjusted accordingly. Technology makes such tasks easily realisable.

The survey of judges has demonstrated much that is not yet known. Judges have impressions of what jurors struggle with and where they encounter the most difficulty but negligible empirical information exists about what jurors in Australia think about such matters. Such information would be valuable indeed to provide a solid information base for reforms that should incorporate the views of this important group of consumers of both expert evidence and trial advocacy.

Phases three and four of the expert evidence project also have the potential to add important information to that which is currently available about the role and difficulties posed by expert evidence for the legal system generally. Proceedings in magistrates courts have much in common with those in intermediate and superior courts but they also have important differences. They are often less formal. They also carry a remarkable range of diversity. Coroners' courts and some children's welfare jurisdictions are characterised by inquisitorial elements that pose tantalisingly the question of whether features of the inquisitorial system could usefully be imported into other proceedings that at present are traditionally adversarial in character. Finally, the proposed survey of litigation lawyers has the potential to add another important perspective upon the litigation process in Australia to which expert witnesses contribute.

The judicial survey has shown that many judges are prepared to contemplate thoroughgoing reforms to trial procedure in both the civil and criminal areas in relation to expert evidence. Judges, and probably the general community, are no longer wedded to the traditional Anglo-Australian concept of the adversary system, in which litigation is entrusted to the hands of the parties and judges are expected to remain relatively uninvolved. Expenses and notorious miscarriages of justice have consolidated a preparedness on the part of many judges to explore options that in previous years would have been repudiated¹.

Significant numbers of judges are prepared to contemplate ways of making the issues in dispute clearer for fact-finders and for judges to take a more interventionist role in facilitating or orchestrating the achievement of such clarity. In some cases, this may be through judges in civil matters referring matters of expert dispute to be determined by an independent referee, him or herself an expert. In others judges are prepared to give serious consideration to calling the evidence themselves, in others

¹ For the Australian context in this regard, see M Brown and P Wilson, *Justice and Nightmares: Successes and Failures of Forensic Science*, New South Wales University Press, Sydney, 1992; K Carrington, M Dever, R Hogg, J Bagen and A Lohrey (ed), *Travesty! Miscarriages of Justice*, Pluto Press, 1991; I Freckelton, "Judicial Attitudes Toward Scientific Evidence: the Antipodean Experience" (1997) 30 *University of California Law Review* 1137 at 1157-1176. For a recent United States work on the subject, see JF Kelly and PK Wearne, *Tainting Evidence: Inside the Scandals at the FBI Crime Lab*, Free Press, New York, 1998.

to sitting with assessors, in others to having more than one witness giving evidence at the same time. The problems presented by expert evidence, amongst a number of contemporary problems within the civil and criminal justice systems, most particularly their cost and inaccessibility, have elicited from a substantial part of the Australian judiciary a preparedness to contemplate fundamental change to the structure of the litigation system. The judicial survey demonstrates a readiness on the part of many Australian judges to canvass practical and cost-neutral procedural changes which will address the challenges posed by complex and conflicting expert evidence. The next step is to translate this goodwill into workable and cost-equitable procedures that will address the problems highlighted with the traditional means of adducing and evaluating party-generated expert evidence.

APPENDIX A: THE SURVEY INSTRUMENT

Survey of Trial Judges on Expert Evidence

Your Comments

Throughout this survey please answer questions by circling your choice of option or options. Any comments or explanations are welcome in the space at the right side of each page ⇨, or at the end of this survey. ⇩

PART ONE

- 1.1 Which one of the following describes the **predominant** area of your judicial practice:
- (a) appellate cases;
 - (b) criminal trials;
 - (c) family law hearings;
 - (d) personal injury/workers compensation hearings;
 - (e) commercial/equity hearings;
 - (f) industrial/employment hearings; or
 - (g) other - please specify ⇨
- 1.2 Have you served as a judge for:
- (a) less than 2 years;
 - (b) between 2 and 5 years;
 - (c) between 6 and 10 years;
 - (d) between 11 and 20 years; or
 - (e) more than 20 years?
- 1.3 Have you served **predominantly** as:
- (a) a Federal judge;
 - (b) a judge of a State;
 - (c) a judge of a Territory ?
- 1.4 Are you: (a) male or, (b) female.
- 1.5 How often in cases over which you have presided at first instance have experts been called to give 'opinion evidence'?
- (a) never ;
 - (b) occasionally;
 - (c) often;
 - (d) always

2.7 Overall how do you assess the usefulness of the written expert reports that are tendered before you?

- (a) very poor;
- (b) poor;
- (c) reasonable;
- (d) good;
- (e) very good.

2.8 In the expert reports that are tendered to you, does it appear that lawyers have played a part in settling the content (for example, as commonly happens in respect of lay affidavits)?

- (a) never- please go to 2.10
- (b) occasionally;
- (c) often;
- (d) always

2.9 If you answered the previous question (b), (c), or (d), what is the usual effect that this participation by the lawyers has upon your assessment of the weight to be given to the expert's evidence?

- (a) it helps;
- (b) it hinders;
- (c) it makes no difference.

2.10 From the following list please **circle the three** factors which you consider to be the most persuasive when an expert is giving oral evidence:-

their appearance; clarity of explanation;
educational qualifications; prior experience in the field;
prior experience as an expert witness;
familiarity with the facts; impartiality; publications.

Survey of Trial Judges on Expert Evidence

Your Comments

If your answer to Question 1.5 was 'never' please proceed no further with this survey. Return this survey now to the AIJA. Thank you.

PART TWO

2.1 When expert witnesses are called, do you find the expert evidence useful for the fact-finding process?

- (a) never;
- (b) occasionally;
- (c) often;
- (d) always.

2.2 Have you encountered any of the following problems with expert evidence?

(i) *bias on the part of the expert;*

- (a) never;
- (b) occasionally;
- (c) often;
- (d) always.

(ii) *use of oral or written language by the expert that was difficult to understand;*

- (a) never;
- (b) occasionally;
- (c) often;
- (d) always.

(iii) *failure by the expert to stay within the parameters of his or her expertise*

- (a) never;
- (b) occasionally;
- (c) often;
- (d) always.

Survey of Trial Judges on Expert Evidence

Your Comments

(iv) *nonresponsiveness by the expert to questions;*

- (a) never;
- (b) occasionally;
- (c) often;
- (d) always.

(v) *failure to prove the bases of the expert's opinions;*

- (a) never;
- (b) occasionally;
- (c) often;
- (d) always.

(vi) *failure by the advocate to pose examination- in-chief questions appropriately;*

- (a) never;
- (b) occasionally;
- (c) often;
- (d) always.

(vii) *failure by the advocate to cross-examine so as to make the expert accountable*

- (a) never;
- (b) occasionally;
- (c) often;
- (d) always.

2.3 What is **the single** most serious problem you have encountered with expert evidence?

- (a) bias on the part of the expert;
- (b) use of oral or written language by the expert that was difficult to understand;
- (c) failure by the expert to stay within the parameters of his or her expertise
- (d) failure to prove the bases of the expert's opinions;
- (e) nonresponsiveness by the expert to questions;
- (f) failure by the advocate to pose examination-in-chief questions appropriately;

Survey of Trial Judges on Expert Evidence

Your Comments

- (g) failure by the advocate to cross-examine so as to make the expert accountable;
- (h) other - please specify ⇨

2.4 Have you encountered evidence from experts which you were not able to evaluate adequately because of its complexity?

- (a) never -please go to 2.7
- (b) occasionally;
- (c) often;
- (d) always.

2.5 If you answered (b),(c),or (d) to the previous question, did the evidence come from a witness or witnesses from the disciplines of:

- (a) science;
- (b) psychiatry
- (c) psychology;
- (d) medicine/surgery;
- (e) accounting;
- (f) engineering;
- (g) statistics;
- (h) planning; or
- (i) other - please specify ⇨

2.6 If you selected more than one field in the previous question, which **one field** was the most difficult to evaluate adequately?

- (a) science;
- (b) psychiatry
- (c) psychology;
- (d) medicine/surgery;
- (e) accounting;
- (f) engineering;
- (g) statistics;
- (h) planning; or
- (i) other -please specify ⇨

- 2.11 From the following list please **circle the one** which you consider to be the single most persuasive factor when an expert is giving oral evidence:-

their appearance; clarity of explanation;
educational qualifications; prior experience in the field;
prior experience as an expert witness;
familiarity with the facts; impartiality; publications.

PART THREE

- 3.1 How effectively do **most** advocates appearing before you elicit oral evidence-in-chief from expert witnesses?

(a) very poorly;
(b) poorly;
(c) reasonably;
(d) well;
(e) very well

- 3.2 On the occasions when there have been difficulties with the way in which advocates appearing before you have elicited evidence-in-chief from an expert witness, has this resulted from **one or more** of the following:

(a) inadequate preparation by the lawyers to master the technical issues;
(b) inadequate preparation of the expert by their lawyers;
(c) poor skills by the lawyer in eliciting the evidence;
(d) taking the expert beyond his or her field of expertise;
(e) other - please specify ⇨

- 3.3 How effectively do **most** advocates appearing before you make expert witnesses accountable by cross-examination for the opinions they expressed in examination-in-chief?
- (a) very poorly;
 - (b) poorly;
 - (c) reasonably;
 - (d) well;
 - (e) very well
- 3.4 If you answered 3.3 by (a), (b) or (c), how much, if at all, a problem for the fact finding process in your court is this failure to make expert witnesses accountable?
- (a) very unimportant;
 - (b) unimportant;
 - (c) significant;
 - (d) very significant
- 3.5 When cross-examination of expert witnesses before you has been inadequate, what have been the most significant reasons (select **up to three** factors):
- (a) inadequate preparation by the cross-examiner;
 - (b) lack of skill by the cross-examiner;
 - (c) non-responsive answers by the expert;
 - (d) confusion in use of terminology by the advocate;
 - (e) confusion in use of terminology by the expert;
 - (f) no application being made to have other experts in court to assist counsel;
 - (g) undue repetition in the evidence.
 - (h) other - please specify ⇨

- 3.6 When cross-examination of expert witnesses before you has been inadequate, what has been the **single** most significant reason:
- (a) inadequate preparation by the cross-examiner;
 - (b) lack of skill by the cross-examiner;
 - (c) non-responsive answers by the expert;
 - (d) confusion in use of terminology by the advocate;
 - (e) confusion in use of terminology by the expert;
 - (f) no application being made to have other experts in court to assist counsel;
 - (g) undue repetition in the evidence.
 - (h) other - please specify ⇨
- 3.7 Have you experienced difficulty in evaluating the opinions expressed by one expert as against those expressed by another?
- (a) never - please go to 3.9
 - (b) occasionally;
 - (c) often;
 - (d) always.
- 3.8 If you answered (b), (c), or (d) to the previous question, which **one** of the following factors has been most responsible?
- (a) poor leading of evidence;
 - (b) poor cross-examination of evidence;
 - (c) poor communication by the experts;
 - (d) experts lacking credibility;
 - (e) the complexity of the expert evidence;
 - (f) fundamental irreconcilability of views expressed by opposing experts
 - (g) other - please specify ⇨
- 3.9 Have you heard cases where you have formed the view that a key expert has been retained by one side just to make the expert less available as a witness for the other side?
- (a) never;
 - (b) occasionally;
 - (c) often;
 - (d) always.

PART FOUR

- 4.1 Are you of the view that further training of experts in their forensic function is:
- (a) unnecessary - please go to 4.4
 - (b) desirable;
 - (c) necessary;
 - (d) essential?
- 4.2 If you answered (b) (c) or (d) to the previous question, in which **one or more** of the following areas do you think that training would be helpful:
- (a) the limits of the forensic expert's role;
 - (b) knowledge of the law about expert evidence;
 - (c) knowledge of the law which relates to their field of expertise (eg. assessment of damages, negligence, contracting etc);
 - (d) preparation, content and layout of written reports;
 - (e) communication skills in the courtroom (eg how to answer questions, referring to additional material, or use of visual aids);
 - (f) other - please specify ⇨
- 4.3 If you made more than one selection in the previous question, in which **one** area do you think that training would be most helpful?
- (a) the limits of the forensic expert's role;
 - (b) knowledge of the law about expert evidence;
 - (c) knowledge of the law which relates to their field of expertise (eg. assessment of damages, negligence, contracting etc);
 - (d) preparation, content and layout of written reports;
 - (e) communication skills in the courtroom (eg how to answer questions, referring to additional material, use of visual aids);
 - (f) other - please specify ⇨

- 4.4 Are you of the view that further training of advocates in calling and cross-examining experts is:
- (a) unnecessary - please go to Part 5.
 - (b) desirable;
 - (c) necessary?
- 4.5 If you answered (b) or (c) to the previous question, in which **one** of the following areas do you think that training would be most helpful:
- (a) improved skills in examination-in-chief;
 - (b) improved skills in cross-examination;
 - (c) improved preparation skills;
 - (d) enhanced knowledge of technical areas;
 - (e) other - please specify ⇨

PART FIVE

The questions in Part Five should only be answered if you have presided over jury trials.

- 5.1 In the cases over which you have presided which area of expertise do you think has presented the most difficulty for jurors to comprehend?
- (a) I do not know
 - (b) science
 - (c) psychiatry
 - (d) psychology
 - (e) medicine/surgery
 - (f) accounting
 - (g) engineering
 - (h) statistics
 - (i) planning
 - (j) other - please specify ⇨

- 5.2 Do you think that because of your training and experience you are better able to evaluate expert evidence than a jury?
- (a) yes;
 - (b) no;
 - (c) I do not know.
- 5.3 Do you think that the jurors have comprehended the expert evidence before your summing up?
- (a) never;
 - (b) occasionally;
 - (c) often;
 - (d) always
- 5.4 Do you think that your summing up assists the jurors to understand and evaluate the expert evidence?
- (a) never;
 - (b) occasionally;
 - (c) often;
 - (d) always
- 5.5 Should matters involving complex and conflicting expert **accounting** evidence be withdrawn from juries and be determined by judges alone or by some other means?
- (a) yes - please specify
 - (b) no;
 - (c) I do not have an opinion
- 5.6 Should matters involving complex and conflicting expert **scientific** evidence be withdrawn from juries and be determined by judges alone or by some other means?
- (a) yes - please specify
 - (b) no;
 - (c) I do not have an opinion

- 5.7 Should matters involving complex and conflicting expert **medical** evidence be withdrawn from juries and be determined by judges alone or by some other means?
- (a) yes - please specify
(b) no;
(c) I do not have an opinion
- 5.8 If you answered (a) to 5.5, 5.6 or 5.7, is there a change to procedure or practice which would obviate the need for such a withdrawal?
- (a) yes - please explain
(b) no;
(c) I do not have an opinion.
- 5.9 If expert reports that go before the jury appear to you to have been settled by lawyers, what effect does this participation by the lawyers have on the probative value of the evidence?
- (a) it hinders;
(b) it makes no difference;
(c) it helps;
(d) it is not possible to say.
- 5.10 From the following list please **circle the three** factors which you consider to be the most persuasive **for jurors** when an expert is giving oral evidence:-
- their appearance; clarity of explanation;
educational qualifications; prior experience in the field;
prior experience as an expert witness;
familiarity with the facts; impartiality; publications.

- 5.11 From the following list please **circle the one** which you consider to be **the single** most persuasive factor **for jurors** when an expert is giving oral evidence:-

their appearance; clarity of explanation;
educational qualifications; prior experience in the field;
prior experience as an expert witness;
familiarity with the facts; impartiality; publications.

- 5.12 Recently the English Court of Appeal found a trial judge to have erred in permitting the defence to lead expert evidence about Bayes' Rule (that the value of a piece of evidence in testing a particular assertion against an alternative is determined by its likelihood ratio). The Court held, *inter alia*, that 'the attempt to determine guilt or innocence on the basis of a mathematical formula applied to each separate piece of evidence is simply inappropriate to the jury's task' *Rose v The Queen* [1996] 2 Cr App R 467 at 481. Do you agree with the Court of Appeal's view:

- (a) yes;
- (b) no;
- (c) I do not have an opinion.

PART SIX

- 6.1 Have you used the *voir dire* procedure to determine the admissibility of expert evidence?

- (a) never;
- (b) occasionally;
- (c) often
- (d) always

- 6.2 Should "reliability" of expert evidence be a condition precedent to its admissibility;
- (a) yes;
 - (b) no;
 - (c) I have no opinion.
- 6.3 In 1993 the United States of America Supreme Court in *Daubert v Merrell Dow Pharmaceuticals* 113 S Ct 2786 (1993) held that "falsifiability" is an important criterion in assessing the reliability of expert evidence. Should "falsifiability" be a criterion for determining "reliability" as a condition precedent to the admissibility of expert evidence in our courts?
- (a) yes;
 - (b) no
 - (c) I have no opinion
- 6.4 Is the courtroom a forum in which the reliability of expert theories and techniques is adequately evaluated?
- (a) yes;
 - (b) no;
 - (c) I have no opinion.
- 6.5 Are **most** experts who give evidence before you representative of the views of their discipline?
- (a) yes - please go to 6.7
 - (b) no
 - (c) I have no opinion.
- 6.6 If you answered (b) or (c) to the previous question, do you think that this is a **significant** problem for the quality of fact-finding in your court?
- (a) yes;
 - (b) no;
 - (c) I have no opinion

- 6.7 Do the same expert witnesses appear regularly before you for the same side in litigation?
- (a) yes;
 - (b) no;
- 6.8 Have you encountered partisanship in expert witnesses called to give evidence before you?
- (a) yes;
 - (b) no - please go to 6.10
 - (c) I do not have an opinion - please go to 6.10
- 6.9 If you answered (a) to the previous question, is this a **significant** problem for the quality of fact-finding in your court?
- (a) yes;
 - (b) no;
 - (c) I have no opinion
- 6.10 What is your view about expert witnesses being in court to hear the evidence of other expert witnesses?
- (a) it is unhelpful;
 - (b) it makes no significant difference;
 - (c) it is helpful.

PART SEVEN

- 7.1 Do you classify the knowledge of the rules of expert evidence on the part of advocates appearing before you as:
- (a) very poor;
 - (b) poor;
 - (c) reasonable;
 - (d) good;
 - (e) very good?

7.2. Have you excluded expert evidence **more than five times** by virtue of:

- (a) the expertise rule: (a) Yes; (b) No
- (b) the area of expertise rule: (a) Yes; (b) No;
- (c) the common knowledge rule: (a) Yes; (b) No;
- (d) the ultimate issue rule: (a) Yes; (b) No;
- (e) the basis rule: (a) Yes; (b) No;
- (f) the exercise of the prejudice/probative discretion: (a) Yes; (b) No?

7.3. Without advocates having raised the point, have you ever excluded expert evidence applying any one or more of the above six grounds?

- (a) the expertise rule: (a) Yes; (b) No
- (b) the area of expertise rule: (a) Yes; (b) No;
- (c) the common knowledge rule: (a) Yes; (b) No;
- (d) the ultimate issue rule: (a) Yes; (b) No;
- (e) the basis rule: (a) Yes; (b) No;
- (f) the exercise of the prejudice/probative discretion: (a) Yes; (b) No ?

7.4 Are you in favour of the abolition of:

- (a) the expertise rule: (a) Yes; (b) No
- (b) the area of expertise rule: (a) Yes; (b) No;
- (c) the common knowledge rule: (a) Yes; (b) No;
- (d) the ultimate issue rule: (a) Yes; (b) No;
- (e) the basis rule: (a) Yes; (b) No;
- (f) the prejudice/probative discretion as it applies to expert evidence: (a) Yes; (b) No ?

PART EIGHT

Answer this part only if you have served as a judicial officer in a jurisdiction which is applying the Evidence Act 1995 (Cth) or (NSW)

- 8.1 Have the 1995 opinion evidence provisions made any difference to the exclusion of expert evidence in hearings over which you have presided?
- (a) yes;
 - (b) no - please go to 8.3
 - (c) I do not know - please go to 8.3.
- 8.2 If you answered (a) to the previous question have the provisions resulted in the admission of:
- (a) more expert evidence;
 - (b) less expert evidence;
 - (c) the same amount of expert evidence?
- 8.3 Do you regard the changes to the admissibility rules for opinion evidence to have resulted in:
- (a) an improvement in the quality of the fact-finding process;
 - (b) a deterioration in the quality of the fact-finding process;
 - (c) no real difference in the quality of the fact-finding process?
- 8.4 Have you found the application of the certificate section (section 177) for proof of expert opinions
- (a) unhelpful;
 - (b) to have made no significant difference;
 - (c) helpful?

- 8.5 Are you applying the prejudice/probative discretion in criminal trials to exclude evidence?
- (a) more often than prior to the Evidence Act 1995
 - (b) less often than prior to the Evidence 1995.
 - (c) as before the Evidence Act 1995.
 - (d) I do not preside over criminal trials.
- 8.6 Are you applying the prejudice/probative discretion in non-criminal cases to exclude evidence?
- (a) more often than prior to the Evidence Act, 1995;
 - (b) less often than prior to the Evidence Act, 1995;
 - (c) as before the Evidence Act, 1995;
 - (d) I do not preside over civil trials.
- 8.7 Do you regard the 'reliability' of expert theories and techniques as a relevant criterion in your application of the prejudice/probative discretion?
- (a) yes;
 - (b) no;
 - (c) I do not know.

PART NINE

This Part should NOT be answered by judges who sit only in appellate courts.

- 9.1 Do you have power to call an expert witness to assist you in relation to the evaluation of expert evidence?
- (a) yes;
 - (b) no.

- 9.2 If you have such a power to call an expert witness, have you exercised it in the last five years?
- (a) never;
 - (b) once;
 - (c) between one and five times;
 - (d) more than five times.
- 9.3 If you have power to call an expert witness, but have not done so, is this because:
- (a) it is incompatible with the adversary process;
 - (b) no party has ever requested that I exercise the power;
 - (c) the parties have argued against the procedure;
 - (d) it has not been necessary;
 - (e) other -please specify
- 9.4 If you have appointed an expert, from the point of view of the quality of the fact-finding process was this:
- (a) unhelpful;
 - (b) not very helpful ;
 - (c) helpful;
 - (d) very helpful?
- 9.5 Are you of the view that more use of court- appointed experts would be helpful to the fact-finding process?
- (a) yes;
 - (b) no;
 - (c) I do not have an opinion
- 9.6 Do you have power to appoint an assessor to assist you in relation to the evaluation of expert evidence?
- (a) yes;
 - (b) no - please go to 9.8

- 9.7 If 'yes' to the above question, have you appointed an assessor to assist you in relation to the evaluation of expert evidence in the last five years?
- (a) never - please go to 9.9
 - (b) once;
 - (c) between one and five times;
 - (d) more than five times.
- 9.8 If you have appointed an assessor, from the point of view of the quality of the fact-finding process, was this:
- (a) unhelpful;
 - (b) not very helpful;
 - (c) helpful;
 - (d) very helpful ?
- 9.9 Are you of the view that more use of assessors would be helpful to the fact-finding process?
- (a) yes;
 - (b) no;
 - (c) I do not have an opinion
- 9.10 Do you have power to appoint a referee to make determinations in relation to technical issues?
- (a) yes;
 - (b) no - please go to 9.13
- 9.11 If 'yes' to the above question, have you appointed a referee to make determinations in relation to technical issues in the last five years?
- (a) never - please go to 9.13
 - (b) once;
 - (c) between one and five times;
 - (d) more than five times.

Survey of Trial Judges on Expert Evidence

Your Comments

- 9.12 If you have appointed a referee, from the point of view of the quality of the fact-finding process, was this:
- (a) unhelpful;
 - (b) not very helpful;
 - (c) helpful;
 - (d) very helpful ?
- 9.13 Do you think that more use of referees would be helpful to the fact-finding process?
- (a) yes;
 - (b) no;
 - (c) I do not have an opinion
- 9.14 Apart from the use of court-appointed experts, assessors and referees, have you used other procedures in relation to expert evidence to assist the fact-finding process?
- (a) yes - please specify
 - (b) no.

If there are other matters concerning expert evidence (such as good and bad examples of advocacy or evidence) which you think may be relevant in the context of this survey, please comment below.

Thank you for participating in this survey.



APPENDIX B: APPENDIX OF SURVEY RESULTS

RESPONSES TO SURVEY QUESTIONS

Note: Freq refers to number of responses in a particular category, percent refers to percent of total responses, %-NR refers to percent of total responses after removal of No Response data

Q1.1 Which one of the following describes the predominant area of your judicial practice?

- (a) appellate cases;
- (b) criminal trials;
- (c) family law hearings;
- (d) personal injury/workers compensation hearings;
- (e) commercial/equity hearings;
- (f) industrial/employment hearings; or
- (g) other - please specify.

	freq	percent
<u>single category responses</u>		
(a) appellate cases only	18	7.38
(b) criminal trials only	66	27.05
(c) family law hearings only	33	13.52
(d) personal injury/workers comp only	19	7.79
(e) commercial/equity only	29	11.89
(f) industrial/employment only	5	2.05
<u>multiple category responses</u>		
appellate + criminal	3	1.23
appellate + commercial	3	1.23
appellate + family law	1	0.41
appellate + criminal + family law	1	0.41
appellate + family law + personal injury	1	0.41
appellate + criminal + commercial	3	1.23
appellate + criminal + personal injury + commercial	4	1.64
appellate + commercial + industrial + other	1	0.41
appellate + criminal + personal injury + commercial + industrial + other	1	0.41
criminal + personal injury	12	4.92
criminal + personal injury + commercial	10	4.10
criminal + family law	2	0.82
criminal + personal injury + industrial	1	0.41
criminal + personal injury + other	2	0.82
criminal + other	4	1.64
family law + personal injury + other	1	0.41

personal injury + commercial	1	0.41
personal injury + commercial + industrial	1	0.41
other	22	9.02
Total	244	100.00

Q1.2 Have you served as a judge for:

	freq	percent
(a) less than 2 years	17	6.97
(b) between 2 and 5 years	62	25.41
(c) between 6 and 10 years	63	25.82
(d) between 11 and 20 years	80	32.79
(e) more than 20 years?	22	9.02
Total	244	100.00

Q1.3 Have you served predominantly as:

	freq	percent	%-NR
(a) a Federal judge	48	19.67	19.83
(b) a judge of a State	189	77.46	78.10
(c) a judge of a Territory	6	2.46	2.48
No response	2	0.82	
Total	244	100.00	100.00

Q1.4 Are you:

	freq	percent	%-NR
(a) male	208	85.25	87.76
(b) female	29	11.89	12.24
No response	7	2.87	
Total	244	100.00	100.00

Q1.5 How often in cases over which you have presided at first instance have experts been called to give 'opinion evidence'?

	freq	percent
(a) never	4	1.64
(b) occasionally	59	24.18
(c) often	178	72.95
(d) always	3	1.23
Total	244	100.00

Q2.1 When expert witnesses are called, do you find the expert evidence useful for the fact-finding process?

	freq	percent	%-NR
(a) never	1	0.41	0.43
(b) occasionally	39	15.98	16.60
(c) often	163	66.80	69.36
(d) always	32	13.11	13.62
No response	9	3.69	
Total	244	100.00	100.00

Q2.2 Have you encountered any of the following problems with expert evidence?

(i) bias on the part of the expert

	freq	percent	%-NR
(a) never	8	3.28	3.45
(b) occasionally	158	64.75	68.10
(c) often	64	26.23	27.59
(d) always	2	0.82	0.86
No response	12	4.92	
Total	244	100.00	100.00

(ii) use of oral or written language by the expert that was difficult to understand?

	freq	percent	%-NR
(a) never	21	8.61	9.05
(b) occasionally	178	72.95	76.72
(c) often	33	13.52	14.22
(d) always	0	0.00	0.00
No response	12	4.92	
Total	244	100.00	100.00

(iii) failure by the expert to stay within the parameters of his or her expertise

	freq	percent	%-NR
(a) never	16	6.56	6.90
(b) occasionally	185	75.82	79.74
(c) often	30	12.30	12.93
(d) always	1	0.41	0.43
No response	12	4.92	
Total	244	100.00	100.00

(iv) non responsiveness by the expert to questions

	freq	percent	%-NR
(a) never	34	13.93	14.17
(b) occasionally	182	74.59	75.83
(c) often	24	9.84	10.00
(d) always	0	0.00	0.00
No response	4	1.64	
Total	244	100.00	100.00

(v) failure to prove the bases of the expert's opinions

	freq	percent	%-NR
(a) never	38	15.57	16.03
(b) occasionally	163	66.80	68.78
(c) often	36	14.75	15.19
(d) always	0	0.00	0.00
No response	7	2.87	

Total	244	100.00	100.00
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(vii) failure by the advocate to cross-examine so as to make the expert accountable

	freq	percent	%-NR
(a) never	15	6.15	6.33
(b) occasionally	137	56.15	57.81
(c) often	84	34.43	35.44
(d) always	1	0.41	0.42
No response	7	2.87	
Total	244	100.00	100.00

Q2.3 What is the single most serious problem you have encountered with expert evidence?

	freq	percent
(a) bias on the part of the expert	85	34.84
(b) use of oral or written language by the expert that was difficult to understand	24	9.84
(c) failure by the expert to stay within the parameters of his or her expertise	14	5.74
(d) non-responsiveness by the expert to questions	12	4.92
(e) failure to prove the bases of the expert's opinions	34	13.93
(f) failure by the advocate to pose examination-in-chief questions appropriately	34	13.93
(g) failure by the advocate to cross-examine so as to make the expert accountable	26	10.66
(h) other	15	6.15
Total	244	100.00

Q2.4 Have you encountered evidence from experts which you were not able to evaluate adequately because of its complexity?

	freq	percent	%-NR
(a) never - please go to 2.7	125	51.23	53.19
(b) occasionally	106	43.44	45.11
(c) often	4	1.64	1.70
(d) always	0	0.00	0.00
No response	9	3.69	
Total	244	100.00	100.00

Q2.5 If you answered (b), (c), or (d) to the previous question, did the evidence come from a witness or witnesses from the disciplines of:

	freq	percent	%-NR
(a) science	33	13.52	13.87
(b) psychiatry	38	15.57	15.97
(c) psychology	31	12.70	13.03
(d) medicine/surgery	25	10.25	10.50
(e) accounting	43	17.62	18.07
(f) engineering	35	14.34	14.71
(g) statistics	23	9.43	9.66

(h) planning	3	1.23	1.26
(i) other - please specify	7	2.87	2.94
No response	6	2.46	
Total	244	100.00	100.00

Q2.6 If you selected more than one field in the previous question, which one field was the most difficult to evaluate adequately?

	freq	percent	%-NR
(a) science	10	4.10	13.89
(b) psychiatry	12	4.92	16.67
(c) psychology	6	2.46	8.33
(d) medicine/surgery	6	2.46	8.33
(e) accounting	14	5.74	19.44
(f) engineering	10	4.10	13.89
(g) statistics	9	3.69	12.50
(i) other - please specify	5	2.05	6.94
No response	172	70.49	
Total	244	100.00	100.00

Q2.7 Overall how do you assess the usefulness of the written expert reports that are tendered before you?

	freq	percent	%-NR
(a) very poor	1	0.41	0.42
(b) poor	6	2.46	2.50
(c) reasonable	116	47.54	48.33
(d) good	91	37.30	37.92
(e) very good	26	10.66	10.83
No response	4	1.64	
Total	244	100.00	100.00

Q2.8 In the expert reports that are tendered to you, does it appear that lawyers have played a part in settling the content (for example, as commonly happens in respect of lay affidavits)?

	freq	percent	%-NR
(a) never - please go to 2.10	61	25.00	25.85
(b) occasionally	126	51.64	53.39
(c) often	42	17.21	17.80
(d) always	7	2.87	2.97
No response	8	3.28	
Total	244	100.00	100.00

Q2.9 If you answered the previous question (b), (c), or (d), what is the usual effect that this participation by the lawyers has upon your assessment of the weight to be given to the expert's evidence?

	freq	percent	%-NR
(a) it helps	72	29.51	40.22
(b) it hinders	45	18.44	25.14

(c) it makes no difference	62	25.41	34.64
No response	65	26.64	
Total	244	100.00	100.00

Q2.10 From the following list please circle the three factors which you consider to be the most persuasive when an expert is giving oral evidence.

	freq	percent
(a) their appearance	4	0.57
(b) clarity of explanation	194	27.48
(c) educational qualifications	13	1.84
(d) prior experience in the field	158	22.38
(e) prior experience as an expert witness	22	3.12
(f) familiarity with the facts	133	18.84
(g) impartiality	181	25.64
(h) publications	1	0.14
Total	706	100.00

Q2.11 From the following list please circle the one which you consider to be the single most persuasive factor when an expert is giving oral evidence.

	freq	percent	%-NR
(a) their appearance	0	0.00	0.00
(b) clarity of explanation	122	50.00	51.91
(c) educational qualifications	2	0.82	0.85
(d) prior experience in the field	31	12.70	13.19
(e) prior experience as an expert witness	4	1.64	1.70
(f) familiarity with the facts	19	7.79	8.09
(g) impartiality	56	22.95	23.83
(h) publications	1	0.41	0.43
No response	9	3.69	
Total	244	100.00	100.00

Q3.1 How effectively do most advocates appearing before you elicit oral evidence-in-chief from expert witnesses?

	freq	percent	%-NR
(a) very poorly	0	0.00	0.00
(b) poorly	33	13.52	13.92
(c) reasonably	161	65.98	67.93
(d) well	40	16.39	16.88
(e) very well	3	1.23	1.27
No response	7	2.87	
Total	244	100.00	100.00

Q3.2 On the occasions when there have been difficulties with the way in which advocates appearing before you have elicited evidence-in-chief from an expert witness, has this resulted from one or more of the following:

	freq	percent
(a) inadequate preparation by the lawyers to master	166	38.97

the technical issues

(b) inadequate preparation of the expert by their lawyers	80	18.78
(c) poor skills by the lawyer in eliciting the evidence	144	33.80
(d) taking the expert beyond his or her field of expertise	27	6.34
(e) other - please specify	9	2.11
Total	426	100.00

Q3.3 How effectively do most advocates appearing before you make expert witnesses accountable by cross-examination for the opinions they expressed in examination-in-chief?

	freq	percent	%-NR
(a) very poorly	3	1.23	1.28
(b) poorly	35	14.34	14.96
(c) reasonably	145	59.43	61.97
(d) well	49	20.08	20.94
(e) very well	2	0.82	0.85
No response	10	4.10	
Total	244	100.00	100.00

Q3.4 If you answered 3.3 by (a), (b) or (c), how much, if at all, a problem for the fact finding process in your court is this failure to make expert witnesses accountable?

	freq	percent	%-NR
(a) very unimportant	4	1.64	2.19
(b) unimportant	45	18.44	24.59
(c) significant	127	52.05	69.40
(d) very significant	7	2.87	3.83
No response	61	25.00	
Total	244	100.00	100.00

Q3.5 When cross-examination of expert witnesses before you has been inadequate, what have been the most significant reasons (select up to three factors).

	freq	percent
(a) inadequate preparation by the cross-examiner	196	33.50
(b) lack of skill by the cross-examiner	194	33.16
(c) non-responsive answers by the expert	42	7.18
(d) confusion in use of terminology by the advocate	77	13.16
(e) confusion in use of terminology by the expert	17	2.91
(f) no application being made to have other experts in court to assist counsel	31	5.30
(g) undue repetition in the evidence	24	4.10
(h) other - please specify	4	0.68
Total	585	100.00

Q3.6 When cross-examination of expert witnesses before you has been inadequate, what has been the single most significant reason?

freq	percent	%-NR
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(a) inadequate preparation by the cross-examiner	126	51.64	52.07
(b) lack of skill by the cross-examiner	84	34.43	34.71
(c) non-responsive answers by the expert	9	3.69	3.72
(d) confusion in use of terminology by the advocate	11	4.51	4.55
(e) confusion in use of terminology by the expert	2	0.82	0.83
(f) no application being made to have other experts	2	0.82	0.83
In court to assist counsel		0.00	0.00
(g) undue repetition in the evidence	5	2.05	2.07
(h) other - please specify	3	1.23	1.24
No response	2	0.82	
Total	244	100.00	100.00

Q3.7 Have you experienced difficulty in evaluating the opinions expressed by one expert as against those expressed by another?

	freq	percent	%-NR
(a) never - please go to 3.9	19	7.79	8.05
(b) occasionally	166	68.03	70.34
(c) often	51	20.90	21.61
(d) always	0	0.00	0.00
No response	8	3.28	
Total	244	100.00	100.00

Q3.8 If you answered (b), (c), or (d) to the previous question, which one of the following factors has been most responsible?

	freq	percent	%-NR
(a) poor leading of evidence	6	2.46	2.73
(b) poor cross-examination of evidence	18	7.38	8.18
(c) poor communication by the experts	9	3.69	4.09
(d) experts lacking credibility	17	6.97	7.73
(e) the complexity of the expert evidence	43	17.62	19.55
(f) fundamental irreconcilability of views expressed by opposing experts	121	49.59	55.00
(g) other - please specify	6	2.46	2.73
No response	24	9.84	
Total	244	100.00	100.00

Q3.9 Have you heard cases where you have formed the view that a key expert has been retained by one side just to make the expert less available as a witness for the other side?

	freq	percent	%-NR
(a) never	164	67.21	70.39
(b) occasionally	67	27.46	28.76
(c) often	2	0.82	0.86
(d) always	0	0.00	0.00
No response	11	4.51	
Total	244	100.00	100.00

Q4.1 Are you of the view that further training of experts in their forensic function is:

	freq	percent	%-NR
(a) unnecessary - please go to 4.4	63	25.82	26.58
(b) desirable	134	54.92	56.54
(c) necessary	27	11.07	11.39
(d) essential	13	5.33	5.49
No response	7	2.87	
Total	244	100.00	100.00

Q4.2 If you answered (b), (c) or (d) to the previous question, in which one or more of the following areas do you think that training would be helpful?

	freq	percent
(a) the limits of the forensic expert's role	113	37.79
(b) knowledge of the law about expert evidence	55	18.39
(c) knowledge of the law which relates to their field of expertise	33	11.04
(d) preparation, content and layout of written reports	84	28.09
(e) communication skills in the courtroom	115	38.46
(f) other - please specify	12	4.01
Total	299	100.00

Q4.3 If you made more than one selection in the previous question, in which one area do you think that training would be most helpful?

	freq	percent	%-NR
(a) the limits of the forensic expert's role	38	15.57	25.17
(b) knowledge of the law about expert evidence	8	3.28	5.30
(c) knowledge of the law which relates to their field of expertise	8	3.28	5.30
(d) preparation, content and layout of written reports	36	14.75	23.84
(e) communication skills in the courtroom	53	21.72	35.10
(f) other - please specify	8	3.28	5.30
Missing responses	93	38.11	
Total	244	100.00	100.00

Q4.4 Are you of the view that further training of advocates in calling and cross-examining experts is:

	freq	percent	%-NR
(a) unnecessary - please go to Part 5	23	9.43	9.91
(b) desirable	153	62.70	65.95
(c) necessary	56	22.95	24.14
No response	12	4.92	
Total	244	100.00	100.00

Q4.5 If you answered (b) or (c) to the previous question, in which one of the following areas do you think that training would be most helpful?

freq	percent	%-NR
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(a) improved skills in examination-in-chief	34	13.93	14.41
(b) improved skills in cross-examination	60	24.59	25.42
(c) improved preparation skills	114	46.72	48.31
(d) enhanced knowledge of technical areas	26	10.66	11.02
(e) other - please specify	2	0.82	0.85
No response	8	3.28	
Total	244	100.00	100.00

Q5.1 In the cases over which you have presided which area of expertise do you think has presented the most difficulty for jurors to comprehend?

	freq	percent	%-NR
(a) I do not know	49	20.08	28.99
(b) science	18	7.38	10.65
(c) psychiatry	31	12.70	18.34
(d) psychology	5	2.05	2.96
(e) medicine/surgery	8	3.28	4.73
(f) accounting	31	12.70	18.34
(g) engineering	10	4.10	5.92
(h) statistics	6	2.46	3.55
(i) planning	0	0.00	0.00
(j) other - please specify	11	4.51	6.51
No response	75	30.74	
Total	244	100.00	100.00

Q5.2 Do you think that because of your training and experience you are better able to evaluate expert evidence than a jury?

	freq	percent	%-NR
(a) yes	118	48.36	76.13
(b) no	18	7.38	11.61
(c) I do not know	19	7.79	12.26
No response	89	36.48	
Total	244	100.00	100.00

Q5.3 Do you think that the jurors have comprehended the expert evidence before your summing up?

	freq	percent	
(a) never	0	0.00	0.00
(b) occasionally	34	13.93	22.37
(c) often	109	44.67	71.71
(d) always	9	3.69	5.92
No response	92	37.70	
Total	244	100.00	100.00

Q5.4 Do you think that your summing up assists the jurors to understand and evaluate the expert evidence?

	freq	percent	%-NR
(a) never	1	0.41	0.68
(b) occasionally	49	20.08	33.56
(c) often	64	26.23	43.84

(d) always	32	13.11	21.92
No response	98	40.16	
Total	244	100.00	100.00

Q5.5 Should matters involving complex and conflicting expert accounting evidence be withdrawn from juries and be determined by judges alone or by some other means?

	freq	percent	%-NR
(a) yes - please specify	58	23.77	36.94
(b) no	77	31.56	49.04
(c) I do not have an opinion	22	9.02	14.01
No response	87	35.66	
Total	244	100.00	100.00

Q5.6 Should matters involving complex and conflicting expert scientific evidence be withdrawn from juries and be determined by judges alone or by some other means?

	freq	percent	%-NR
(a) yes - please specify	38	15.57	24.20
(b) no	100	40.98	63.69
(c) I do not have an opinion	19	7.79	12.10
No response	87	35.66	
Total	244	100.00	100.00

Q5.7 Should matters involving complex and conflicting expert medical evidence be withdrawn from juries and be determined by judges alone or by some other means?

	freq	percent	%-NR
(a) yes - please specify	25	10.25	16.13
(b) no	118	48.36	76.13
(c) I do not have an opinion	12	4.92	7.74
No response	89	36.48	
Total	244	100.00	100.00

Q5.8 If you answered (a) to 5.5, 5.6, or 5.7, is there a change to procedure or practice which would obviate the need for such a withdrawal?

	freq	percent	%-NR
(a) yes - please explain	16	6.56	25.81
(b) no	37	15.16	59.68
(c) I do not have an opinion	9	3.69	14.52
No response	182	74.59	
Total	244	100.00	100.00

Q5.9 If expert reports that go before the jury appear to you to have been settled by lawyers, what effect does this participation by the lawyers have on the probative value of the evidence?

	freq	percent	%-NR
(a) it hinders	23	9.43	17.42
(b) it makes no difference	23	9.43	17.42
(c) it helps	33	13.52	25.00
(d) it is not possible to say	53	21.72	40.15

No response	112	45.90	
Total	244	100.00	100.00

Q5.10 From the following list please circle the three factors which you consider to be the most persuasive for jurors when an expert is giving oral evidence

	freq	percent	%-NR
(a) their appearance	30	6.30	7.94
(b) clarity of explanation	138	28.99	36.51
(c) educational qualifications	13	2.73	3.44
(d) prior experience in the field	12	2.52	3.17
(e) prior experience as an expert witness	30	6.30	7.94
(f) familiarity with the facts	86	18.07	22.75
(g) impartiality	69	14.50	18.25
(h) publications	0	0.00	0.00
No response	98	20.59	
Total	476	100.00	100.00

Q5.11 From the following list please circle the one which you consider to be the single most persuasive factor for jurors when an expert is giving oral evidence:

	freq	percent	%-NR
(a) their appearance	3	1.23	2.04
(b) clarity of explanation	114	46.72	77.55
(c) educational qualifications	1	0.41	0.68
(d) prior experience in the field	7	2.87	4.76
(e) prior experience as an expert witness	3	1.23	2.04
(f) familiarity with the facts	6	2.46	4.08
(g) impartiality	13	5.33	8.84
(h) publications	0	0.00	0.00
No response	97	39.75	
Total	244	100.00	100.00

Q5.12 Recently the English Court of Appeal found a trial judge to have erred in permitting the defence to lead expert evidence about Bayes' Rule. Do you agree with the Court of Appeal's view?

	freq	percent	%-NR
(a) yes	142	58.20	91.03
(b) no	5	2.05	3.21
(c) I do not have an opinion	9	3.69	5.77
No response	88	36.07	
Total	244	100.00	100.00

Q6.1 Have you used the voire dire procedure to determine the admissibility of expert evidence?

	freq	percent	%-NR
(a) never	57	23.36	24.15
(b) occasionally	151	61.89	63.98
(c) often	27	11.07	11.44

(d) always	1	0.41	0.42
No response	8	3.28	
Total	244	100.00	100.00

Q6.2 Should "reliability" of expert evidence be a condition precedent to its admissibility?

	freq	percent	%-NR
(a) yes	58	23.77	25.44
(b) no	131	53.69	57.46
(c) I have no opinion	39	15.98	17.11
No response	16	6.56	
Total	244	100.00	100.00

Q6.3 In 1993 the United States of America Supreme Court ... Should "falsifiability" be a criterion for determining "reliability" as a condition precedent to the admissibility of expert evidence in our courts?

	freq	percent	%-NR
(a) yes	39	15.98	17.73
(b) no	99	40.57	45.00
(c) I have no opinion	82	33.61	37.27
No response	24	9.84	
Total	244	100.00	100.00

Q6.4 Is the courtroom a forum in which the reliability of expert theories and techniques is adequately evaluated?

	freq	percent	%-NR
(a) yes	127	52.05	55.22
(b) no	71	29.10	30.87
(c) I have no opinion	32	13.11	13.91
No response	14	5.74	
Total	244	100.00	100.00

Q6.5 Are most experts who give evidence before you representative of the views of their discipline?

	freq	percent	%-NR
(a) yes	167	68.44	73.57
(b) no	12	4.92	5.29
(c) I have no opinion	48	19.67	21.15
No response	17	6.97	
Total	244	100.00	100.00

Q6.6 If you answered (b) or (c) to the previous question, do you think that this is a significant problem for the quality of fact-finding in your court?

	freq	percent	%-NR
(a) yes	20	8.20	34.48
(b) no	25	10.25	43.10
(c) I have no opinion	13	5.33	22.41

No response	186	76.23	
Total	244	100.00	100.00

Q6.7 Do the same expert witnesses appear regularly before you for the same side in litigation?

	freq	percent	%-NR
(a) yes	170	69.67	71.73
(b) no	67	27.46	28.27
No response	7	2.87	
Total	244	100.00	100.00

Q6.8 Have you encountered partisanship in expert witnesses called to give evidence before you?

	freq	percent	%-NR
(a) yes	208	85.25	87.76
(b) no - go to 6.10	24	9.84	10.13
(c) I do not have an opinion - go to 6.10	5	2.05	2.11
No response	7	2.87	
Total	244	100.00	100.00

Q6.9 If you answered (a) to the previous question, is this a significant problem for the quality of fact-finding in your court?

	freq	percent	%-NR
(a) yes	98	40.16	46.67
(b) no	110	45.08	52.38
(c) I have no opinion	2	0.82	0.95
No response	34	13.93	
Total	244	100.00	100.00

Q6.10 What is your view about expert witnesses being in court to hear the evidence of other expert witnesses?

	freq	percent	%-NR
(a) it is unhelpful	11	4.51	4.68
(b) it makes no significant difference	26	10.66	11.06
(c) it is helpful	198	81.15	84.26
No response	9	3.69	
Total	244	100.00	100.00

Q7.1 Do you classify the knowledge of the rules of expert evidence on the part of advocates appearing before you as:

	freq	percent	%-NR
(a) very poor	3	1.23	1.25
(b) poor	34	13.93	14.17
(c) reasonable	160	65.57	66.67
(d) good	39	15.98	16.25
(e) very good	4	1.64	1.67

No response	4	1.64	
Total	244	100.00	100.00

Q7.2 Have you excluded expert evidence more than five times by virtue of:

(a) the expertise rule

	freq	percent	%-NR
(a) yes	66	27.05	31.13
(b) no	146	59.84	68.87
No response	32	13.11	
Total	244	100.00	100.00

(b) the area of expertise rule

	freq	percent	%-NR
(a) yes	73	29.92	33.49
(b) no	145	59.43	66.51
No response	26	10.66	
Total	244	100.00	100.00

(c) the common knowledge rule

	freq	percent	%-NR
(a) yes	70	28.69	32.86
(b) no	143	58.61	67.14
No response	31	12.70	
Total	244	100.00	100.00

(d) the ultimate issue rule

	freq	percent	%-NR
(a) yes	64	26.23	29.63
(b) no	152	62.30	70.37
No response	28	11.48	
Total	244	100.00	100.00

(e) the basis rule

	freq	percent	%-NR
(a) yes	35	14.34	16.75
(b) no	174	71.31	83.25
No response	35	14.34	
Total	244	100.00	100.00

(f) the exercise of the prejudice/probatie discretion

	freq	percent	%-NR
(a) yes	27	11.07	12.98
(b) no	181	74.18	87.02
No response	36	14.75	
Total	244	100.00	100.00

Q7.3 Without advocates having raised the point, have you ever excluded expert evidence applying any one or more of the above six grounds?

(a) the expertise rule

	freq	percent	%-NR
(a) yes	56	22.95	27.05
(b) no	151	61.89	72.95
No response	37	15.16	
Total	244	100.00	100.00

(b) the area of expertise rule

	freq	percent	%-NR
(a) yes	53	21.72	26.11
(b) no	150	61.48	73.89
No response	41	16.80	
Total	244	100.00	100.00

(c) the common knowledge rule

	freq	percent	%-NR
(a) yes	64	26.23	30.92
(b) no	143	58.61	69.08
No response	37	15.16	
Total	244	100.00	100.00

(d) the ultimate issue rule

	freq	percent	%-NR
(a) yes	53	21.72	26.37
(b) no	148	60.66	73.63
No response	43	17.62	
Total	244	100.00	100.00

(e) the basis rule

	freq	percent	%-NR
(a) yes	19	7.79	9.69
(b) no	177	72.54	90.31
No response	48	19.67	
Total	244	100.00	100.00

(f) the exercise of the prejudice/probative discretion

	freq	percent	%-NR
(a) yes	14	5.74	6.83
(b) no	191	78.28	93.17
No response	39	15.98	
Total	244	100.00	100.00

Q7.4 Are you in favour of the abolition of:

(a) the expertise rule

	freq	percent	%-NR
(a) yes	6	2.46	2.75
(b) no	212	86.89	97.25
No response	26	10.66	
Total	244	100.00	100.00

(b) the area of expertise rule

	freq	percent	%-NR
(a) yes	8	3.28	3.70
(b) no	208	85.25	96.30
No response	28	11.48	
Total	244	100.00	100.00

(c) the common knowledge rule

	freq	percent	%-NR
(a) yes	18	7.38	8.41
(b) no	196	80.33	91.59
No response	30	12.30	
Total	244	100.00	100.00

(d) the ultimate issue rule

	freq	percent	%-NR
(a) yes	56	22.95	26.29
(b) no	157	64.34	73.71
No response	31	12.70	
Total	244	100.00	100.00

(e) the basis rule

	freq	percent	%-NR
(a) yes	10	4.10	4.78
(b) no	199	81.56	95.22
No response	35	14.34	
Total	244	100.00	100.00

(f) the exercise of the prejudice/probative discretion as it applies to expert evidence

	freq	percent	%-NR
(a) yes	12	4.92	5.50
(b) no	206	84.43	94.50
No response	26	10.66	
Total	244	100.00	100.00

Q8.1 Have the 1995 opinion evidence provisions made any difference to the exclusion of expert evidence in hearings over which you have presided?

	freq	percent	%-NR
(a) yes	31	12.70	27.43
(b) no - go to 8.3	70	28.69	61.95
(c) I do not know - go to 8.3	12	4.92	10.62
No response	131	53.69	
Total	244	100.00	100.00

Q8.2 If you answered (a) to the previous question have the provisions resulted in the admission of:

	Freq	percent	%-NR
(a) more expert evidence	20	8.20	62.50
(b) less expert evidence	3	1.23	9.38
(c) the same amount of expert evidence	9	3.69	28.13
No response	212	86.89	
Total	244	100.00	100.00

Q8.3 Do you regard the changes to the admissibility rules for opinion evidence to have resulted in:

	Freq	percent	%-NR
(a) an improvement in the quality of the fact-finding process	21	8.61	19.63
(b) a deterioration in the quality of the fact-finding process	4	1.64	3.74
(c) no real difference in the quality of the fact-finding process	82	33.61	76.64
No response	137	56.15	
Total	244	100.00	100.00

Q8.4 Have you found the application of the certificate section (section 177) for proof of expert opinions

	Freq	percent	%-NR
(a) unhelpful	0	0.00	0.00
(b) to have made no significant difference	87	35.66	86.14
(c) helpful	14	5.74	13.86
No response	143	58.61	
Total	244	100.00	100.00

Q8.5 Are you applying the prejudice/probative discretion in criminal trials to exclude evidence?

	Freq	percent	%-NR
(a) more often than prior to the Evidence Act 1995	10	4.10	11.11
(b) less often than prior to the Evidence 1995	1	0.41	1.11
(c) as before the Evidence Act 1995	32	13.11	35.56
(d) I do not preside over criminal trials	47	19.26	52.22
No response	154	63.11	
Total	244	100.00	100.00

Q8.6 Are you applying the prejudice/probative discretion in non-criminal cases to exclude evidence?

	freq	percent	%-NR
(a) more often than prior to the Evidence Act 1995	10	4.10	10.10
(b) less often than prior to the Evidence 1995	2	0.82	2.02
(c) as before the Evidence Act 1995	83	34.02	83.84
(d) I do not preside over civil trials	4	1.64	4.04
No response	145	59.43	
Total	244	100.00	100.00

Q8.7 Do you regard the reliability of expert theories and techniques as a relevant criterion in your application of the prejudice/probative discretion?

	Freq	percent	%-NR
(a) yes	51	20.90	49.51
(b) no	28	11.48	27.18
(c) I do not know	24	9.84	23.30
No response	141	57.79	
Total	244	100.00	100.00

Q9.1 Do you have power to call an expert witness to assist you in relation to the evaluation of expert evidence?

	Freq	percent	%-NR
(a) yes	116	47.54	52.97
(b) no	103	42.21	47.03
No response	25	10.25	
Total	244	100.00	100.00

Q9.2 If you have such a power to call an expert witness, have you exercised it in the last five years?

	Freq	percent	%-NR
(a) never	122	50.00	81.88
(b) once	7	2.87	4.70
(c) between one and five times	12	4.92	8.05
(d) more than five times	8	3.28	5.37
No response	95	38.93	
Total	244	100.00	100.00

Q9.3 If you have power to call an expert witness, but have not done so, is this because

	Freq	percent	%-NR
(a) it is incompatible with the adversary process	26	10.66	15.85
(b) no party has ever requested that I exercise the power	57	23.36	34.76
(c) the parties have argued against the procedure	6	2.46	3.66
(d) it has not been necessary	68	27.87	41.46
(e) other - please specify	7	2.87	4.27
No response	80	32.79	
Total	244	100.00	100.00

Q9.4 If you have appointed an expert, from the point of view of the quality of the fact-finding process was this

	Freq	percent	%-NR
(b) not very helpful	1	0.41	2.56
(c) helpful	27	11.07	69.23
(d) very helpful	11	4.51	28.21
No response	205	84.02	
Total	244	100.00	100.00

Q9.5 Are you of the view that more use of court-appointed experts would be helpful to the fact-finding process?

	Freq	percent	%-NR
(a) yes	119	48.77	54.34
(b) no	74	30.33	33.79
(c) I do not have an opinion	26	10.66	11.87
No response	25	10.25	
Total	244	100.00	100.00

Q9.6 Do you have power to appoint an assessor to assist you in relation to the evaluation of expert evidence?

	freq	percent	%-NR
(a) yes	108	44.26	50.23
(b) no - go to 9.8	107	43.85	49.77
No response	29	11.89	
Total	244	100.00	100.00

Q9.7 If 'yes' to the above question, have you appointed an assessor to assist you in relation to the evaluation of expert evidence in the last five years?

	freq	percent	%-NR
(a) never - go to 9.9	100	40.98	90.09
(b) once	3	1.23	2.70
(c) between one and five times	5	2.05	4.50
(d) more than five times	3	1.23	2.70
No response	133	54.51	
Total	244	100.00	100.00

Q9.8 If you have appointed an assessor, from the point of view of the quality of the fact-finding process, was this

	freq	percent	%-NR
(b) not very helpful	3	1.23	23.08
(c) helpful	5	2.05	38.46
(d) very helpful	5	2.05	38.46
No response	231	94.67	
Total	244	100.00	100.00

Q9.9 Are you of the view that more use of assessors would be helpful to the fact-finding process?

	freq	percent	%-NR
(a) yes			
(b) no	84	34.43	41.18
(c) I do not have an opinion	76	31.15	37.25
No response	44	18.03	21.57
Total	40	16.39	
	244	100.00	100.00

Q9.10 Do you have power to appoint a referee to make determinations in relation to technical issues?

	freq	percent	%-NR
(a) yes	111	45.49	52.61
(b) no - go to 9.13	100	40.98	47.39
No response	33	13.52	
Total	244	100.00	100.00

Q9.11 If yes to the above question, have you appointed a referee to make determinations in relation to technical issues in the last five years?

	freq	percent	%-NR
(a) never - go to 9.13	80	32.79	68.97
(b) once	6	2.46	5.17
(c) between one and five times	19	7.79	16.38
(d) more than five times	11	4.51	9.48
No response	128	52.46	
Total	244	100.00	100.00

Q9.12 If you have appointed a referee, from the point of view of the quality of the fact-finding process, was this

	freq	percent	%-NR
(b) not very helpful	3	1.23	8.33
(c) helpful	24	9.84	66.67
(d) very helpful	9	3.69	25.00
No response	208	85.25	
Total	244	100.00	100.00

Q9.13 Do you think that more use of referees would be helpful to the fact-finding process?

	freq	percent	%-NR
(a) yes	73	29.92	36.50
(b) no	73	29.92	36.50
(c) I do not have an opinion	54	22.13	27.00
No response	44	18.03	
Total	244	100.00	100.00

Q9.14 Apart from the use of court-appointed experts, assessors and referees, have you used other procedures in relation to expert evidence to assist the fact-finding process?

	freq	percent	%-NR
(a) yes - please specify	30	12.30	14.93
(b) no	171	70.08	85.07
No response	43	17.62	
Total	244	100.00	100.00

INDEX

Academy of Experts (UK):	28-29
Accountability of experts:	53
Accounting evidence:	40, 66
courtroom aids:	111
withdrawal from juries:	69
Accreditation of experts:	115
Adversary system:	4, 57
Advocates	
confusion in terminology:	53
drafting the expert's report inadequate preparation performance of:	36-37, 51-55
poor skills:	52-53
settling the expert's report:	41-43
taking expert beyond expertise:	52
ANZAPPL:	63
Appearance of experts:	47-48, 71-72
Area of expertise rule - see Rules of expert evidence	
Assessors:	105-107
Australian Advocacy Institute:	61
Australian Competition Tribunal procedures for expert evidence:	100
Australian and New Zealand Forensic Science Society:	63
Australian and New Zealand Association of Psychiatry, Psychology and Law (see ANZAPPL)	
Australian Law Reform Commission: (see also Adversary system)	15, 19, 57
Australian Medical Association:	57
Bases of expert opinion:	35-36
Basis rule - see Rules of expert evidence	
Bias: - see also Expert witnesses	23-29, 37
Cecil and Willging study:	104-105
Champagne et al study:	48-50
Children's welfare:	117
Clarity of evidence:	47-48, 71-72
Codes of conduct for expert witnesses:	27-28
Common knowledge rule - see Rules of expert evidence	

Commonwealth Evidence Act - see Evidence Act 1995 (Cwlth)	
Complexity of expert evidence:.....	29-33
Comprehension of expert evidence:	29-33
Conflicting expert evidence:	29-33
Coroners' courts:	117
Costs:	15-16
Court-appointed experts:	101-105
Cross-examination performance of advocates in:	52-53
reasons for inadequate:	53-54
Declaration by expert witnesses:	10-12, 113-115
Demonstrative evidence:	111
Discretionary exclusion of evidence - see Rules of expert evidence	
Doctors - see Medical practitioners	
Effective evaluation:	115
Engineering evidence:	40, 66
Evaluation Difficulties:	54-55
Evidence Act 1995 (Cwlth):	91-94
impact of:	91-94
Evidence Act 1995 (NSW):	91-94
impact of:	91-94
Examination-in-chief performance of advocates in:	51
Exclusion of expert witnesses:	82-83
Exclusionary rules - see Rules of expert evidence	
Expert culture:	10, 113
Expert evidence	
admissibility of:	75-83
bases of:	35-5
cross-examination and:	52-54
difficulties in evaluating:	40, 54-55
evidence-in-chief and:	51
frequency of judges encountering:	23
incomprehensibility of:	38-39
most serious problem with:	37
persuasiveness of:	43-50

reliability of:	75-84
utility of:	23
Expert reports:	41
lawyers settling:	41-43
Expert witnesses	
accreditation of:	115
appearance of:	47-48, 71-72
bases of evidence:	35-36
bias of - see also impartiality, partisanship:	23-29
clarity of explanation by:	47-48, 71-72
comprehension of:	29-33
credentials - see educational qualifications	
declaration by:	10-12, 113-115
duties of:	27-29
educational qualifications of:	47-48, 71-72
ethics of:	27-29
exceeding parameters of expertise:	33-34
exclusion from court:	82-83
expertise, exceeding:	33-34
experience as witness:	47-48, 50, 71-72
experience in field:	47-48, 71-72
familiarity with facts:	47-48, 71-72
impartiality - see also bias, partisanship..... of:	47-48, 71-72
non-responsive answers by:	35
out-of-play:	55
partisanship of: - see also bias, impartiality	80-82
presence in court:.....	82-83
prior experience in the field:	47-48, 71-72
prior experience as witness:	47-48, 71-72
publications by:	46, 50
qualifications - see educational qualifications	
representativeness of:	80
Family Court counsellors:	110
Federal Court	

court expert usage guidelines	
Practice Direction:	98-100
Field of expertise rule - see Rules of expert evidence	
Hot tub procedure:	109
Impartiality - See Expert witnesses	
Judicial perspective:	16-18
Judicial survey - see also Magistrates' Survey	
background to:	15
Californian symposium:	19
methodology of:	18-19
novelty of:	19-20
pilot study:	18
profile of respondents:	22
representativeness of results:	21
responses to:	141-161
response rate:	21
summary of findings:	1-13
text of:	119-139
Junk science:	9
Jurors	
areas of difficulty with expert evidence:	65
capacity to evaluate expert evidence:	67
effectiveness of trial judge's summing up upon:	67-68
most persuasive expert evidence factors:	70-72
research:	43-45
withdrawal of trials from:	68-70
Junk science:	9
Law reform - see also Rules of Expert Evidence:	89
Medical evidence:	40, 66
withdrawal from juries:	69
Medical panels:	111
Medical practitioners - see also Medical evidence:	17
Medicine - see Medical evidence	
Miscarriages of justice:	57, 117

National Institute of Forensic Science:	20-21
Parameters of expertise:	33-34
Partiality - see Bias, Expert witnesses	
Partisanship - see Bias, Expert witnesses	
Practice Direction - see Bias, Expert witnesses	
Pre-hearing procedures for expert evidence	
crystallising of issues:	109
exchange of reports:	109-111
joint statement of issues:	109-111
Prejudicial, more than probative - see Rules of expert evidence	
Procedural reform	
need for:	6-7
Professional Negligence List (NSW):	10
Psychiatry evidence:	40, 66
Psychology evidence:	40, 66
Referees:	107-109
Reliability	
application of term:	77-78
courtroom as forum for evaluating:	79-80
meaning of, for expert evidence:	78
recondition for admissibility of evidence:	75-84
Reports - see Expert reports	
Roskill Committee:	31-32
Royal Commission on Criminal Justice (UK):	109
Rules of Expert Evidence,	85-90
abolition of:	87-90
application of:	85-90
area of expertise rule:	86, 87, 88
basis rule:	86, 87, 88
common knowledge rule:	86, 87, 88
Commonwealth rules:	91-94
expertise rule:	86, 87, 88
federal rules:	91-94
field of expertise rule - see area of expertise rule	

NSW rules:	91-93
prejudice-probative discretion:	93
reform of:	91
retention of:	87-90
ultimate issue rule:	86, 87
Scientific evidence:	40, 66
withdrawal from juries:	69
Sentencing - role of expert evidence, <i>see</i> Expert witnesses	
Special juries:	95
Speculation:	92
Statistics	
evidence:	40, 66
trial by:	72-73
Surgery - <i>see</i> Medical evidence	
Survey - <i>see</i> Judicial Survey; Magistrates' Survey	
Taking experts out-of-play:	55
Training for advocates	
most helpful aspects of:	61-63
need for:	60
Training for experts	
most helpful aspects of:	59-60
need for:	57-59
Ultimate issue rule - <i>see</i> Rules of expert evidence	
Visual aids - <i>see</i> Demonstrative evidence	
Voire dire	
procedure:	75
Woolf, Lord:	17, 57, 95-96