



Ministry
of Justice

The Government's response to the Law Commission report:

*“Expert evidence in criminal proceedings in
England and Wales” (Law Com No 325)*

21 November 2013

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Summary

1. Prompted by the previous Parliament (House of Commons Science and Technology Committee report of 29 March 2005 “*Forensic science on trial*”), the Law Commission published in March 2011 the report “*Expert evidence in criminal proceedings in England and Wales*” (Law Com No 325)¹. The Law Commission report was largely based on a public consultation conducted in April-July 2009 and on the Forensic Science on Trial Report and used examples of four high profile appeal cases involving unreliable or conflicting expert evidence (*Dallagher*² – ear prints; *Clark*³ and *Cannings*⁴ – sudden infant death syndrome; and *Harris and others*⁵ – shaken baby syndrome).
2. In summary, the Law Commission’s key recommendations were:
 - a. To introduce a statutory admissibility test, to be applied in appropriate cases, whereby expert opinion is admissible in criminal proceedings only if it is sufficiently reliable to be admitted (“the reliability test”);
 - b. To provide, by statute, judges with a single list of generic factors to help them apply the reliability test;
 - c. To codify (with slight modifications) the uncontroversial aspects of the present law, so that all the admissibility requirements for expert evidence would be set out in a single Act of Parliament and carry equal authority.

¹ Law Commission, *Expert evidence in criminal proceedings in England and Wales*, 21 March 2011, Law Com No 325 (lawcommission.justice.gov.uk/areas/expert-evidence-in-criminal-trials.htm - accessed on 30/10/2012).

² *R v. Dallagher* [2002] EWCA Crim 1903

³ *R v. Clark* [2003] EWCA Crim 1020

⁴ *R v. Cannings* [2004] EWCA Crim 1

⁵ *R v. Harris and others* [2005] EWCA Crim 1980

3. The Government shares the Law Commission's concern about problems caused by the use of inappropriate or unreliable expert evidence, and is persuaded of the benefits of taking action on this. It recognises the potential value of the proposed reliability test in reducing the risk of unsafe convictions arising from unreliable expert evidence. However, there is no robust estimate of the size of the problem to be tackled – either in terms of the number of cases where unreliable expert evidence is adduced, nor in the impact this has in terms of subsequently quashed convictions. The impact assessment published with the Law Commission's recommendations indicates that application of the new test would involve additional pre-trial hearings, with the concomitant additional costs, but without sufficiently predictable savings to compensate for those costs. Without certainty as to the offsetting savings which might be achieved, when set against current resource constraints it is not feasible to implement the proposals in full at this time.
4. Rather than creating a statutory reliability test at this time, the Government will invite the Criminal Procedure Rule Committee to consider amending the Criminal Procedure Rules to ensure that judges are provided, at the initial stage, with more information about the expert evidence it is proposed to adduce. If endorsed by the Committee, we believe that such changes could increase the likelihood of the trial judge and the opposing party, where appropriate, challenging expert evidence.
5. Although this will, of course, fall short of the recommended reliability test, the Government considers that the amended Criminal Procedure Rules would go some way towards reducing the risk of unsafe convictions as a result of unchallenged inappropriate or unreliable expert evidence.

The Law Commission's recommendations and the Government's response

6. Listed below are the 22 recommendations from the Law Commission and the Government's response. Both the recommendations and the response only refer to criminal proceedings in England and Wales.

A new reliability test

Recommendation 1. “We recommend that there should be a statutory admissibility test which would provide that an expert’s opinion evidence is admissible in criminal proceedings only if it is sufficiently reliable to be admitted (“the reliability test”).”

7. This proposal, if implemented, would enhance the existing common law rules, and potentially increase the likelihood that unreliable expert evidence would be excluded from criminal trials.
8. However, the Government is concerned about the cost of fully implementing the Law Commission’s recommendations. Although the Law Commission’s Impact Assessment estimates savings for the Ministry of Justice, these are very uncertain. As the Law Commission notes: *“it is very difficult to quantify the scale of the problem associated with unreliable expert evidence in criminal proceedings”*.
9. In light of the above, the Government is unable to act on recommendation 1 at this time.

Recommendation 2. “We recommend a rule which would provide, for the reliability test, that if there is any doubt on the matter expert evidence presented as evidence of fact should be treated as expert opinion evidence.”

Recommendation 3. “We recommend that trial judges should be provided with a single list of generic factors to help them apply the reliability test and that these factors should be set out in the primary legislation containing the test”.

10. For the reasons indicated above, the Government is not in a position to introduce a statutory reliability test at this time.
11. The Government, therefore, does not intend to act on recommendations 2 and 3.

Recommendation 4. “We recommend that the trial judge should be directed to take into consideration the factors which are relevant to the expert opinion evidence under consideration and any other factors he or she considers to be relevant.”

12. Since the Government is not intending to legislate at this time, we aim to implement this recommendation through two routes: first, by inviting the Judicial College to strengthen the existing judicial guidance (for example, the *“Crown Court Bench Book – Directing the Jury”*) on the issue of experts; second, by inviting the Criminal Procedure Rule Committee to amend Part 33 of the Criminal Procedure Rules to provide a stronger indication of the factors that trial judges should consider when assessing expert evidence.

Recommendation 5. “We recommend that:

(1) criminal courts should have a limited power to disapply the reliability test so that it does not have to be applied routinely and unnecessarily;

(2) but, equally, the power to disapply must not be such that the reliability test becomes only a nominal barrier to the adduction of unreliable expert opinion evidence.”

Recommendation 6. “We recommend for our proposed reliability test that, where the test is applied, the party wishing to adduce the expert opinion evidence should bear the burden of demonstrating that it is sufficiently reliable to be admitted.”

13. For the reasons indicated above, the Government is not in a position to introduce a statutory reliability test at this time.
14. The Government, therefore, does not intend to act on recommendations 5 and 6.

Recommendation 7. “We recommend that there should be a single framework in primary legislation governing the admissibility of all expert evidence in criminal proceedings.”

15. Current guidance on the common law framework on the admissibility of expert evidence in criminal proceedings has already been summarised by the courts themselves (see, for example, paragraphs 270-273 of *Harris and others*). Further guidance on expert evidence for the courts is currently available including in Part 33 of the Criminal Procedure Rules 2012⁶ and in the *“Crown Court Bench Book – Directing the Jury”*⁷.

⁶ www.legislation.gov.uk/ukxi/2012/1726/part/33/made

⁷ Judicial Studies Board, *Crown Court Bench Book – Directing the Jury*, March 2010, Chapter 8: Expert Evidence, pp. 148-154 (www.judiciary.gov.uk/Resources/JCO/Documents/Training/benchbook_criminal_2010.pdf - accessed on 30/10/2012); Judicial Studies Board, *Crown Court Bench Book – Directing the Jury – First Supplement*, October 2011, Chapter 8: Expert Evidence, pp. 30-35 (www.judiciary.gov.uk/Resources/JCO/Documents/eLetters/CCBB_first_supplement_071211.pdf - accessed on 30/10/2012); Judge Simon Tonking and Judge John Wait, *Crown Court Bench Book Companion*, 2012, p. 69

16. Guidance on expert evidence for the experts themselves has already been issued by, for example, the Crown Prosecution Service⁸, the Forensic Science Regulator⁹, the General Medical Council¹⁰ and the Health and Safety Executive¹¹.
17. In light of the above, the Government does not consider that there is a sufficiently strong case to set out in statute the current framework on the admissibility of expert evidence in criminal proceedings, and consequently the Government does not intend to act on recommendation 7 at this time.

Codification of the common law

Recommendation 8. “We recommend that primary legislation should provide that expert evidence is admissible in criminal proceedings only if:

- (1) the court is likely to require the help of an expert witness; and***
- (2) it is proved on the balance of probabilities that the individual claiming expertise is qualified to give such evidence.”***

Recommendation 9. “We also recommend that this legislation should provide that expert evidence is inadmissible if there is a significant risk that the expert has not complied with, or will not comply with, his or her duty to provide objective and unbiased evidence, unless the court is nevertheless satisfied that it is in the interests of justice to admit the evidence.”

www.judiciary.gov.uk/Resources/JCO/Documents/eLetters/Bench%20Book%20Companion_revised%20complete%20march%202012.pdf – accessed on 30/10/2012).

⁸ Crown Prosecution Service, *Guidance booklet for experts*, May 2010

www.cps.gov.uk/legal/assets/uploads/files/Guidance_for_Experts_-_2010_edition.pdf - accessed on 30/10/2012).

⁹ Forensic Science Regulator, *Codes of Practice and Conduct for forensic science providers and practitioners in the Criminal Justice System*, Version 1.0, December 2011

www.homeoffice.gov.uk/publications/agencies-public-bodies/fsr/codes-practice-conduct - accessed on 30/10/2012).

¹⁰ General Medical Council, *Acting as an expert witness – guidance for doctors*, (www.gmc-uk.org/guidance/ethical_guidance/expert_witness_guidance.asp - accessed on 30/10/2012).

¹¹ Health and Safety Executive, *Expert evidence*, Guidance, 13 January 2011

www.hse.gov.uk/enforce/enforcementguide/investigation/expert-intro.htm - accessed on 30/10/2012).

18. As far as possible, the above changes could be incorporated into Part 33 Criminal Procedure Rules. Under section 40 of the Criminal Procedure and Investigations Act 1996, a trial judge can already make, at a pre-trial hearing, any ruling on the admissibility of evidence (thus implicitly including expert evidence). The Government will therefore invite the Criminal Procedure Rule Committee to consider how to incorporate these changes. This would not, of course, provide a power in relation to defence expert evidence equivalent to the power under s 78 of the Police and Criminal Evidence Act 1984 to exclude prosecution evidence where its inclusion would be “unfair”.

Recommendation 10. “We recommend that the Criminal Procedure Rules be amended to include the following additional requirements:

(1) before giving oral evidence, an expert witness should be referred to his or her overriding duty to give expert evidence which is

(a) objective and unbiased, and

(b) within his or her area (or areas) of expertise;

(2) the trial judge or magistrates’ court should rule on the expert witness’s area (or areas) of expertise before he or she gives evidence and monitor the position to ensure that he or she does not give expert evidence on other matters.”

19. The Criminal Procedure Rule Committee has considered and discussed this recommendation but found no current need for the suggested additional requirements, in the absence of new primary legislation. The matters with which they deal are already dealt with routinely in examination-in-chief or cross-examination and, in the Crown Court, in the judge’s directions to the jury. However, the Government invites the Criminal Procedure Rule Committee to keep this recommendation under review in case it should prove desirable in future to incorporate the established practice in the Criminal Procedure Rules.
20. In light of the above, the Government does not consider that it is appropriate to implement recommendations 8, 9 and 10 at this time.

The reliability test

Recommendation 11. “We recommend for criminal proceedings:

(1) a statutory provision in primary legislation which would provide that expert opinion evidence is admissible only if it is sufficiently reliable to be admitted;

(2) a provision which would provide our core test that expert opinion evidence is sufficiently reliable to be admitted if –

- (g) whether there is a range of expert opinion on the matter in question; and, if there is, where in the range the expert's opinion lies and whether the expert's preference for the opinion proffered has been properly explained;*
- (h) whether the expert's methods followed established practice in the field; and, if they did not, whether the reason for the divergence has been properly explained;*
- (2) approved factors, if any, for assessing the reliability of the particular type of expert evidence in question (insofar as they appear to be relevant); and*
- (3) any other factors which appear to be relevant."*

Recommendation 13. *"We recommend the following for criminal proceedings:*

- (1) there should be a presumption that expert opinion evidence tendered for admission is sufficiently reliable to be admitted, but this presumption would not apply if:
 - (a) it appears to the court, following a reasoned challenge, that the evidence might not be sufficiently reliable to be admitted, or*
 - (b) the court independently rules that the presumption should not apply;**
- (2) if the presumption no longer applies, the court should direct that there be a hearing to resolve the question of evidentiary reliability, unless the question can be properly resolved without a hearing; and*
- (3) for Crown Court jury trials, the reliability hearing should ordinarily take place before the jury is sworn, but, exceptionally, it should be possible to hold a hearing during the trial in the absence of the jury."*

Recommendation 14. *"We recommend that, if challenged on appeal, the trial judge's ruling under the reliability test should be approached by the appellate court as the exercise of a legal judgment rather than the exercise of a judicial discretion."*

21. For the reasons indicated above, the Government is not in a position to introduce a statutory reliability test at this time, and will therefore not be acting on recommendations 11, 12, 13 and 14.

Court-appointed experts

Recommendation 15. *"We recommend that a Crown Court judge (for a trial on indictment) should be provided with a statutory power to appoint an independent expert to assist him or her when determining whether a party's proffered expert opinion evidence is sufficiently reliable to be admitted."*

Recommendation 16. *"We recommend that this power should permit a Crown Court judge to appoint an independent expert only if he or she is*

satisfied that it would be in the interests of justice to make an appointment, having regard to:

- (a) the likely importance of the expert opinion evidence in the context of the case as a whole;**
- (b) the complexity of that evidence, or the complexity of the question of its reliability; and**
- (c) any other relevant considerations.”**

Recommendation 17. “We recommend that the judge should make his or her appointment from a shortlist of individuals prepared by an independent panel of legal practitioners, chaired by a Circuit Judge, reflecting the interests of both the prosecution and the defence.”

- 22. We note that these recommendations are helpfully qualified by an acknowledgement that there would be a start-up cost and the need for ongoing administrative support for the proposed appointments panel, and by the suggestion that the Government might wish to see whether the recommended power was necessary (for example, by monitoring the extent to which the existing common law power of the court to call a witness of fact provided an adequate alternative).
- 23. The Government is concerned about the efficiency of the recommended procedure. Use of an independent selection panel is a potentially cumbersome process which the Government would hesitate to make mandatory in every case where these issues arose. It might be sufficient in most cases for the judge to have access to a standing “long list” of experts in various fields, drawn up by a suitably independent process.
- 24. In particular, HM Courts and Tribunals Service is very concerned about the cost of setting up, maintaining and administering the kind of system envisaged. As well as the costs relating directly to the selection panel, there would be ongoing costs in respect of the additional time spent by the prosecution and defence in considering (in consultation with their experts) and making representations on the judge’s proposal to appoint an expert, on the choice of expert, on instructions to the expert and on the expert’s evidence, and by the court in dealing with those representations. If, following pre-trial argument, the evidence was admitted, it is questionable whether all that additional effort would significantly shorten the trial.
- 25. In light of the above, the Government does not accept recommendations 15, 16 and 17.

Procedural matters

Recommendation 18. “We recommend that Part 33 of the Criminal Procedure Rules be amended to include the following:

(1) a rule requiring an appendix to the expert’s report, setting out

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(a) sufficient information to show that the expertise and impartiality requirements are satisfied; and

(b) a focused explanation of the reliability of the opinion evidence with reference to the test and relevant examples and factors in our draft Bill, concisely set out in a manner which would be readily understood by a trial judge, along with a summary of:

(i) other cases (if any) where the expert’s opinion evidence has been ruled admissible or inadmissible after due enquiry under the reliability test; and

(ii) other judicial rulings after due enquiry which the expert is aware of (if any) on matters underlying the expert’s opinion evidence;

(2) a rule requiring an expert’s report to include –

(a) a statement explaining the extent to which the expert witness’s opinion evidence is based on information falling outside his or her own field of expertise and/or on the opinions of other (named) experts;

(b) a schedule identifying the foundation material underpinning the expert witness’s inferences and conclusions; and

(c) a rule that where an expert witness is called by a party to give a reasoned opinion on the likelihood of an item of evidence under a proposition advanced by that party, the expert’s report must also include, where feasible, a reasoned opinion on the likelihood of the item of evidence under one or more alternative propositions (including any proposition advanced by the opposing party);

(3) an extension of rule 33.4(2) of the Criminal Procedure Rules so that, if a party seeking to adduce expert evidence does not comply with the above requirements, the evidence would be inadmissible unless all the parties agree that it should be admitted or the court gives leave for it to be admitted.”

Recommendation 19. “We recommend that the Criminal Procedure Rules should require pre-trial disclosure by the parties of the following matters to the other parties and to the court:

(1) information relevant to the application of the expertise and impartiality tests;

(2) if requested, information relevant to the application of the reliability test (including, in particular, the evidence underpinning the expert’s opinion); and

(3) information which could substantially undermine the credibility of the experts being relied on.”

Recommendation 20. “We also recommend, in line with the current position under rule 33.4(2) of the Criminal Procedure Rules 2010, that a party’s failure to comply with the requirements of sub-paragraph (1) or with a request for disclosure under subparagraph (2), should render that party’s expert evidence inadmissible, unless the judge gives leave (or all the parties agree that the evidence should be admitted).”

26. The Government will be inviting the Criminal Procedure Rule Committee to consider making appropriate changes to Part 33 of the Criminal Procedure Rules to reflect these recommendations. This will, of course, rely on the judge’s existing powers to exclude evidence, rather than providing any new powers.

Recommendation 21. “We recommend that:

**(1) Part 33 of the Criminal Procedure Rules be amended to make explicit provision for a judge-led meeting of the parties’ legal representatives and experts if there is a dispute on the expert issues and the judge believes that such a meeting would be beneficial in resolving or reducing the dispute; and
(2) this power be supported by a provision similar to that now set out in rule 33.6(4) of the Rules.”**

27. The Criminal Procedure Rule Committee has considered and discussed this recommendation but found no current need to extend the existing provision in the Rules for discussion between experts in advance of the trial so as to include a meeting with the judge.
28. According to the Law Commission’s Impact Assessment the additional meetings proposed would have a net cost of £6.9m over two years. We believe that it would be better to allow the existing arrangements for discussion to become more firmly established before considering such an extension.

Recommendation 22. “We recommend that the Criminal Procedure Rules should provide that, for trials on indictment (before a judge and jury), if the judge determines at the end of the trial that the prosecution case depends wholly or substantially on disputed expert opinion evidence, the judge should:

**(1) consider whether to provide the jury with a cautionary warning in relation to that evidence; and
(2) if a cautionary warning is thought to be appropriate, provide the jury with an appropriate warning tailored to the facts of the case.”**

29. The Criminal Procedure Rule Committee has considered and discussed this recommendation. While approving of such warnings, the Committee did not think that such a requirement should be added to the Criminal Procedure Rules at present because such warnings are already given where relevant. They may also be given by the justices' clerk or legal adviser to a lay bench where necessary. However, the Government invites the Criminal Procedure Rule Committee to keep this recommendation under review, in case it should prove desirable in future to incorporate the established practice in the Criminal Procedure Rules.

