

SUMMARY OF KEY FINDINGS AND OUTCOMES

1.1 The Survey

The survey of magistrates, upon which this report concentrates, is the first to determine what the Australian magistracy thinks about expert evidence and its court room presentation. It incorporates comparison of the magistrates' answers with those of judges who had replied to a previous survey instrument distributed to members of Australia's judiciary some 18 months previously¹.

Three quarters of the magistrates who responded to the survey had served for more than six years, with half having served for more than a decade.² The perspective of such an experienced magistracy is important because their courts have the largest share of litigation in Australia. Magistrates' case loads necessitate high efficiency and the need for significant throughput of litigation. A characteristic of cases in magistrates' courts is that they tend to be shorter than those conducted in District/County Courts or in Supreme Courts. This has ramifications for the evaluation process, for the procedures that are employed, and for the characteristics of the advocates and those experts whom the advocates examine and cross-examine.

While many surveys are conducted to test an hypothesis, this survey had no explicit preconceptions. Rather, in its formulation it drew upon the survey of judges on similar subject matter³ and sought to gather information representative of the opinions held by magistrates, thus going beyond the occasional comment in a decision, and thereby to ascertain their collective beliefs and approaches in relation to the way in which evidence from other disciplines fares, and should fare, in the course of contemporary litigation.

A particular aspect of the survey was that it afforded an opportunity to build upon the results of the survey of judges reported on in 1999⁴ and also to explore some features of trial practice which are unique to the magistrates' jurisdiction. It also enabled a comparison between the answers given by magistrates and judges to comparable questions.

One of the issues that was prominent in the judges' responses was the extent to which the accusatory/adversary system, as it has evolved in Australia, constrains judicial practices in relation to intervention in proceedings such as by judicial questioning of expert witnesses, and also in relation to drawing upon aspects of the inquisitorial systems of justice, such as the ability of courts, rather than only the parties, to call witnesses.

¹ I Freckelton, P Reddy and H Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study*, AIJA, Melbourne, 1999.

² Question 1.2.

³ Freckelton, Reddy and Selby, op cit, n1.

⁴ Freckelton, Reddy and Selby, op cit, n1.

Magistrates sit in a number of capacities. Some, for instance, sit as coroners, that jurisdiction being one of the few examples of a fundamentally inquisitorial form of justice which exists in Australia, albeit overlaid with some components of the adversary system of justice. Thus there appeared to be an opportunity to gain some insight into how inquisitors function within the Australian justice system. Unfortunately the sample size proved too small to derive anything beyond interesting anecdotes and observations.

About one third of the magistrates who responded to the questionnaire had sat in children's or juvenile courts⁵ which tend, at least in their protective jurisdiction, not to apply the rules of evidence strictly and yet to hear a considerable amount of expert evidence. We sought to learn what impact the relaxation of the formal rules of evidence had exercised upon the procedure of magistrates' courts and also upon the decision-making processes. Such responses also have ramifications for tribunals, many of which function in an inquisitorial framework.

The magistrates' survey took place some 18 months after the judges' survey which had been answered only relatively soon after the Evidence Acts 1995 (Cwth and NSW) had come into force. The magistrates' survey permitted an attempt to explore the impact of the changes to expert evidence law upon magistrates in New South Wales and in the ACT. Magistrates in other Australian jurisdictions continue to function under the common law exclusionary rules.

The judges' comments in their survey raised a number of questions which, ideally, would have been canvassed with those respondents. With the magistrates' survey came an opportunity to raise some of them with Australia's magistrates. An example was the use of demonstrative evidence, a subject which had not been explicitly traversed with the judges but which many had commented upon in answers to other questions.

All 401 Australian magistrates were sent the survey instrument in 1998 by the Australian Institute of Judicial Administration.⁶ Responding to the survey was, of course, voluntary but the response rate was substantial - 203 or 50.62% of the Australian magistracy. The figure is remarkably similar to the response rate in the companion judicial survey - 244 of 478 judges or 51.05%.⁷ Probably there is something of a skewed distribution effect in terms of those who elected to complete the instrument, meaning that it was those who had a strong view of some kind in relation to the issues raised in the survey who tended to respond. Nonetheless, the fact that on any view over a half of all magistrates 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 magistracy⁸. In addition to the actual answers to the survey questions, this report draws upon the free-form comments offered by some respondents.

⁵ Question 5.2

⁶ See Appendix One.

⁷ However, a number of appellate judges were sent the survey instrument which was essentially directed toward trial judges, meaning that the response rate from trial judges was in the order of 60%.

⁸ However, it is not possible to speculate usefully upon how the 48.95% of magistrates who did not respond to the survey would have responded, had they chosen to do so.

Since this was the first time that all of the Australian magistracy has been surveyed on any issue, there is added importance to the processes used to secure the data which were elicited. In any future assessment of proposals to make changes to our litigation system, and to the admission of expert evidence in particular, the data from this survey should be an important reference source.

1.2 The Role of Expert Witnesses in Contemporary Magistrates' Court 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 courts which have to make decisions about disputed facts⁹. Without expert opinions, the magistrate would be deprived of the benefit of the insights and perspectives from other disciplines and may misconstrue the evidence.

More than three quarters of both responding judges and magistrates found expert evidence to be "often useful".¹⁰ It is apparent that both judges and magistrates are frequently appreciative of 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 case. Selection of expert witnesses is not generated by a dispassionate quest for truth. This is so no less in magistrates' courts than in intermediate and superior trial courts.

1.3 Magistrates' Concerns

These litigation realities are well known to Australian magistrates who, nowadays 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. Given magistrates' and 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 surveys expressed concern about a tendency on the part of a percentage of experts toward a lack of

objectivity.¹¹ Sometimes the deficit identified in comments from respondents was in the form of overt bias; on other occasions it was said that the partisanship in the expression of opinions was less obvious; and in some instances it was commented that it took the form of an unwitting lack of neutrality.

Apart from bias and partisanship, significant numbers of the magistrates responding to the questionnaire were concerned about the quality of the advocacy, and the ability of experts to be clear communicators. Closely related to both of

⁹ See eg *Makita Australia Pty Ltd v Sprowles* [2001] NSWCA 305 at [59]; *Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh* 1953 SC 34 at 39-40.

¹⁰ Question 2.1.

¹¹ Questions 2.2; 2.3; 6.8; 6.9.

those concerns, the magistrates articulated a worry about the task of evaluating conflicting expert views.¹²

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 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. That choice requires the decision-maker to feel confident that she or he has understood the explanations proffered by the experts. So it is understandable that magistrates, like 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 evidence.¹³ Just over half of those answering the question recalled occasions where they had felt that they had not evaluated the expert evidence adequately in the cases before them.¹⁴ Likewise, more than half of the magistrates responding to the question said that they had occasionally experienced difficulty in evaluating the opinions expressed by one expert as against those expressed by another. More than a quarter said that they had had this experience “often”¹⁵, perhaps not surprisingly given that evaluation of the opinions of experts carries an inherent difficulty and is an inescapable part of the function of decision-making even where honest, articulate and careful experts disagree.

Magistrates’ confidence that they have understood expert evidence, however, is just one of the factors they must take into account when they have to decide what weight they should give to the evidence. Decision-makers need to look for touchstones of reliability in relation to expert evidence, indicia including impartiality, pertinent prior experience, a disinclination by experts to step beyond their limits of expertise, and a familiarity on the part of the experts with the relevant facts.¹⁶

About a third of the magistrates expressed the view that courts are a place where the reliability of expert theories and opinions can be adequately evaluated. However, nearly a half had the opposite view.¹⁷

The capacity of both the witness and the cross-examiner to discharge their respective 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 in any court. While a majority of magistrates was 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 experts.¹⁸ They were concerned that the

¹² Questions 2.2; 2.3 and 2.11; 3.7

¹³ Questions 2.10. 2.11.

¹⁴ Just under half said they had not had this experience. See Question 2.4.

¹⁵ Question 2.4; 3.7.

¹⁶ Questions 2.10 and 2.11.

¹⁷ Question 6.4.

¹⁸ Questions 3.1;3.3;3.4; and 6.4.

courtroom was not functioning as an effective crucible to separate the spurious from the sound expert opinion.

1.5 Training for Advocates and Experts

Magistrates' responses suggest a need for both experts and advocates to perform better so that the burden upon magistrates as decision-makers is eased. The responses took the form of strong support for training for expert witnesses to communicate their views more effectively and to fulfill their role as forensic witnesses more professionally, as well as for lawyers to discharge their roles as examiners and cross-examiners more effectively through both better case preparation and improved questioning techniques.¹⁹

Another aspect of communication and advocacy, and one that is too often overlooked, is the non-verbal. Further and more sophisticated use of demonstrative forms of evidence - charts, overheads, videos, simulations - is part of better presentation of evidence. Magistrates were evenly divided about the quality of the use of such demonstrative evidence, with half saying that it was done poorly or very poorly, and half being satisfied.²⁰ However, nearly three quarters found it helpful and almost one in five thought such aids to be necessary.²¹

¹⁹ Questions 4.1 and 4.4.

²⁰ Question 3.1A.

²¹ Question 2.7A.

1.6 The Evidence Acts 1995 (Cwth and NSW)

While a recognition 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 forum for experts being made accountable for their opinions are three key outcomes from the survey, there are several aspects of the expert evidence presented in courts that await final determination at appellate level.

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 in 1995.²² The statutory provisions simplify the common law exclusionary rules of expert evidence by (apparently²³) abolishing the common knowledge and the ultimate issue rules and omitting both the basis and the area of expertise rules. The provisions retain control by means of the “expertise rule”, requiring that an expert only express opinions if he or she possesses specialized knowledge based of training, study or experience. Considerable reliance is now also placed on the operation of the exclusionary discretions under s135 and s137 of the Evidence Act 1995 (Cth and NSW) to exclude evidence of inadequate probative value²⁴.

The survey respondents, drawn from all jurisdictions, revealed little inclination to modify 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 today’s magistrates are not in favour of the abolition of any of the common law rules, with a bare ten percent, for instance, supporting the abolition of even the most criticised of the rules - the ultimate issue rule.²⁵ This result was rather surprising, given that they also said that they hardly ever used any of the rules.

The seventy-eight magistrates responding to the survey who are working under the new statutory provisions indicated that in the early phase of the implementation of the evidence legislation they perceived the new evidentiary rules to have made a difference to their exclusion of expert evidence.²⁶ Whether this changes with further appellate review of first instance decisions remains to be seen²⁷. For the present, there is 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.

²² Evidence Act 1995 (Cwth) and Evidence Act 1995 (NSW).

²³ *Pepsi Seven-Up Bottlers Perth Pty Ltd v Federal Commissioner of Taxation* (1995) 132 ALR 632 at 643; *Allstate Life Insurance Co v Australian and New Zealand Banking Group Ltd* (1996) 137 ALR138 at 142-144; *O'Brien v Gillespie* (1997) 41 NSWLR 549.

²⁴ See below 10.2. See *R v G K* [2000] NSWCCA 413.

²⁵ Question 7.4(d).

²⁶ Question 8.1

²⁷ See, however, *Makita Australia Pty Ltd v Sprowles* [2001] NSWCA 305.

1.7 The Exclusionary Rules of Expert Evidence

Magistrates want expert help that is objective and reliable. An aspect of that quest is inquiry 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 and rapid advances in knowledge and methodology.²⁸ It used to be enough, certainly in 1912 and 1923, for decision-makers to ask whether witnesses and their views were generally accepted as sound by a broad community of their peers.²⁹ This “general acceptance” focus protected courts from the charismatic charlatan, and the iconoclastic expert fringe-dweller, or at least that was what it was intended to do. In the mid-1990s the United States Supreme Court, but not number of State Supreme Courts in the United States, moved to a test with four criteria, or hurdles, to establish whether expert evidence had sufficient reliability to be employed by the trial court.³⁰

The Australian High Court, unlike the United States and Canadian³¹ Supreme Courts, has not been called upon to take a full overview of the criteria for reception of expert evidence at common law³². No authoritative determination has yet emerged on the threshold question of whether an “area of expertise” test exists at common law (the likelihood being that it does not exist under the Evidence Act 1995 (Cwth and NSW)) along the lines of those applied in the United States, Canada or New Zealand, and, if it does, what are its criteria. However, in Victoria, the Court of Appeal has rejected the test in *J v The Queen*.³³ In response to questions posed in the survey, magistrates were more prepared than the judges to require “reliability” as a precondition to admissibility of expert evidence.³⁴ Again, and in contrast to the judges, magistrates were more prepared to consider “falsifiability” as a criterion for determining “reliability”;³⁵ however, it was still only a quarter who expressed the view that “falsifiability” should be a condition precedent to admissibility.³⁶ The “non responses” to both questions were high.

1.8 Changing the Culture of Partiality

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; and more squarely *Frye v United States*, 293 F 1013 (1923).

³⁰ *Daubert v Merrell Dow Pharmaceuticals*, 125 L Ed (2d) 469; 113 S Ct 2786 (1993); (1994) 2(1) *The Judicial Review* 37; see also *Kumho Tire Co v Carmichael*, 119 S Ct 1167 (1999).

³¹ See *R v Mohan* [1994] 2 SCR 9; *R v J-LJ* [2000] SCC 51; *R v DD* [2000] SCC 43.

³² In *HG v The Queen* (1999) 73 ALJR 281, however, the High Court examined the status of speculation evidence by a psychologist pursuant to the provisions of the Evidence Act 1995 (NSW). In *Makita Australia Pty Ltd v Sprowles* [2001] NSWCA 305 the New South Wales Court of Appeal analysed s79 and s80 of the Evidence Act 1995 (NSW) in the context of evidence given at trial by an engineer about the slipperiness of stairs.

³³ (1994) 75 A Crim R 522 at 535.

³⁴ Question 6.2.

³⁵ Question 6.3.

³⁶ Question 6.3.

Whether key admissibility decisions are lurking now in appeal papers, or are a decade away, there is one step which can be taken straight away to enhance the quality of expert evidence in Australian court rooms. There is now a broad-based recognition of the need to develop codes of ethics and practice for forensic experts which will consolidate an expectation and practice of objectivity. This is demonstrated by the Federal Court of Australia's "Guidelines for Expert Witnesses", Schedule K of the New South Wales Supreme Court Rules³⁷, Practice Direction 46 of the South Australian Supreme Court Rules and the Victorian Civil and Administrative Tribunal's Practice Direction Concerning Expert Witnesses.

There is much to be said for consistent court rules requiring indicia of objectivity and scientific soundness in expert reports. One aspect of such indicia is a declaration by an expert which embraces the principles of independence and sound practice expected of the expert report writer or witness³⁸.

In the report on the judicial survey, we recommended the declaration to be incorporated into intermediate and superior court rules in relation to expert reports. Nothing in the magistrates' responses has led us to conclude that the obligation for such a declaration would be inappropriate for reports written for magistrates' courts. The advisability of consistency and the expanding civil and criminal jurisdictions of magistrates' courts lead us to the view that eroding the culture of partiality in magistrates' courts is an objective worthy of pursuit.

Symbolically, such a declaration is eloquent in terms of the ideals expressed. In time, it is likely to forge a culture of primary obligation on the part of expert witnesses 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 declaration:

I,, DECLARE THAT:

- 1. I recognise that my overriding duty in writing reports and in giving evidence is to the Court, 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.**

³⁷ See B Madden, "Changes to the Role of the Expert Witness" (2000) 38(5) *Law Society Journal* 50.

³⁸ See Re W and W (Abuse Allegations: Expert Evidence) [2001] FamCA 216.

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.

(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 magistrates 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 parameters of competence and to be thoroughly prepared.³⁹

1.9 The Challenge Ahead

The magistrates responding to the questionnaire 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.⁴⁰ Their views in this regard are consistent with those expressed by the judges. The adoption of a range of procedural reforms has the potential to assist courts at all levels in grappling more effectively with the evidence. Improved performance by experts and lawyers alike will reduce the problems of comprehension,⁴¹ confusion and unnecessary complexity.

Some magistrates too raised the possibility, explored specifically by questions in the judges' survey, of the use of court-appointed experts⁴². An early 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. An aspect of communication and advocacy is the non-verbal. Further and more sophisticated use of demonstrative forms of evidence - charts, whiteboards, overheads, videos and simulations - is part of better presentation of evidence. Provision of information and enhancement of skills in the developing technologies of research and communication may provide a means of encouraging involvement

³⁹ Questions 2.3;2.11;6.8.

⁴⁰ Questions 3.7; 3.8; and 6.4.

⁴¹ Justice Maurice observed the tendency "amongst academics, professionals and others who develop skills in a particular area to mystify their field, often by the use of what seems to the outsider to be arcane language. It is the role of a prosecutor to strip forensic evidence of its mystery so far as is possible; trial by expert must never be allowed to take the place of trial by jury. The inability to articulate the principal tenets that need to be understood, to describe in ordinary language the methods used and the reasons that point to a particular conclusion, these are the hallmarks of unreliable science and the not-so-qualified expert.": *Lewis v R* (1987) 29 A Crim R 267 at 271. See also *Tran v R* (1990) 50 A Crim R 233 at 242.

⁴² One magistrate, for instance, commented, that "I believe courts should retain their own experts, make them available to the parties and also to meet with parties' experts (informally) to define what is agreed and what is disputed. In relation to the disputed area the basis of the dispute can then be defined. This can then be explored formally by the adversary process. The present system is largely an insufficient cast-building exercise, especially in medico-legal cases."

by both lawyers and potential expert witnesses in further training of the kind contemplated by magistrates as being worthwhile.

The magistrates' responses should prompt the following responses: litigation reformers to customise their proposals for change to address the areas identified by Australia's magistrates and judges 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 improve their preparation and questioning skills so as better to present expert evidence and to make expert witnesses more accountable.

