Parliament House

16th August 2014

Lord Cullen,

Chair,

Scottish Law Commission

Dear Paul,

Submissions for the Ninth Programme of Law Reform

I am writing in response to your invitation for suggestions for the Ninth Programme of Law Reform. My suggestion is directed to reform regarding the admissibility and use of expert evidence in criminal trials. In this submission I seek to identify the causes for concern and the need for reform.

Put shortly my concern is that we have been complacent. To a significant extent the admission and use of expert evidence in criminal trials is uncontrolled, absent any proper safeguards and is in conflict with our duty to secure a fair trial.

Introduction

The Commission is no doubt aware of many of the concerns over this issue. In particular the call for reform some 10 years ago by the House of Commons Science and Technology Committee[1] and the detailed response and proposals from the English Law Commission[2]. The draft bill derived from the ELC Report seems to have been left on a shelf in Westminster and I am not aware what progress has been made if any.

In Scotland at a conference organised by the Forensic Science Society in March 2013 these calls for reform were considered by the Commission and it was suggested that there was no widespread demand for reform in Scotland. There was no indication given that these concerns were going to be addressed here. I make this submission in part to correct this and suggest there are real causes for concern here and there is a pressing case for reform, at least in criminal trials.[3]

There has been a long standing recognition of need for a systematic appraisal of the use of expert evidence in almost all comparable jurisdictions. There is no reason why this does not apply here and indeed we lag behind and that need is now pressing.

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[1] Seventh Report (2004-2005)

[2] ELC Consultation No190 and Report No 325

[3] See for example the Scottish Universities Insight Institute paper " Scots Law of Evidence: Fit for Purpose" (December 2011) which suggests there is a real danger of future miscarriages of justice unless the system for admitting evidence is made more robust

I have restricted my submission to the position in criminal trials because I believe the criminal justice system is most at peril and because our position in criminal law on this issue is close to that in England. This assists in making the subject suitable for law reform because any such reform can build upon the impressive work by the ELC. In so doing I recognise of course that concerns that exist in civil proceedings.

Current Context

Since the alarm was first raised in Westminster the need for reform has become more obvious. Here this is due to a variety of factors :-

- The increased complexity and developments in science – covering both medical, forensic and social science.

- This has in turn led to more demand from expert regulatory bodies for regulation of the admission expert evidence and for reform with little response.[5] See for example the limited reforms following the recommendations of the Fingerprint Inquiry [6]

- The increased use of expert evidence in criminal trials – not least by the Crown. This is seen in the new approach and powers in Sexual Offences cases[7] and in practice.

- Decisions of the court to admit psychiatric or psychological evidence such as on the question of the reliability of a child witness in light of the interviewing techniques used[8]; on the question whether a witness suffered from a severe personality disorder and was a pathological liar [9] and on the question of an appellant's susceptibility to pressure when he was being questioned by the police [10]. This has too extended to frankly dubious areas of expertise such as whether a complainer who suffered from bi-polar illness (manic depression) exhibited false memory syndrome [11] to battered women's syndrome [12] facial mapping [13] image comparison evidence[14] voice identification (without auditory analysis) [15]and lip reading (not led but listed on the indictment and admitted in England)[16]

- At the same time there has been an increased use of complex expert evidence - for example in relation to child injury and death cases (suffocation, Sudden deaths, munchausen by proxy etc)[17] or DNA - raising difficult quality issues regarding low copy number samples).[18]

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[5] Raised in evidence to the House of Commons Select Committee
[6] Fingerprint Inquiry Scotland Report 14th December 2011
[7] S275C of the 1995 Act
[8] *AJE* v *HMA* 2002 JC 215
[9] *McBrearty* v *HMA* 2004 JC 122

[10] *Gilmour* v *HMA* 2007 HCJAC 48
[11] *HMA v A* 2005 SCCR 593

[12] Arising in diminished responsibility cases – eg *Graham* 2013 HCJAC 140
[13] *Church v HMA* 1996 SCCR 29
[14] *HMA v Sheridan* unreported preliminary objection determination – evidence allowed
[15] *HMA v Sheridan* supra
[16] *HMA v (Nat) Fraser* produced at trial but not led – admitted in England R v Luttrell 2004 EWCA Crim 1344
[17] *Walker v HMA* 2011 SCCR 419; *Hainey vHMA* 2013 HCHAC 47

Allied to this is the expanding use to which forensic evidence is sought to be put – for example increasingly where comparisons are made expert opinion is sought to obtain an identification or 'match', or a 'consistent with' opinion, which opinion is rarely challenged (see below).

- Increased difficulties for the defence to fund and obtain expert evidence to counter those led by the Crown

- The developing lucrative market in providing 'experts' to the criminal justice system in a context where there are weaker controls and regulation of standards. For example the demise of the UK Forensic Science Service (FSS) and replacement by a mixture of police and private organisations. An individual Regulator has now been introduced and here, there is now the little noticed Scottish Police Services Authority. It has been suggested in England under the Regulator, even as assisted by the Forensic Service Advisory Council, the gap between the theoretical codes of practice and their implementation is wide. Whilst there is apparent co-operation between the Regulator and the SPSA it is not clear how that assists. Most notably there is no independent oversight of the forensic services provided by the SPSA.

- A social context where the CSI effect has potentially influences juries if not to expect great things from forensic evidence to view such evidence as influential.

- The context of future reform on the law of evidence. The Carloway Review seemed to point towards an approach favouring the removal of rules on the admission of evidence in general[19] and echoed an approach which views relevancy as the only rule.[20] It is important to clearly distinguish expert evidence from this. In addition of course the proposal to abolish corroboration adopted by the government makes the concerns would remove an existing safeguard and make these concerns more acute.

- Finally recent appeal cases demonstrating miscarriages of justice in respect of this type of evidence and which have highlighted failures within the existing system. In *Liehne* where the failures of the trial judge to explain and direct the jury how to approach and assess the expert evidence rendered the trial unfair.[21] And in *Hainey* which held the experts had given opinion beyond their expertise and the jury had been inadequately directed on the evidence and how to assess it.[22]

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[18] *Hoey v HMA* 2007 NICC 49; *Reed & Anr* [2009] EWCA Crim 2698

[19] Review at 7.2.10; 7.2.53 and 7.2.55

[20] See for example Lord Phillips Criminal Bar Association Kalisher Lecture 23rd October 2007

[21] 2011 SCCR 419at [46] [47] and [49]

[22] 2013 HCJAC 47

I recognise that much skilled evidence – especially perhaps forensic evidence – is an invaluable tool in our criminal justice system, but it can also carries the potential of serious injustice unless it is properly evaluated and safeguarded within the expert professions and within the courts.

ADMISSIBILITY OF EXPERT EVIDENCE

I don't need to rehearse the common law on the admission of expert evidence to the Commission. I would simply make the following observations.

Beyond the basic principles – that the evidence is necessary, that it does not usurp the function of the jury, that the expert is adequately skilled and his evidence is confined to his area of expertise and that he is impartial - there is little jurisprudence and little mention of what I suggest is a crucial admissibility requirement, namely the reliability of the area of expertise or body of knowledge spoken to.

I have found only one recent case which fully addresses this – *Young v HMA* [23] where the Lord Menzies states :

"[54] Evidence about relevant matters which are not within the knowledge of everyday life reasonably to be imputed to a jury or other finder of fact may be admissible if it is likely to assist the jury or finder of fact in the proper determination of the issue before it. The expert evidence must be relevant to that issue (and so not concerned solely with collateral issues), and it must be based on a recognised and developed academic discipline. It must proceed on theories which have been tested (both by academic review and in practice) and found to have a practical and measurable consequence in real life. It must follow a developed methodology which is explicable and open to possible challenge, and it must produce a result which is capable of being assessed and given more or less weight in light of all the evidence before the finder of fact. If the evidence does not meet these criteria, it will not assist the finder of fact in the proper determination of the issue; rather, it will risk confusing or distracting the finder of fact, or, worse still, cause the finder of fact to determine the crucial issue on the basis of unreliable or erroneous evidence. For this reason, the court will not admit evidence from a "man of skill" or an "expert" unless satisfied that the evidence is sufficiently reliable that it will assist the finder of fact in the proper determination of the issue before it. We agree with, and adopt, the general observations of the court with regard to evidence from a person claiming specialist knowledge and expertise which were made by the court in *Hainey* v *HM Advocate* [2013] HCJAC 47, particularly at paragraph [49]."

This places reliability as a condition of admissibility and sets out what it means. Much as I welcome it I would suggest this is new authority, influenced I suggest by the submissions made. It has not received much attention.

Such a requirement of reliability addresses whether the science or body of knowledge involved is soundly based – so that for example the strength of any opinion or hypotheses is justified having regard to the grounds upon which it is based and the methodology and any assumptions are valid and/or objectively verifiable.

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[23] 2013 HCJAC 145

Reliability in this sense has been internationally recognised as a requirement and as you will be aware, reliability was the focus of admissibility in the recommendations made by the ELC and I commend their reasoning.

It may be obvious, but worth stating, that expert opinion evidence should stand or fall - in admissibility terms - on its own. That it is supporting evidence or is supported by other evidence has no bearing on the inherent reliability or unreliability of the opinions to be provided and in considering admissibility the evidence is question should be tested alone. This also ensures consistency in decisions on admissibility.

Specific Causes for Concern

(1) Admission of Questionable Science or Areas of Expertise

Looking at other jurisdictions, as well as what I see in practice, I get the impression that almost any form investigative means of obtaining evidence is being developed into so called expert evidence. In forensic science there is an underlying drive to establish identification of the suspect – wholly understandable in an investigation but not always a matter which carries proper probative value.

Recently we seem to conflate information obtained for investigative purposes with information from a forensic or police source which can be used in evidence without evaluating the reliability of the area of expertise.

For example I have seen photo selection from emulator boards allowed under the regulations as an investigative tool being admitted and used as evidence of positive identification rather than non-identification at a VIPER parade. The problem here is that the process of obtaining a photo selection has no inbuilt safeguards and carries a heightened risk of wrongful identification and is necessarily of poor quality.

And an all too common example is the admission of 'image comparison' evidence led by the Crown. In my experience this evidence generally comes from ex-police officers whose 'expertise' appears to rest on the experience of examining photographs and CCTV stills and the use of computer facilities which enhance the images. The comparison made between images is entirely subjective.

(2) Failure To Assess The Scope Of And Probative Value Of Expert Evidence

Allied to the absence of evaluating reliability of the area of expertise is a failure to assess the extent to which such expertise is relied upon and it's probative value.

For example I have seen footprint impressions relied upon in an investigation which suggest the same type of trainer, which is then being led and relied upon as "an adminicle" of evidence of identification – as being 'consistent' with that worn by the accused. This is to be distinguished from evidence of comparison based upon unique 'wear and tear' marks.

There are many examples - including other well established areas of forensic science such as fingerprints,, fibre comparison, ballistics etc where forensic information is being stretched into providing individual identification evidence where there is no objectively verifiable or statistical basis for making any such identification. In the example above there is no research or database to measure the prevalence of the make of trainer in the particular area of Scotland or of the identifiable features relied upon in image comparison. That being so expert opinion that a 'match' is made and this is the shoe/ person in question ought not to be admitted but very often is. And rarely is a jury directed on the probative value of the 'match' spoken to in evidence.

My impression is that even in established areas of forensic comparison work (other than DNA) little effort has been made to provide a means of measuring or testing the reliability of their finding - or more accurately their opinion on the probability - of a match.

The problem is exacerbated where some areas of so called expertise 'dress up' the process with pretend science – for example in image comparison I have seen reports containing tables of comparison (mirroring science based likelihood ratios) which list a spectrum of selection from "not the same" to "similar" to " very similar" etc. These tables are simply made up and have no objective basis. The choice made to tick a strength of likeness is entirely subjective. This is in my view pseudo science designed to mislead.

(3) Lack of Knowledge

These problems are compounded by the lack of understanding of juries, lawyers and indeed the experts themselves on the meaning or import of some of the language used in giving opinions – what does a 'match' mean ? What is the probative value of "consistent with" or "probable". Understanding of such expressions in the sense intended by the scientist is often misunderstood by judges as well as juries.[24]

The Fingerprint Inquiry exposed a worrying issue of the standards or perception of the experts, where the forensic examiners appeared to deny their comparison process was subjective. The primary recommendation made was that fingerprint examination had to be viewed as opinion evidence and not as evidence of fact.

There is no systematic training for judges and lawyers in the evaluation of expert opinion or what constitutes sound scientific methodology. In the absence of any guidance it is not therefore surprising if lawyers and judges don't go there.

(4) Focus on the Expert not the Area of Expertise

This may explain what I see as a misguided concentration in practice of evaluating admissibility by testing the individual's expertise and not the area or body of science or experience involved. In the example of image comparison used above, the witness may have a weight of experience having

[24] See D.McQuiston-Surrett & M.Saks 'The Testimony Of Forensic Identification Science: What Exoper Witnesses Say And What Fact Finders Hear (2009) 33 Law And Human Behaviour 436

viewed thousands of photographs or CCTV images and he is able to use computer enhancement but the simple truth is the process of comparison is not itself objectively verifiable.

This reflects our absence of legal recognition for such an assessment and the absence of guidance on how to assess any area of expertise. It is the individual expert which is the target and the only issue of reliability for the jury to resolve. This is reflected in the common law authorities as well as in practice.

Apart from missing what I suggest is the most important target, this focus carries the danger of becoming personal to the expert in question which may be unfair to him or her – see for example the judicial apology issued following *Hainey supra.*

FAIR TRIAL

The underlying legal principle for the focus on securing the impartiality and reliability of expert evidence is of course the protection of the fairness of the trial. The accused has a right to be protected against conviction based on unreliable evidence. The admission and use of unreliable evidence makes wrongful conviction more likely and carries a considerable risk of same.

Allied to this the fairness of the trial is undermined where the trier of fact does not understand or does not have the information to properly assess whether or not the evidence is reliable.

Any assessment under Article 6 is not concerned with the admissibility of evidence as such but of safeguards in place to protect the fairness of a trial The absence of any procedural safeguards or means of controlling the admission and use of expert evidence exposes the accused to wrongful conviction and undermines his right to a fair trial. Accordingly, in addition to the test of admissibility, the procedures for securing the reliability of expert evidence are an important aspect to be addressed.

In any event, if it is accepted that admissibility of expert evidence depends in part and importantly upon the demonstrable reliability of such evidence, then many questions arise as to how this is to be secured in practice. Questions such as -

- How is the quality and reliability of the expert evidence to be established and assessed ?
- What is the role of the parties or proponents presenting this evidence ?
- What is the role of the judge ?
- How are juries to be assisted in understanding and assessing expert evidence ?

I submit that we have at present no clear answer to these questions. This is simply not commensurate with a fair trial.

Common Law Position

The most that has been identified as requirements related to reliability in recent authority concerns the role of the expert witness in *Wilson & Murray v HMA* [25] where some fairly strong indications were given by Lord Reed in respect of that role :

"[59] The effect of expert opinion evidence can perhaps be described with more precision. The role of the expert witness, and his duties and responsibilities, have been subject to much judicial comment. In *National Justice Campania Naviera, S.A.* v *Prudential Assurance Co. Ltd ("The Ikarion Reefer")* [1993] 2 Lloyds Rep 68, Cresswell J listed a number of such duties and responsibilities, *inter alia* -

> "1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation.
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise.
> 3. An expert witness should state the facts or assumptions on which his opinion 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."

[60] To this might be added a requirement that an expert witness should in particular explain why any material relevant to his conclusions is ignored or regarded as unimportant. Although the categories of duty and responsibility described by Cresswell J in the *Ikarion Reefer* case were concerned with civil matters, these rules are equally applicable to criminal cases.

[61] In addition, particularly in criminal cases, other duties and responsibilities have been recognised by the courts. For example, the court will expect in a criminal matter that an expert's report must state the facts upon which opinions are based, and if assumptions are made, these must be clearly identified. Reasons must be given for conclusions. Whether instructed for the prosecution or defence, the principal duty of an expert witness is to the court, and this overrides any duty he owes to the party which instructed him. Again, explanations should be given for the basis on which all relevant material is either accepted or reject
... It is therefore of the utmost importance that any expert witness carefully describes the source and assesses the worth of all material on which his opinion is based."

So the concern here was the terms of the expert report and the assumptions made in which the expert opinion. Whilst the call for disclosure of the basis of the experts reported conclusions could have a wider application, this has not developed. This is an isolated example where the common law has effectively prescribed requirements to be met by an expert witness, which is of course only one aspect of the reliability of expert evidence. This case has only a very limited bearing on assessing whether or not the evidence is sufficiently reliable for admission. In contrast wider considerations of

[25] 2009 SCCR 666

the reliability of expert evidence are not addressed at common law both in principle (other than in *Young supra)* or in terms of making procedural requirements.

The Starting Point

The starting point is not established – who is responsible to ensure the reliability of such evidence ? How is the fairness of the trial to be protected where there are concerns over the reliability and quality of the expert evidence proposed to be led - or in regard to the scope of such evidence once admitted ?

At present procedurally the only recognised starting point is an objection to the admissibility of such expert evidence. This surely is not good enough. Surely the accused should not carry the responsibility of raising and persuading the trier of fact that the evidence is not reliable or of little probative value.

Role of the Judge

The judge has a duty to protect the fairness of the trial both at common law and in terms of Convention and s6 of the Human Rights Act 1998.

In this context we have recognised that where there was been admission of wrong or inadmissible evidence to left uncorrected before a jury the trial will be unfair – *McGinty v HMA*. [26]And we have recognised the important role of the judge in protecting the fairness of the trial in charging juries to ensure they understand and can assess expert evidence and that a failure to do so properly will breach Article 6.[27]

It is a logical step that this duty to secure a fair trial extends to an assessment of expert evidence throughout the trial process – whether or not there has been any objection to the admissibility of same. But here the position of the judge is not clear. The traditional role of the trial judge, of non-interference or as 'referee', persists and there will be many judges who do not recognise any power to intervene absent any objection to admissibility of the evidence. Even where as in *Liehne* the "overarching" duty to protect the fair trial was recognised in giving directions, the hesitation in the language used in the opinion of the Lord Justice General demonstrates the unease that persists.[28] Indeed it wasn't that long ago that the Scottish judges – at least for a period – left questions of admissibility to the jury.[29] And recently any power to remove a case from the jury where the judges considers the evidence is not a quality or sufficient to entitle a reasonable jury to convict has been itself been removed.[30]

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[26] 2006 HCJAC 8 at [10]
[27] Liehne and Hainey supra
[28] See [46] and [47]
[29] Thomson v Crowe 1999 SCCR 1003
[30] Removed by Criminal Justice (Scotland) Act 2010

So, in contrast to England, Scottish judges do not have any power to exclude evidence on the basis of its quality.[31] We stand less protected against unfairness and appear less able to offer judicial protection of a fair trial.

In any event even if minded to be pro-active, how is the judge to exercise his/her duty to protect the fairness of the trial by assessing the reliability of expert evidence? This ought to arise at the preliminary hearing stage. But the judge has no guidance on the matter and absent any clear requirements placed upon the parties to produce information at such a hearing, she or he intervenes in a vacuum.

That vacuum extends to the role of the judge at trial. Firstly where a judge has a concern the expert evidence is not sound what can be done ? Can and should the judge *ex propio motu* embark on an enquiry with the witness to establish the reliability ? How is the judge to direct the jury on how to assess the reliability of the expert evidence? Absent any information or testing of reliability at the trial, only the most general guidance can be given. The updated jury manual on this is very limited and reflects the problem.

Finally the trial judge – unlike the appeal court[32] – cannot call in an assessor or expert to assist him or her in determining the reliability and admissibility of such evidence.

Giving the judge a gatekeeping role in respect of expert evidence is now a recognised role or responsibility held by the judge in the abstract but it is meaningless without reforms which clearly establish the role of the judge and provide the procedure for the exercise of such a role.[33]

The Role Of Parties – Crown And Defence

Current Position

Certain statutory provisions and rules have sought to obtain agreement over evidence, to encourage early disclosure and preparation in the presentation of evidence eg s258 – but in my experience such encouragement does not necessarily result in implementation in practice and falls far short of what is required to secure reliability. The existing provisions are not comparable to mandatory statutory requirements which spell out what is required and place the onus on the proponent seeking to lead such expert evidence.

In addition the usual disclosure requirements apply but are interpreted simply as a requirement to disclose the productions and reports to be relied upon in court and mean little in the absence of any requirement as to what such reports should contain.

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[31] S78 of the Police and Criminal Evidence Act 1984 (PACE)

[32] S104(1)(e)

[33] An exceptional example of which is the judges gatekeeping role in the admission of evidence under s275 of the 1995 Act

Enquiry is made at preliminary hearings as to the arrangements for expert evidence but there is no procedure where it is clear that the proponent of the expert evidence has any duty to establish the reliability and admissibility of same in advance. Certainly there is no protocol or practice note in place which sets out what is required to be established by the proponent to set up the admissibility of the evidence. Again this is rarely addressed unless an objection is taken in a preliminary issue.

Accordingly what we have in place by way of practice and procedure to establish the reliability of expert evidence is poor and piecemeal. This is connected to the failure of the court to actively intervene or screen the admission of the evidence.

Position of the Defence

In my experience – with of course notable exceptions - we have in practice a defence bar who appear to be largely unaware or ill-equipped to address issues of reliability beyond an individual expert's qualifications. This is not just about funding but also the absence of training and lack of communication between the expert bodies and lawyers. Many defence lawyers do not know where to start (especially without their own expert) and need guidance from the professional bodies as to what is recognised as reliable and what is appropriate methodology and practice. It is my impression that much cross examination is superficial and any challenge to the evidence tends to focus on the individual expert.

If lawyers do not understand the limitations of expert evidence then they may be liable to assume because it is 'scientific' it is reliable and therefore make no challenge. In any event the ELC suggested cross examination is not a sufficient safeguard.[34]

Even more likely, jurors will not understand the limitations pf expert evidence and regard it as reliable. This risk may be exacerbated by the 'CSI effect' mentioned above. TH ELC research suggest that juries generally defer to expert evidence.[35] At the same time it also suggests research shows juries are slow to convict in the face of conflicting expert evidence.

Crown Position

I am not aware as to whether the Crown have any established evaluation procedure for using expert evidence. Certainly there is little evidence of it in the courtroom and there have been examples of failures to keep informed on the quality or reliability of evidence being led. For example at the Fingerprint Inquiry evidence was led which suggested that the Crown had not monitored fingerprint evidence coming before the courts and in *McGinty v HMA* the Crown did not have arrangements to keep informed such that the Lord Justice General observed at [10] :

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[34] Consultation Paper No190 at 2.9

[35] Consultation Paper No190 at 2.3-.2.11 and 2.28; Report at 1.15

" It is now obvious that that evidence ought not to have been given, and that it would not have been given if the Crown experts had been fully abreast of contemporary research studies on the subject. Since that evidence was given, we conclude that the appellant did not have a fair trial"

I suggest that this may be related to a view that the Crown, absent any objection, have no particular onus or responsibility to establish that evidence led is reliable or of appropriate quality. This is worrying. It suggests that any onus established by reform needs to be a requirement.

Nor is there an apparent practice of obtaining and disclosing information from experts addressing the quality and reliability of opinions.

Professional Regulation

Of major area of concern is the failure of expert bodies to regulate and validate areas of expertise to enable the courts to assess reliability. The ELC Report suggested there existed a widespread lack of interest among forensic scientists in understanding and eliminating biases in their procedures.[36] That attitude is echoed in the Fingerprint Inquiry. At the same time there are very strong concerns held by professionals as to 'junk science' being admitted and in the commercial interests of some groups holding out offers of expert assistance. For example when I attended 2 years ago a conference organised by psychologists on expert evidence I was taken aback by the stinging criticism of some 'expert' areas we admit in our courts – notably image comparison and facial mapping.

What kind of Reform ?

I believe systematic law reform is needed to address all of these concerns. Encouragement, practice notes and procedural 'tweaks' will not I suggest be enough because -

(a) The law on admissibility requires reform. The legal test for admissibility is weak and reliability needs to be established clearly at the centre of any test. And a definition of what would be sufficiently reliable for admission needs to made
(b) All participants – judges lawyers and juries – need clear guidance on how to conduct that assessment and all triers of fact need guidance on how to assess whether they are satisfied the evidence is sufficiently reliable
(c) The underlying principle behind this is the protection of the right to a fair trial – this requires legal not practice guarantees.

Reform I suggest should place the emphasis on the need to establish admission – as opposed to assuming admissibility in the absence of challenge. This would mean statutory provisions which set requirements for admissibility in any test. For example in respect of impartiality the ELC have recommended expert evidence will not be admitted if there is a significant risk the expert has not

[36] Report 5.35 and Recommendation 5

complied with his or her duty to provide objective and unbiased opinion unless the court is satisfied that it is in the interests of justice to do so.[37]

I would hope this task and the resources needed to address is alleviated by the work done by the ELC. Caution is always needed by referring to English experience and very much so in respect of substantive criminal law. But there is a well established and obvious overlap in the approach taken to expert evidence in criminal trials.

I would therefore refer the Commission to the ELC proposals and would suggest the following reforms:

- A statutory admissibility test which along with the recognised common law principles places reliability at the centre of that test
- Statutory duty on the judge to assess admissibility whether or not objection is made.
- Statutory or SI guidelines for trial judges on how to apply the test
- A statutory power for the trial judge to revise any earlier admissibility ruling and a power to exclude any evidence not addressed under that ruling which in the judges view fails to meet the admissibility test
- A statutory power for the judge exclude any evidence which in his/her view a reasonable jury could not rely upon
- Statutory onus on the party seeking to rely upon such evidence to demonstrate its reliability
- Provision for judges to appoint experts to assist the court
- Requirements for pre-trial disclosure addressing admissibility
- Extensive revision of the jury manual on assessment of such evidence and its reliability
- Recommendations for work /liaison with expert bodies to devise accreditation and the provision of information to assist the courts assess reliability
- Provision of training for judges and lawyers

[37] ELC Report 325 at 4.9

Conclusion

Forgive me the length of this paper and for repeating so much of the ground covered in the ELC Reports. I have sought to address this issue in our context. Overall I fear in any comparison, we Scots are in more urgent need for reform.

Although largely absent from the ELC Report, I believe the appropriate emphasis on the legal principles underpins the need for reform. That is, to secure within our system guarantees of a fair trial. I would however share their observation that :

"If the innocent are convicted – or, for that matter, the guilty are acquitted – because juries are permitted to rely on unreliable evidence, the perception of justice and the efficacy of the legal system within the community it serves is likely to be seriously undermined."" [38]

Lady Scott

[38] ELC No325 at 2.33