

Registering the experts

The consultation period for the proposals made by the Council for the Registration of Forensic Practitioners expires on March 15, and **Simon Carne** voices his objections

- extending the CRFP register into the civil arena
- the categories of expert evidence
- why there is no need to replicate the functions of a qualifying body

Following a series of highly publicised miscarriages of justice in the 1990s, a register of competent forensic practitioners was created for experts whose work related to the criminal and coroners' courts. But now there is a proposal to extend the register to all fields of expertise across both civil and criminal proceedings.

This is a step too far. The reasons which make the register successful in criminal courts do not read across into civil proceedings and the costs of the proposal are likely to outweigh the benefits quite significantly.

The existing register is maintained by the Council for the Registration of Forensic Practitioners (CRFP). It was first set up in October 1999, as a register of forensic scientists and scene examiners. Since then it has been extended to include fingerprint examination. During 2002, the CRFP expects to extend it further with the addition of police surgeons, traffic accident investigators and a few other groups. It is the step beyond that, into the civil arena, that is causing controversy.

The main point which seems to be missed by proponents of a register of civil work is that, in criminal and coroners' proceedings, the work of the forensic practitioner can rarely be replicated (for example the collection of evidence from crime scenes). So the examination has to be right first time, every time. But in civil proceedings, the collection of evidence by the expert (for example a surveyor's theodolite reading) can, for the most part, be replicated relatively easily. This negates the primary reason for creating the register in the first place, which was to eliminate miscarriages of justice.

What is an expert?

It is often said that the distinguishing feature of expert witnesses is that experts give evidence of *opinion*, whereas other witnesses give evidence of *fact*. This simple distinction belies the complexity of the nature of expert evidence in a way which obscures the debate and encourages people (wrongly) to argue

that, if a register is needed for one group of experts, it is needed for all experts.

In fact, expert evidence can be broken down into several sub-categories, based on the way in which the evidence (or underlying facts) are collected.

First, there is evidence based on data which cannot be collected without the specialist skills of the relevant expert and, crucially, which cannot be re-created at a later date. So, for example, the collection of forensic samples from a crime scene or the medical examination of the victim of a crime may be time-critical and/or sensitive to contamination. Such evidence has to be collected properly first time if it is to be safe to rely on.

This may be contrasted with the second category of evidence which can be collected time and time again by different experts. For example, a site-survey where the site is in a permanent state, or the medical examination of a person (perhaps in the case of a personal injury claim) whose impaired health is accepted to be permanent.

The third category is evidence of opinion based on information collected by others. So, for example, in a medical negligence case, a doctor is typically called upon to express an opinion drawn solely from information contained in a set of medical notes and/or evidence of fact given by the parties in a case, without conducting a medical examination of the patient in question. A medical examination is usually not appropriate or required, because the claim of negligence is based on the symptoms which presented at a particular date in the past, often several years in the past, and there is no point in examining (and often no dispute regarding) the patient's current state of health.

In other areas of negligence, including audit negligence, the source papers are normally the documents on the auditor's file and from his client, which the expert is required to interpret and opine on, but there is no call for any expertise in the collection of the documents (unless they have been shredded).

The need to register

The need for maintaining a register of qualified forensic practitioners is self-evidently at its greatest in the case of the first category described above, evidence collected using the skill of the expert and which can be collected only once, so the collection process must be reliable. The argument for registration is at its weakest in the third category, evidence for which the expertise is limited solely to the interpretation of the information; the information itself can be collected without any expertise.

The intermediate category—evidence collected using the skill of the expert, but which can be re-created if the findings are challenged—could go either way. It's really a question of weighing up the likely costs of maintaining a register against the costs of having to collect evidence twice in those cases where the expert failed to get an accurate reading first time.

The adversarial system, which typically has an expert on each side, is well able to flag up those cases where one expert took the wrong reading, so there is relatively little risk that justice will not be done. The exception is where the parties elect to have, or the court orders, a single joint expert. And that can be dealt with by maintaining a register of experts qualified for appointment as single joint experts, without having to register all experts.

Other qualifying bodies

Many experts are members of a recognised profession or qualifying body, for example accountants, doctors and engineers. Is it really necessary to incur the costs of registering these experts a second time over?

A key feature of a qualifying body is that they not only restrict admission to those who have demonstrated a minimum competence, typically by passing exams or completing a practical test, but they also insist that standards are maintained at an acceptable level. They achieve this maintenance of standards

by means of the twin tools of continuing professional education to keep standards current and a disciplinary system to investigate any members accused of misconduct.

So, unless the expert needs additional skills or a higher level of competence than the qualifying body demands, there seems no necessity for a separate register maintained with all the extra costs that would entail.

Experts who are members of a professional body are clearly in a different position from those experts whose training is a one-off, with no requirement to maintain standards (or, worse, no training at all).

So, for example, despite the fact that economists are increasingly drawn upon in connection with allegations of anti-competitive behaviour, there is no qualifying body for economists. A university degree provides good evidence that the individual's knowledge or expertise was above a certain standard at the relevant time. But, once the degree has been awarded, there is no requirement to maintain standards and the degree certificate cannot be withdrawn if the economist's knowledge falls away—or if he carries out unacceptable work.

Conclusion

There seems little need to extend the CRFP Register to include all experts who give evidence in civil proceedings. A more limited extension based on three simple tests (see table) would be a sensible compromise. ■

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| Categorisation of evidence | Inclusion in register? | Registration compulsory? |
|---|--|---|
| Data requires an expert for its collection and can be collected only once | Scope of the register extended to include all such experts | Use of experts from the register designated either as compulsory or "strongly encouraged" |
| Data requires an expert for its collection but collection of data can be re-performed if challenged | Scope of the register extended to include such experts <i>only where either:</i> <ul style="list-style-type: none"> ■ there is no qualifying body* <i>or</i> ■ the collection of data requires additional skills above and beyond those required for membership of the qualifying body | Use of experts from the register should be strongly encouraged (or compulsory) only where the appointment is as a single joint expert |
| Evidence is limited to the expert interpretation of information collected without any expertise | Scope of the register extended to include such experts only where there is no qualifying body* | Use of experts from the register to be recommended |

* The term "qualifying body" is used here to denote a body which not only assesses candidates before admitting them into membership, but also has a mechanism for removing from membership those who fall below an acceptable standard