

**AUSTRALIAN JUDICIAL PERSPECTIVES ON EXPERT
EVIDENCE: AN EMPIRICAL STUDY**, by Dr Ian Freckelton, Dr
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SUMMARY OF KEY FINDINGS AND OUTCOMES

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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

¹ See Appendix A.

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 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.

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

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 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

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.

⁵ See para 4.10.

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

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

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." 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.

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 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

¹¹ Question 6.4.

¹² Questions 3.1 and 3.3.

¹³ Questions 4.1 and 4.4.

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 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

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.

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 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

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).

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 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 an 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 admissibility of expert evidence³⁵. Approximately a quarter of those responding expressed the view that it should be a precondition but comparatively few thought

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.

³⁵ Question 6.2.

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.**
- 2. I have used my best endeavours to produce my report in sufficient time to enable proper consideration of it.**

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.

- 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 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,

⁴⁰ See answers to questions 4.2 and 4.3.

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

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.

