publicity. Once the legislation was enacted, it was given regular publicity by the reporting of individual cases by the *Canberra Times*. The magistrates and police in the ACT were using the legislation quite vigorously and newspaper reports ensured that the word got around.

acceptance. The key people in making the legislation work were the magistrates and the police. The Magistrates' Court has been handling these cases with firmness, but at the same time with sensitivity and compassion. An atmosphere of quiet informality has been fostered in order to calm down the parties and to encourage the respondent to accept the authority of the court. Most orders are made by consent.

If an order is broken, the magistrates have not hesitated to punish quite severely. This has encouraged the police to believe that, at last, they have an effective law to work with. This tends to counter the formerly negative attitudes that some police showed in domestic violence cases.

review. The Attorney-General's Department is to review the new legislation after six months of operation. One recommendation for change will almost certainly be that the legislation be available for the protection of a wider group of people than at present. Its very success has generated pressure for the legislation to be adapted for use in domestic relationships other than married and de facto partners and their children, and in neighbour disputes. Another measure of the perceived effectiveness of the legislation is that it has virtually taken over from Family Court injunctions, applications for which have slowed to a trickle. By contrast, in the first five months of operation, there were 161 applications for protection orders under the Ordinance.

the expert and the law

> The clever men at Oxford
> Know all that there is to be knowed.
> But they none of them know one half as much
> As intelligent Mr Toad.
> Kenneth Grahame, *The Wind in the Willows*

government experts. Controversy has arisen relating to the use of experts in litigation. In an article in the *Age* (11 April 1987), Ms Prue Innes examined the legal advice given to the Federal Government by two Melbourne barristers in relation to anticipated claims by employees suing for repetition strain injury (RSI).

Part of the report dealt with a British lecturer in ergonomics, Dr Dennis Thompson, whom the barristers described as 'a crusader who easily sees faults in the system of work and the equipment provided by the Tax Office for its keyboard operators'. The barristers gave advice on preventing Dr Thompson from being, or reducing his effectiveness as, a witness for the plaintiffs.

- After their discussions with Dr Thompson, the barristers explained to him that an expert witness who has discussed particular cases with one party to the litigation could be compromised if approached by the other party. They felt that Dr Thompson had not thoroughly understood this.
- Therefore, they recommended that efforts be made to retain Dr Thompson, if necessary by paying him a fee for the services rendered to date. (Dr Thompson has denied being tricked into receiving a financial retainer and has said that he was not offered a fee and did not accept

> any fee for acting as an expert witness in legal action over RSI in Australia: *Australian Financial Review,* 9 April, 1987).

It appears that these tactics are generally regarded as legitimate. The payment of witnesses for a consultation does not stop their being interviewed by the other party to the litigation or giving evidence for that other party but it would stop a witness passing on information given in confidence and cause the witness, if approached by the other party, to inform those who had paid for the consultation.

The Vice Chairman of the Victorian Bar Council, Mr EW Gillard, QC, would not comment on the particular conduct in question but said that it was quite ethical to engage the services of an expert without being obliged to call him or her as a witness.

experts on trial. The ideal of an expert witness as a source of impartial advice to assist the court to reach a decision as opposed to the reality that the expert is more closely associated with one party to the litigation is investigated in a book recently published by Oxford University Press, *The Trial of the Expert: a Study of Expert Evidence and Forensic Experts* by Mr Ian Freckelton, the Manager of the Victorian Police Complaints Authority and a former Senior Law Reform Officer with the Australian Law Reform Commission.

Mr Freckelton cites remarks made by the English judge Sir George Jessel as long ago as 1876 on the selection of experts:

> A man may go, and does sometimes, to half-a-dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, Will you be kind enough to give evidence? and he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to 68 people before they found one (*Thorn v Worthing Skating Rink Co* (1877) 6 Ch D 415).

Mr Freckelton argues that the increased recourse of the courts to technology and the 'growth industry' of forensic science bring with them many dangers. He points out the following problems with current methods of expert selection.

- The result may be deceptive if a party is for some reason (probably financial) not able to 'hire' his or her own experts or has counsel who are not able successfully to negative the expert testimony led by the other side.
- The prosecution has a monopoly on available expert witnesses in some areas.
- An incorrect impression can be given if an expert appearing for one side is unrepresentative of current scientific thinking on the area in question.
- Experts are called to testify because they have information that the party calling them thinks will help his or her case.

Mr Freckelton cites instances from the United States of America where doctors, ophthalmologists, architects, builders and engineers advertise their availability for court appearances as experts in terms of their 'success rates' and their 'competitive charges'. He identifies the beginnings of these practices in Australia with the emergence of forensic science as an industry in its own right. As Mr Freckelton points out, this sort of behaviour at least lays to rest the myth of the expert's neutrality and non-partisanship. The partisanship, however, can be intensified when the

expert is confronted first by a supportive examination-in-chief from his or her counsel and then hostile cross-examination by opposing counsel. This contrast may result in a loss of objectivity and greater emotional identification with the case of the party who has called the expert to give evidence.

mercenaries of the witness box. In his foreword to the book, the President of the New South Wales Court of Appeal and former Chairman of the Australian Law Reform Commission, Justice Michael Kirby also comments on the role of experts as 'mercenaries of the witness-box'. He cites Sir George Jessel's comment:

> Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather considering themselves as the paid agents of the person who employs them (*Lord Abinger v Ashton* (1873) 17 LR Eq 358, 373).

Justice Kirby notes that few who spend their 'daily lives in the courts' could be unmindful of the imperfections of much expert evidence as remarked upon by Sir George Jessel. For this reason, he suggests, the rules of expert evidence as developed by the common law significantly restrict the range of information that can be put before tribunals of fact by expert witnesses.

A further factor noted by Mr Freckelton which hinders the expert's role in assisting the court to find the truth is that experts are at the mercy of counsel: they have elicited from them in examination-in-chief only what their barrister wants to have before the court and in cross-examination only what opposing counsel are informed and competent enough to bring to light. Mr Freckelton takes these problems together with the difficulties of assessment of complex and conflicting expert evidence as signs of the need for reform.

He argues that the technical and outmoded rules of expert evidence require modernisation and makes a number of suggestions for enhancing the usefulness of experts to the court.

- The courts must have a discretion to exclude evidence if it is unduly misleading, confusing or time consuming.
- There should be provision for expert reports to be admitted into evidence so that the experts can put their full findings before the tribunal.
- Where technology allows it, jurors should have access to transcripts of evidence or video recordings of witnesses testifying.
- Compulsory disclosure of expert reports should be encouraged as a condition precedent to admission of expert evidence.
- On occasion the appointment of a 'neutral' expert agreed by the parties may assist.
- The provision of assessors whose brief is limited to public cross-examination of experts could be useful in particularly difficult cases.
- The innovation of group expert evidence as pioneered by Justice Rogers in the New South Wales Supreme Court deserves further attention.
- Scientific standards should be developed to enable tribunals of fact better to assess the procedures employed by experts.
- Jurors should be encouraged to ask questions where they find expert evidence difficult to understand.