



Science and Technology Select Committee

Corrected oral evidence: forensic science

Tuesday 30 October 2018

3.25 pm

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Members present: Lord Patel (The Chairman); Lord Borwick; Lord Fox; Lord Griffiths of Fforestfach; Lord Kakkar; Lord Mair; Baroness Manningham-Buller; Baroness Morgan of Huyton; Baroness Neville-Jones; Lord Oxburgh; Lord Renfrew of Kaimsthorn; Lord Thomas of Cwmgiedd; Lord Vallance of Tummel; Baroness Young of Old Scone.

Evidence Session No. 4

Heard in Public

Questions 33 - 42

Witnesses

Adrian Foster, Chief Crown Prosecutor, Crown Prosecution Service; Chris Henley QC, Chair, Criminal Bar Association; Abigail Bright, Junior Representative.

USE OF THE TRANSCRIPT

This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

Examination of witnesses

Adrian Foster, Chris Henley QC and Abigail Bright.

Q33 **The Chairman:** Good afternoon. Welcome, and thank you for coming to give evidence to the Committee. We know that Mr Henley has been slightly delayed, but we will make a start. Perhaps you will introduce yourselves for the record, and if you want to make a short opening statement, please feel free to do so.

Adrian Foster: I am the Chief Crown Prosecutor with responsibility for forensics. It is a thematic lead. For the past five years I have been the Chief Crown Prosecutor for Thames and Chiltern, but I have just moved into a new post as the Chief of the Proceeds of Crime team. I serve on the Forensic Science Advisory Council to the Forensic Science Regulator and have done so for the past five years. I have no statement to make.

Abigail Bright: I practise as a barrister at Doughty Street Chambers. I am an elected member of the Criminal Bar Association. I represent barristers at that association who are fewer than seven years' call. I am also a member of the Home Office Forensic Science Advisory Council, and similarly I have no opening statement to make.

Q34 **The Chairman:** I shall put the first question, which concerns the criminal justice system. Is it being provided with robust, accurate and transparent forensic science evidence in order to deal with cases? In that respect, are you aware of the differences between the forensic science provision available to the prosecution and what is available to the defence? We have received some evidence that, particularly in cases involving legal aid, the defence may find it difficult. Are there any mechanisms for capturing feedback and learning about the use of expert evidence in forensic science during a trial?

Adrian Foster: I will take those questions one at a time. Yes, in the main, forensic science is accurate and transparent within the system. That results in 78% of CPS-prosecuted cases in the magistrates' court pleading guilty and 71% of CPS-prosecuted cases in the Crown Court doing so. Many of those cases have forensic evidence in them. It may be because of unchallengeable forensic evidence that those people plead guilty. But when cases go all the way to trial, through robust case management by the judiciary to identify the triable issues, while forensic science might be part of the case, it is often not actually a triable issue. For instance, if someone has been identified through DNA or fingerprint evidence and the issue of identity is no longer one that is in contention, it is likely that issues such as consent or self-defence become evident, and those are the triable issues. Although forensic evidence can be agreed between the parties at an early stage and led very quickly in evidence at the trial, very few cases turn on the forensic science element.

There is an issue with the robustness of the market. I do not know whether you meant that or whether you meant the robustness of the science itself.

The Chairman: Both.

Adrian Foster: In the main we are comfortable with the science, although some cases can raise issues. In terms of the robustness of the market, there are some fragilities that you will be aware of. There are issues around the suspension of Randox Testing Services to do toxicology. That has had a big impact on that type of work because it represented 50% of the market in toxicology. It has had a knock-on effect for other providers which are now trying to do 100% of the work as well as looking at the results from Randox over the past few years.

There are other potential issues such as forensic science providers coming out of the market, which nearly happened with Key Forensic Services. That in itself creates issues around the capture of exhibits, notes, the experts and the computer systems which go with that. If there is no time to move the work to a different provider, it will create all sorts of issues in terms of the criminal justice system and the prosecution of cases. Those are considerations in terms of the fragility of the market. We are not entirely convinced that there is huge robustness in some sectors and they may need to be improved.

Of course, there are some differences. In-house police providers do not provide evidence for the defence; they do only prosecution work. The commercial market providers will provide evidence for both the prosecution and the defence but, as you rightly say, there is an issue with legal aid. If someone is being legally aided, they have to apply to the Legal Aid Agency to try to get funding for that. Perhaps we will be able to talk about that a bit more.

The defence will commission work on a bit-by-bit basis. Many police forces have a managed service with essentially a bulk management service which allows them to send bulk evidence to providers and in that way make savings. Some police forces have used the bit-by-bit payment method in the same way as the defence, but they seem to be moving towards a managed service approach with a broader understanding of forensic issues.

The third question was about learning. Locally, there are probably two levels. Prosecutors are encouraged to capture judicial criticism of expert evidence and make sure that it is fed back into the management chain. We discuss those cases with the police at monthly meetings to ensure that we can make improvements. Where there is a national issue and the same expert is experiencing many cases of judicial criticism, those are picked up and we will put guidance out to our prosecutors. Of course, the Court of Appeal is a very useful provider of information where a conviction is overturned because of forensic failures. We respond to those as well. Those are the convictions. We probably look more on a local level at the cases that are unsuccessful—the acquittals.

Abigail Bright: If it is convenient to you, I will start by answering the third of those questions first. You asked whether there are mechanisms for capturing feedback and learning about the use of expert evidence and forensic scientific evidence in trials. The Criminal Bar Association would respectfully submit to the Committee that judges are an excellent source

of information. They are daily at the coal face of crime and can see in criminal courtrooms how evidence is used, along with the outcome of cases. Certainly judges who present at Criminal Bar Association events, who associate with the association and are drawn from its ranks as former members, are candid about the delays and disruption caused to trials and other kinds of court hearings when key expert evidence has not been sourced on time or otherwise is not ready to present to a jury. Criminal Bar Association training events are an excellent mechanism with which the association can monitor the experiences and impressions of its members in this regard.

In answer to the second question of whether I am aware of differences between the forensic science provision available to the respective parties on the different sides of the courtroom—the prosecution and the defence—I submit that there are not significant, if any, differences in the availability of forensic science services or evidence available to the two. The issue is not availability of the technology, or for that matter capability; it is very different. It is that real and unacceptable delays, drift and frustration are being experienced in the system by the police, prosecutors, judges and other legal practitioners, including those of us who defend. That is caused, in short, by the need for the police at the earliest stage, at the earliest onset of the investigation and often prior to charge, in order to inform a charging decision and before a trial, to apply for the cheapest provider of a service. Very specific quotes need to be gathered about the exact sort of service being sought, along with price and expertise. In short, at the very start of a case such as a firearms case where one really does need to see if the weaponry or the ammunition is capable of fulfilling the 1968 Act, one needs access to that information at the earliest point rather than be delayed by the present need to make those sorts of applications. That drift and delay is being experienced on both sides of the courtroom. It has nothing to do with differences in availability, it is the current applications process.

I can take the last question very briefly. You asked whether the criminal justice system is being equipped with robust, accurate and transparent forensic science. On the question of capability, the answer is yes, but being equipped meaningfully means having access to it in a timely way without delay, which of course means funding. What this Committee will have seen is that successive Governments have made new laws rather than fund the police and keep the courts open. That necessarily has a knock-on impact in the form of delay, often of months for people being remanded in custody, for courts to reach the trial. It also affects the life of cases. In short, my answer is that the capability exists, but as to whether the criminal justice is being equipped, in short it is not being equipped adequately or, in one view, at all.

Q35 Lord Fox: Turning to the level of understanding that the main players in the courtroom might have, we heard evidence last week saying that judges and lawyers for both the prosecution and the defence may not be fully aware of the absoluteness or the balance of probability of evidence that is coming from the forensic side. What is your opinion of the level of understanding of forensic science among the various players in the

criminal justice system? How can that level of understanding be improved so that people know when evidence is absolute as against when it is a matter of opinion? That is the nexus which we are trying to explore here. Lastly, assuming that more work is required, how should science go about working with lawyers and the judiciary to improve the level of understanding?

Adrian Foster: We do not see this as so much of an issue. Neither prosecutors nor lawyers in general can be experts in everything. We try to equip our advocates to make sure that they have a general understanding of the subject matter, and certainly knowing how to deal with experts is important. We have a raft of guidance for advocates to help them understand what defences might be raised and about some of the issues within each of the topics. I could go through the list, but it is quite lengthy.

Lord Fox: Perhaps you could submit that to the Committee.

Adrian Foster: I certainly can. On the question of the rapidly changing forensics like digital, that is something we need to pick up on more quickly. It is a challenge to us in that while everyone has a mobile phone, they do not quite understand what is on it. Judges, prosecutors and the defence have to face a learning curve on that. The average mobile phone is a 32-gigabyte device which, if it is well used, will probably have around 4 million pages of data on it. I think that the new Apple phone is around 256 gigabytes while the new Samsung is four times that. There is an ever-increasing amount of data on mobile phones, so an understanding of what can be achieved by a download from a phone is crucial. The Metropolitan Police recently had two cases, one of which was a rape case involving mobile phones and facebook. It took 630 hours of police time to look at the phones and facebook accounts of the three complainants under judicial order to make sure that everything had been checked. There was also a straightforward rape case involving a complainant who had met the defendant on Tinder. Both of them had a mobile phone and again it took 150 hours of officer time to go through them. It is about an understanding of what can be achieved through the different types of analysis, whether it is obtaining a kiosk download, and I use the word "download" in the broadest sense, at a police station—it would probably take about two hours, and we can hand the phone straight back to the victim—or a level 2 or 3 download which looks either at deleted data which is not available on the device or actually breaks the device up to look at the memory chip to find out what can be retrieved from it. Those things take longer and we are currently seeing delays of up to five or six months. We are trying to make sure that everybody has an understanding of what can be achieved at each level, because that obviously affects case progression, hearings and the trial date, along with what can be achieved.

We¹ are trying to make sure that we articulate to the defence and to the court exactly what we have done around digital media. We are trying to

¹ Clarification from Adrian Foster: References to 'we' in this paragraph means investigators. CPS staff do not examine phones. CPS can and do advise investigators on

make sure that we complete what is known as a Disclosure Management Document (DMD). It describes which phones we have looked at and which we have not, and the time period. If a couple has been in a relationship for only two months, we do not look any further back than two months; we do not look at the last 10 years' worth of data on the phone. We also articulate what search terms we have used on the mass of data and we then provide all of that to the court and the defence as a mechanism for them to say, "Actually, we think that they were in a relationship for four months, so you need to go back a bit further". If you are looking at a warehouse full of information, you do not get the officer to search the whole warehouse; you look only in the corner that relates to the case—the relevant information and the reasonable line of inquiry. That is what we are trying to do in terms of making sure that people have an understanding of what can and cannot be achieved.

Abigail Bright: In answer to the first question about the level of understanding of forensic science in the criminal justice system among lawyers, judges and juries, I would submit that there is a real appreciation of and ability to comprehend forensic scientific evidence in the criminal courts. There are common law and statutory principles of evidence which govern admissibility. Lawyers and judges ask themselves about the relevance of a certain type of forensic science in a case. There is then a distillation in terms of digesting and reducing it for juries as clear presentation of the evidence. Juries are given legal directions on the relevance of types of evidence, including forensic scientific evidence. Cross-examination remains the best way, where it is disputed, to test the real value of evidence. Where forensic scientific evidence is disputed, juries can see the cross-examination and the product where, for example, concessions are elicited, as well as how a witness responds. Juries are well placed, with the assistance of judges, to judge its reliability.

In answer to the second question about how the court's response to forensic scientific evidence can be improved, in short, I would submit that forensic scientific evidence is routinely presented to juries, and where cases are before a judge or a panel that is not a jury, they are presented in a simple and readily understood way. Directions of law, which are directions given by a judge to jurors which have the force of law, improve and aid understanding.

In answer to the third question about what channels of communication are needed between scientists, lawyers and the judiciary, there are technical capacities for communication and of course it is best if the parties and the court are in contact as soon as possible to identify the real issues for the trial. Instant means of secure communication include the Crown Court Digital Case System. The Criminal Bar Association has suggested that the police should have access to this system; at present, they do not while the probation service does. We would suggest that the police should have access to the system. Secure email is now invariably used between lawyers, judges and any other legal personnel, and the criminal justice system itself provides material information and updates.

what phones they should examine.

On the channels of communication, you will have heard mention of examples of sex cases, including rape allegations, and volume of data. I played a part in defending a case that was reported earlier this year—Makele, at Snaresbrook Crown Court. In that case the parties had both given an account to the police and it was clear that they both agreed that they had met for the first time at the Notting Hill carnival, having latterly been strangers. The problem in that case was that that detail had been made clear at the earliest opportunity by the defendant in his police station interview. The police had access to the mobile phones of the complainant and the defendant. There was a delay of 18 months before the decision was made to charge the defendant. In the event, no evidence was offered until what I think was the week before the listing of the trial. The mobile phone for the defendant should have been examined for the one day they both agreed they had spent together, from pretty early in the morning until late at night. However, the two then disagreed about what had happened. The complainant said that they happily went back to his house, but that after he shut the door he became violent and raped her repeatedly. His case was different. He said that it remained consensual and that there was no issue or incident. However, had his phone been checked for that one day, it would have been apparent at the earliest opportunity rather than a week before the trial that there were photographs of the two of them, naked and smiling, and both holding the camera away from their bodies. That became apparent for inexplicable reasons only a week before the trial, notwithstanding that the defence had proactively asked that the police and the Crown Prosecution Service should communicate what items were found in terms of the downloaded material on that phone. In the event, the material became apparent because solicitors commissioned their own expert to go into the police laboratory and view it. That would not necessarily happen when access to funding through legal aid is really pared back. The defendant was legally aided and he was represented by proactive solicitors, but that is not invariably the case.

The point is that on the MG6C schedule which itemises pieces of disclosure and should be sufficient for a judge and any legal practitioner to see what exists on that mobile phone, what was itemised was simply “mobile phone download” and was not disclosable. In the event, the defence had reason not to accept that and took the course they did. However, for a person accused of such a crime who is perhaps not as articulate, agitating and proactive, that available objective and independent information would not have come to light.

Lord Vallance of Tummel: Mr Foster, I would like to take you back to what you were saying about forensic science itself. I think you suggested that there are many different elements of forensic science and that people in the criminal justice system could not be expected to be au fait with them all. However, there are certain themes that run through most of them, one of which is probability theory; in other words, the likelihood of a piece of evidence being valid or not. Would you expect people in the criminal justice system to be au fait with probability theory? Is understanding probability theory part of the education of a barrister, a

judge and yourself in the CPS?

Adrian Foster: The probability theory features in many of the forensic statements we receive, often being quoted as a one in 2 billion chance of something being an identical match. However, the guidance that has been created in terms of the judicial primers for the Royal Society and the Royal Society of Edinburgh is an excellent example of where the community has come together to provide guidance for barristers, solicitors and judges and, hopefully, juries. In very simple terms, it sets out the science and the difficulties as regards relying on it. It relates only to DNA and gait analysis at the moment, and I know that your later speakers were part and parcel of creating that under Lord Hughes. Perhaps they will be more fluent about this than I am. Initiatives such as this provide the legal community with a better knowledge and understanding of forensic science. Obviously training is carried out locally and there is access to training from different avenues. The Bar is quite good at providing training in different fields, so prosecutors have access to a wider range of training than just the guidance on the CPS website.

Lord Vallance of Tummel: Would you expect a QC to be au fait with probability theory?

The Chairman: First, if I am going to manage this session in good time, the questions need to be concise, as do the answers. But of course we do want to be given the information we need. Welcome, Mr Henley.

Chris Henley: I must apologise.

The Chairman: For the record, I hope that you will not mind introducing yourself.

Chris Henley: I am the chair of the Criminal Bar Association, the specialist body which represents all criminal barristers in England and Wales.

Q36 **Baroness Morgan of Huyton:** I want to push Mr Foster a little further on the issue of training. It is one thing to say that the primers are now available. We have heard about the primers from many witnesses and they appear to be helpful. Has every barrister been issued with those primers? Where are they? How does the training move from being available to being delivered? To what extent should the main initial legal training that both barristers and solicitors are given be changed?

Adrian Foster: I can speak only for the Crown Prosecution Service and prosecutors in England and Wales. The primers were circulated to all prosecutors. We have a gateway system whereby they were sent to everybody. There probably was not the training to go with them, but in my experience prosecutors tend to wait until they have a case involving gait analysis, for instance, and then they will go to the guidance on our site. It is also available on the external side, so our prosecution advocates who are not within the CPS are able to see it. It allows them to be taken through exactly what is required. As I understand it, there is a link to the gait analysis information.²

On wider training, there are links to dealing with vulnerable witnesses in rape and sexual offences cases. There are links to potential defences in cases of links to indecent images of children. They are part of the courses we run. Digital evidence has been a big part of the disclosure training that we have rolled out over the past few months to all prosecutors—face to face with Chief Crown Prosecutors. Every prosecutor will have had training in digital evidence as part of their training.

Baroness Neville-Jones: You say that people will have had various things as part of their training and that the training is available, but do they actually take it up? Do they have the time within a busy career to go on these courses? Are they obligatory or voluntary? What is the reality of the situation?

Baroness Morgan of Huyton: We would also particularly like to learn what happens with defence counsel.

Adrian Foster: They are voluntary, although the disclosure training is mandatory so every prosecutor has had to take that up. Digital evidence training has been given to everyone. Until recently, all barristers had to go through continuous professional development for 12 hours every year, which was useful. The CPS tries to devote five days a year to training. That can be individual training in which people have bespoke learning accounts to get their own training. It might be to go to see a barrister led training in chambers or to take another course. They can choose their own training depending on what casework they have.

Baroness Neville-Jones: Do you feel that training in this area ought to be compulsory?

Adrian Foster: If you mean on forensic evidence, it would do no harm but obviously there are competing issues, disclosure being one of them, as well as competing priorities. However, I do not know about the Bar.

Chris Henley: It probably should be, yes. The CBA holds a wide range of events throughout the year. We run two quite substantial conferences which are very well attended—by hundreds of practitioners. We also have monthly lectures. For practitioners in their early years, certainly the first three years, the continuous professional development requirements are more demanding than later on in a barrister's career. Perhaps they should be just as demanding as time passes because so much is changing. It tends to be the younger members of the Bar who know more about these things than the more mature members do, but I guess that is the same in many other fields.

Again, a lot of it is self-selection. If you do the work, you will gain a reputation when you go to court that you know what you are talking about and you will be instructed in those sorts of cases. We operate—I hope—in a competitive market which rewards excellence. If you do not do the extra voluntary work—there are certain mandatory courses that we

² Clarification from Adrian Foster: The CPS circulated the Royal Society's gait analysis primer to prosecutors internally. There is not a link on the CPS external website to the primers, but they are available at the Royal Society's [website](#).

all have to attend—you will be found out, and that is not a pleasant experience.

Baroness Morgan of Huyton: What about juries? Is there a danger that the evidence becomes more and more sophisticated and thus moves further and further away from juries? Picking up on the point made by Lord Vallance, I am struck by the lack of understanding of statistics and probability among a large number of the population and I am sure that is the case for barristers as well.

Chris Henley: Of course, and there is a debate about what the right answer is to that. Not everyone agrees, not even all the experts. Across the whole of a trial, these things usually get resolved properly, fairly and accurately because they are part of the overall picture. On its own, DNA evidence does not determine the outcome of a case. It is part of the evidence that is deployed by the prosecution or which the defence calls into question. It is a combination of different things. A case I was involved in some years ago, the Damilola Taylor trial, involved a great deal of forensic and scientific evidence. It included expert evidence in relation to blood, to fibres that had broken off poor Damilola Taylor's trousers, glass fragments and so on. That evidence was part of the overall picture because there was also circumstantial evidence, alleged confession evidence and all the rest of it. It was a matter of putting it all together. If the jury had been asked to resolve guilt or innocence simply on the basis of the fibre evidence, I am sure that that would have been completely unrealistic. However, I am confident that the quality or significance of the evidence, in the context of that trial, was communicated sufficiently effectively for the jury to place appropriate weight when considering it as part of the whole picture.

Q37 **Lord Oxburgh:** We have somewhat different systems for dealing with forensic and scientific evidence in the different countries of the United Kingdom. Would you care to talk, individually or together, about those differences? Do you think that there is good practice to be adopted by one from another?

Adrian Foster: Scotland and Northern Ireland have different prosecuting authorities and they have also kept more of a central forensic science service. You might be better off asking them about their experiences. What I can say is that the Forensic Science Regulator has members of those communities on the Advisory Council that I sit on. In terms of best practice, the regulator has access to the whole of the UK.

Lord Oxburgh: The regulator covers all areas?

Adrian Foster: Yes, so you may want to speak to her about that when she gives evidence to you.

Lord Oxburgh: Leaving the UK for the moment, what about other countries in the world? Are there markedly different ways in which scientific evidence is prepared and handled? Is there anything we can learn from them?

Adrian Foster: In terms of DNA and other forensic evidence, we are trying to become accredited to the European standards to make sure that we have one standard across all European countries—ironically. It means that we can share information between the parties. If we have one standard that meets all the European benchmarks, it will allow us to share information across databases and so on. We need to get accreditation. DNA is quite good in terms of the coverage for accreditation, while fingerprints are less so. Everyone should have been accredited by October, but we are struggling and that has not happened. However, the police are trying to get there.

Lord Oxburgh: Does that mean that in terms of seeking expert advice, one need not stop at the Channel? Can you approach the French or the Germans?

Adrian Foster: That is more difficult. It happens from time to time, but we tend to have UK-based experts because it is easier for them to get to court and give evidence in this time zone rather than others, and there is no language barrier. There are specific instances when you might go to a different jurisdiction where only that one company has the specific specialism to enable you, for instance, to break into an encrypted phone. You may have to go abroad for that.

The Chairman: May I ask you a slightly different question? We have had a lot of written evidence about streamlined forensic reporting. Is it a help or a hindrance?

Abigail Bright: Streamlined forensic reporting—SFR—certainly aids police investigations. It is indicative only and potentially informative. It is not admissible per se, but it is a useful investigative tool and a prompt to look at what other lines of investigation and inquiry may reasonably exist. It can be treated by the parties as agreed and it can be admitted into evidence by agreement; otherwise, as it stands, it is not admissible.

The answer is that it is not a hindrance. A contrary view, I think, misunderstands what SFR is, its potential and how it operates. It can be very useful throughout the life of a case and it is undoubtedly a help. If it is indicative and useful, it can be evidentially progressed such that it becomes admissible or else it is accepted by agreement. The answer is certainly not a binary one.

Adrian Foster: In a system with so many guilty pleas, carrying out that short-form indication of the outcome makes very efficient use of forensic scientists' time. Where the forensic science is challenged and the defence identifies the issues, it allows the proper, full statement—the SFR 2—to be created. That is then used as part of the trial. It is very suitable for a guilty plea and it may be suitable for admissions in contested cases, such as if the issue is self-defence but not identification. Where the science is being challenged, you need the expert to do a fuller statement identifying the issues in the form of the SFR 2. I accept the criticism that some prosecutors, judges and defence counsel are asking for the witness who created the SFR 1 to come to court. That is the wrong person. They are just the author of the findings. You need the expert who actually carried

out the work and that is the person who should write the SFR 2. That may be some of the push-back you are getting from witnesses.

Q38 **Baroness Neville-Jones:** We have had some evidence from the Northern Ireland end of forensic science that, in its view, forensic science in England and Wales is treated as a policing responsibility, with insufficient weight being attributed to the rest of the criminal justice system—the role of the CPS, the judiciary and so on. Ms Bright said earlier that there is communication between the various parts of the system, but I understood her to mean that that was in a given case. Are you confident that forensic science is equally available to and effective for all the different parts of the court and the criminal justice system? We have had conflicting evidence on this. There was, for instance, the question of the cost to the defence in certain cases and therefore of availability. Do you stand back and is the issue of the availability of good forensic evidence considered in a more reflective way? What conclusions have you come to about the quality and evenness of availability of good forensic evidence to the various parts of the court and the criminal justice system?

Adrian Foster: From a prosecution point of view, the police are the contractors and that is where the relationship lies. There are some tensions at times because they are the budget-holders and are trying to get value for money out of what they submit. I believe that Chief Constable James Vaughan gave evidence about submitting half of the product to see if they got a hit. If that worked, they would not need to get everything else analysed. That is a potential example.

Prosecutors, judges and the defence community want evidence that points towards someone's guilt as well as pointing away from it. Forensic science can often make sure that we are certain that someone is innocent, which is as valuable as showing that someone is guilty. We always need to consider that when making submissions to forensic scientists. We have to go through the police to speak to the scientists, but once the case has been charged, that allows us to hold case conferences between the reviewing lawyer and counsel. Under the Criminal Procedure Rules, more and more judges are making sure that the experts speak to each other and provide a joint statement to the court. As I have said, the very best evidence is joint evidence that not only identifies whether the science is on trial, but the facts at issue which determine both of them needing to give slightly separate evidence but the science is agreed. That is happening more and more across the piece in criminal cases.

Chris Henley: There is little doubt that there are real capacity issues which are linked to resources. You know what has happened to policing budgets and the CPS. Inevitably, one of the drivers of the decisions that are made at every stage is the cost implication. One of the beauties of the old Forensic Science Service was that there was a hive of experts across the disciplines who were all available. A number of different experts were involved in the Damilola Taylor trial. It was quite inspiring to see these people trying to get to the truth of what the forensic

evidence might or might not be able to establish. Now we have a private market, with people competing with each other to provide all of this. The police go first, the prosecution may need to review the evidence, and the defence comes in later on. A series of applications has to be made to show that the market has been tested in terms of price, which slows the whole thing down. It does not work efficiently if decisions are not made sufficiently quickly.

Baroness Neville-Jones: Does capacity affect quality?

Chris Henley: It certainly affects speed.

Baroness Neville-Jones: That is a form of quality, of course.

Chris Henley: Yes, if everything slows down, that affects the quality and the whole system feels the impact. It is because of the under-resourcing of every single aspect—I do not think that there are any exceptions. We are all doing our best and there is an awful lot of good will on the part of everyone involved, including the experts, but it is a daily challenge. I mentioned to a colleague that I was to attend this hearing. She told me about a murder trial that she was involved in. She could not get the funding for a DNA expert from the Legal Aid Agency, so in the end, on a prayer, she called the author of a textbook, who agreed to do it for nothing. We really should not be reduced to that. The reliable outcomes of criminal trials should not depend on the random good will of an expert.

Baroness Neville-Jones: Is justice always served?

Chris Henley: It is difficult to have complete confidence. Every case is different. A case that rests wholly or substantially on forensic evidence, with the rest of the evidence simply setting the scene for it being the heart of the case, unless real experts are engaged in a timely fashion, provided with all the information and properly resourced, it is hard to have complete confidence. There have been cases, which I will not cite but some of them quite well known, where the expert evidence has been decisive in the context of the appeal. I can think immediately of two very high-profile cases that went to retrial. In effect, they went back to the beginning. A new jury listened to the evidence and ultimately the outcomes in both cases were different. My fear is that across the system, not only in this context, is that while things tend to be done pretty well—we still have pretty much a gold standard at the top end; the high-profile serious cases with the best advocates and properly resourced by the police and the CPS—the more mainstream cases just do not get that sort of attention. I suspect that to some extent, not overwhelmingly, mistakes are made routinely; in a small number of cases, those mistakes will be life-changing.

Lord Kakkar: Just to be clear, there are two elements. The first is the question of the experts who are brought to bear to interpret the output of the forensic analysis. The second is the quality of the forensic analysis itself, now being outsourced. How is the quality of the operational delivery of that into the hands of the experts being secured?

Adrian Foster: That is where accreditation comes in. UKAS can speak for itself, but it provides a framework for the actual quality of the analysis

along with a sample being obtained and worked on throughout the process to make sure that there is an environment of proper governance and a proper culture in these organisations to make sure that they check and challenge. There are protections around personal development for experts to make sure that they keep up their expertise and that they use up-to-date software. It is no good someone being given accreditation based on current software and then finding out in five to eight years' time that they are still using the same software.

Lord Kakkar: Is that a fastidious and regular process across all providers of forensic services? Can all parties in the criminal justice system be content that what is being delivered to their experts is of sufficient quality and of a robust nature?

Adrian Foster: There are problems from time to time, but that is what accreditation would bring if it could be enforced across the board. It applies only to certain topics at the moment—i.e. DNA and Fingerprint forensics. That is the science which we are more used to dealing with. There is better understanding among judges and juries of those sciences.

Lord Kakkar: What about the science that we are not used to dealing with frequently but which still has a big impact on criminal trials? Who secures our confidence in it being appropriate and delivered consistently?

The Chairman: No one.

Q39 **Lord Mair:** My question relates to an issue that we have been discussing; that is, the dangers of the market. You mentioned earlier that the police have to apply for the cheapest provider of a service. Is there a danger that in the exercise of looking for the lowest price, the successful bidder does not necessarily have the right scientific expertise?

Adrian Foster: It is the cheapest bidder for the quality mark. Quality is part of the contract, so the provider needs to achieve a certain quality in providing consistent and accurate evidence. You are right that there is a danger that someone would bid at an uneconomical rate, putting existing providers out of business. It would mean that experts would move into different fields, leave the country or retire. That would force the provider who won the contract into carrying out the work at a rate that is below market value. That is a concern when it puts pressure on people in terms of the quality of the work and, as I have mentioned, their own expertise. There need to be some safeguards around that.

Lord Mair: Worse still, is there a danger of a provider going out of business during a case because it has bid so low that it cannot actually sustain what is needed?

Adrian Foster: That would be a risk.

Lord Mair: Does that happen?

Adrian Foster: It has not done so yet, but Key Forensic Services was a provider that went into administration. It was well supported by policing which enabled it to stay on its feet while a new buyer was found. That

showed the fragility of some of the market. Key is a major player in the forensics market, so there are fragilities that need to be strengthened.

Lord Mair: Does all this point to it being better to return to some sort of national forensic science model?

Adrian Foster: We do not have a comment on that because it is for others to think about. We need consistent, reliable, timely and accurate statements. It is about quality and timeliness. That can be provided by a national provider or by individual commercial market providers. As long as they work to the same standard, it can be provided by either.

Baroness Manningham-Buller: I am sorry to pester you on this, but you have twice used the word “fragility” when talking about the system. What is your solution for that? How do you strengthen it?

Adrian Foster: We have to look at this over the long term. We should be looking 18 months ahead. For instance, an expert in toxicology will take a number of months to train. At the moment there is a gap in the market because of the suspension of Randox’s accreditation. We need to look at what will be happening in a year or 18 months so that we have the experts in place to take on the next bit of work.

Digital media will obviously expand from now on, and it may be that the marketplace—the private providers of software—will lead that charge. It may be that research and development for that needs to be set up by the Government. I am not really the right person to comment on this.

Baroness Neville-Jones: Who is responsible for making sure that the experts are available?

Baroness Morgan of Huyton: I was going to ask the same question. When you say “we”, who is the “we”?

Adrian Foster: I suppose that policing has a role in that, or the Home Office. It would not be the CPS.

Lord Fox: Mr Foster, you said that the current situation could provide consistent, reliable and timely services. Ms Bright, you said that it does not because timeliness is an issue. It seems that the current service is not providing the timeliness element of consistency and reliability. Your evidence so far says that the system is failing at the moment.

Adrian Foster: My experience is different. I would say that general forensic work is as timely or more timely than when we had the Forensic Science Service. However, looking into things like digital media is creating delays. We have delays of five or six months just to look at the item before we then give it to the defence. That is an issue.

Lord Fox: Ms Bright, you have been more critical of the timeliness.

Abigail Bright: Yes, that has been the experience of a number of barristers who defend in cases at the Crown Court. Before one gives meaningful advice, it is helpful to see what exists in terms of the served case. I mentioned the firearms case because it is absolutely essential to see whether the item or ammunition fulfils the Act. Because it is essential for the police to make applications that necessarily incur delay, that

trespasses on the time of the court. The reality is that a number of accused persons are remanded in custody.

Lord Fox: Would a national service do that any more quickly?

Abigail Bright: I do not think that necessarily it would. What matters is that at the moment there is some misplaced emphasis on the idea of keeping costs low rather than on excellence and reliability, and thus being able to have confidence in something that has integrity and worth because it is valuable. There is a rush to focus on the criterion of cost rather than the police simply identifying a capable, competent and available forensic science service provider and commissioning that rather than having to make applications. It is the initial focus on competitiveness and cost which is the real scourge.

Lord Griffiths of Fforestfach: I want to come back to the same question. It seems to me that any market system inevitably has some degree of fragility. Some firms will grow while others decline. You will have new entrants and some firms will go out of business. If you have a national system, presumably there is not quite the same energy in terms of innovation that you might otherwise get. Then there is the question of whether it is the market or the underfunding of the existing system. As someone who is completely new to this area, what I am looking for is some judgment. If you put all this together, what would you say? Would you want to carry on with the present system but with some reforms being made or would you want to go back to a national service? Where do the three of you stand on that issue?

Chris Henley: I think that there is a balance to be struck. When the market works best, the price is at the right level and the agility and innovation that you mentioned exists. When the market does not work, charges are too high and firms are at risk of collapsing, with all the consequences that follow from that.

A hybrid system of approved providers, available to the defence at certain costs, might be a solution to that. I thought that the Forensic Science Service was fantastic, from my direct experience of it, but clearly a different view was taken on that. Too often at the moment we have frantic phone calls going around: "Is anybody available? Will anybody do it?" Understandably, the prices that the Legal Aid Agency is willing to pay are pretty inflexible. You go through the exercise, you find nobody who is prepared to do it at the set price, you go back to the beginning and say, "What would you do it for?", then you go back to the Legal Aid Agency. It is crazy.

When the court is waiting for the case to be called on—that is, to be fixed on a realistic date—generally speaking, the work, or at least the majority of it, has already been done, pre-charged by the police. Usually, the CPS has come in; perhaps it is better at playing the market than individual independent defence practitioners concerned more about an individual case than having a long-term relationship with the provider. This can lead to a very unsatisfactory situation developing, so perhaps a hybrid system of long-term rolling contracts, subject to certain performance indicators, being approved to suppliers is a potential answer.

Obviously, the risk of that is that you create mini-monopolies and cannot get new entrants into the market. It is not easy. Certainly a national service solves that sort of problem if it is done properly.

Baroness Neville-Jones: I had a question on this very point about the current transactional system, which you have rather answered. Would we not be better off if we had a series of long-term contracts between suppliers? I take it that when the national system existed, which presumably was government-funded through the Budget, the transaction did not take place for an individual piece of work. It simply came out of the Budget, did it not?

Adrian Foster: The police have managed services with providers in the exact same way. They have long-term contracts with the management service, which provides all the forensics to the company, but that is not universal. Each force will have a different arrangement. Some join together.

Baroness Neville-Jones: So there are a number of options other than the existing system when it comes to managing payment?

Adrian Foster: Again, I would say, go to Scotland and Northern Ireland. They will have a perspective on their market, which they have kept in one place.

Q40 **Baroness Young of Old Scone:** We have talked a bit about the Forensic Science Regulator. There seems to be general support for the regulator having statutory powers. Do you support that? What sort of powers should they be?

Adrian Foster: The CPS supports having powers, as described in the Private Member's Bill currently before Parliament, to provide a level playing field where there is accreditation across the piste, as a quality assurance for those topics. We would not be in favour of unaccredited providers being unable to give evidence in the criminal courts. We would say that the decision should be left to the judges.

At the moment, there are providers who are unaccredited and give very good evidence in court. There may be a good reason why they are with a commercial supplier that is quite close to accreditation and there are some mitigating barriers around why they have not passed the accreditation threshold but they can still give evidence. It should still be left to the judiciary to decide whether that evidence should be admitted, whether from the prosecution or the defence's expert, but we would generally say yes to statutory powers.

It enables the regulator to give words of advice to those providers that do not meet the standard, in terms of the code of conduct and articulating some of the safeguards in it. It also puts stop notices on the providers who are not meeting the quality threshold and are not providing the services to the criminal justice system. Judges would then consider whether to admit the evidence when making a decision.

Baroness Young of Old Scone: Would stop notices apply to those who are not accredited?

Adrian Foster: The regulator would be able to put a stop notice on someone who is not accredited. The judge would then consider whether to admit that evidence. Of course, it might be very persuasive if the regulator is not satisfied with the environment in which the forensic evidence is being obtained.

Abigail Bright: In answer to your question about the role the forensic regulator should have and what statutory powers the Forensic Science Regulator should have if it is to have them, the Forensic Science Regulator has an advisory and monitoring role at present. That is based on issuing technical, specific guidance. It carries out that function by issuing regular information updates that are freely, easily accessible online by way of reports and anonymised case digests with outcomes. Information is provided in a number of ways.

It seems to me that there is no apparent need or call for the regulator's powers to be statutory. There would be no harm if they were; one would imagine that they would identify, with the force of law, the functions that the regulator already acquits and carries out. The regulator has a government function to advise, monitor and provide this technical guidance at present. There may be some advantage to it being able to do that with the force of law and with such powers.

Baroness Young of Old Scone: The regulator appears to feel that it does not have enough powers at the moment. Is that unjustified, in your view?

Abigail Bright: I would defer to the regulator's view. Certainly from my vantage point I would need to be persuaded that statutory powers should be identified or that there is a real need. That said, the evidence from the regulator may carry more weight with this Committee.

Q41 **Lord Renfrew of Kaimsthorn:** We have already spoken a little about digital forensics, particularly in relation to mobile phones, which you spoke about earlier. Do you feel that the criminal justice system has the capacity to deal with forensics in the future? Perhaps you might like to say a word about cybercrime, where it might be particularly relevant.

Adrian Foster: There needs to be investment in that sphere. Being able to work with digital media helps with all types of crime—such as cybercrime, new types of crime and counterterrorism—but it also enables us to look into tracking county lines for drugs nationally and child sexual exploitation. It is quite important across the board.

Along with the National Police Chiefs' Council, the CPS is looking into new technology that will enable us to take social media on various devices in somebody's home, such as computers and mobile phones, and use a search tool and better analysis to capture data. We are looking into using artificial intelligence to assist prosecutors and investigators in searching through huge reams of digital data.³ That work is taking place as part of

³ Clarification from Adrian Foster: It would be for the police to look through the material and highlight to the CPS anything which might undermine our case or assist the defence. This is not the role of the prosecutor.

the Joint National Disclosure Improvement Plan. There is a technology element in that.

You might have had evidence from the Science and Justice forum, which is a group of government leads and experts looking at future research and development. That is an excellent idea to identify what exists in research and development and what needs to be put in place for the future.

Lord Renfrew of Kaimsthorn: Do you think that the defence might be disadvantaged against the prosecution if the balance we are looking for in general between the two is not maintained in this rather complex area?

Chris Henley: That is undoubtedly the case. Going back to the prosecution side of things, the demands at the moment of investigating in this sort of way, with counterterrorism inquiries and all the other sorts of work—high-end, difficult, demanding but important work—and the financial demands mean that money is being taken from elsewhere because the budgets are not keeping pace with what modern crime and investigative techniques require. That is exaggerated further on the defence side of things. I will not bore you with the details of how we are paid—perhaps I will just for a moment—but there was a very high-profile case recently where it was down to the defence barrister sitting up throughout the night and trawling through hundreds of electronic pages of the product of a particular mobile phone and finding the key text messages and photographs that caused the case to grind to a halt the following morning. The system does not provide for a single penny of payment for that sort of work. The inevitable consequence of that, if there is no payment for the defence, is that it depends entirely on the integrity and commitment of the lawyer representing the defendant.

You can with a clear conscience say, “Well, I do not have to do this, I can skim through it”, or you can do the job properly. But doing the job properly has very significant personal cost to personal life of the lawyer doing it, because there will be no remuneration. In the old days, you were paid properly for the work that you genuinely needed to do. No doubt there were people who did not behave properly but, broadly speaking, you had to justify what you had done and then a view would be taken as to the adequate rate of remuneration for that. As a result, if you worked very hard for a number of months on a number of cases, you could then take a break and recharge. Now, the fees are so low that, if you do the job properly, there is no opportunity for a break, you have to go on to the next job just to stay standing still. In fact, I have just come from a meeting discussing how we can deal with these sorts of challenges, because they are getting greater and greater all the time. The system needs to be able to capture what the new investigative techniques require in terms of preparation for the defence. It really is a problem.

Baroness Neville-Jones: Do you think that the present system is sustainable?

Chris Henley: Something fundamental needs to happen over the next 18 months to two years, otherwise the criminal Bar will haemorrhage

talented individuals that the system requires—both prosecuting and defending. I get emails every day, particularly from those with caring responsibilities, which overwhelming means women at a certain stage in their career, who are saying, “I can’t afford to do this job anymore”. Two days ago, I had one from someone who has been a core practitioner for 20 years saying that she cannot tell her husband how little she earns, and that she is borrowing money from her mum. She has spent 20 years doing a job that she loves, but the system is in real crisis, I am afraid.

Q42 The Chairman: Thank you. In the context of that last answer, can I ask each of you which one recommendation you would like to see that would make a difference and make the whole system more reliable and efficient? Mr Foster?

Abigail Bright: May I start? I think it could help. There should be payments for the reading of disclosure, and it should really start with better remuneration for the Crown Prosecution Service. But it really needs to be seen as a separate category of work that requires its own remuneration. One expects that, if the counsel who prosecutes for the prosecution service were to be paid in order to take a view on, read and make decisions about disclosure—whether to disclose and why—then, overnight, we could all truly place confidence in decisions about disclosure in, for example, sex cases, which occupy between 40% and 50% of the work of most Crown Courts. That would be a very meaningful recommendation.

The Chairman: Thank you. Without the help of Ms Bright, what would you have said, Mr Foster?

Adrian Foster: I would say the contrary, actually. The reviewing lawyer is the best person to do that function. They charge and make decisions with the police; they are the right person to do that job. I do not disagree with needing more money in the system. Certainly, the CPS would probably say that it has taken a 30% cut in its staffing as well, along with other government departments. That is only right and proper, but we need to invest now, particularly if we are going to do casework to a high quality. There are more demands on the system: homicides are up by 46% in the last five years; sex offences are up 30%. But we have lost the acquisitive crimes. That has gone down quite dramatically, which has had an impact on the forensics market. The traditional burglary/robbery is happening less and less—or is certainly being prosecuted less and less.

Chris Henley: It is certainly being prosecuted less and less.

Adrian Foster: In terms of change, there needs to be a real focus on digital media—that is what is holding up the whole system at the moment. There is a need for research and development to get timely downloads of digital media on phones that capture everything accurately and can then be revealed to the prosecution and the defence. That will reveal, as we have discussed today, evidence that will go towards someone’s innocence as well as that which might point towards their guilt.

Chris Henley: I think we need honesty about the resources that are required right across the system. The rule of law is a very precious thing. It seems that confidence is fast slipping away in the quality of what goes on in the courts. If jurors lose confidence in the police or the families of defendants lose confidence in the quality of the material being advanced on behalf of their loved ones, a spiral can very quickly develop. We have traditionally, across the world, had a system that we can be incredibly proud of, but it requires excellent people to be engaged. Inevitably, it is money that makes a big difference. It is not the whole difference, because most of us who do these jobs do not do them because we are driven by money. But there comes a point, and we have pretty much hit it now, where it really starts to make a dramatic difference to the quality of what we have. We care about health and we care about education; we need to care about justice.

The Chairman: Thank you very much indeed. Thanks to all three of you for coming today to give evidence. It has been most helpful.