The Accreditation of Expert Witnesses

Chris Pamplin PhD
Editor
UK Register of Expert Witnesses
11 Kings Court
Newmarket
CB8 7SG
Tel: 01638 561590
email: editor@jspubs.com

Executive Summary

This is a discussion document prepared by Dr Chris Pamplin, editor of the *UK Register of Expert Witnesses*. It is intended to foster debate amongst those attending the Civil Justice Council's Expert Forum meeting on accreditation. It draws heavily from our response to the 'The Use of Experts' consultation paper issued by the Legal Services Commission (LSC) on 25 November 2004. It brings together contributions from 654 expert witnesses listed in the *Register*.

The principal proposal on quality in the LSC's recent consultation paper was predicated on two assumptions:

- there is a current problem with the quality of expert evidence
- Council for the Registration of Forensic Practitioners (CRFP) accreditation is capable of delivering quality assurance.

We believe, and over 80% of our expert contributors agree, that both assumptions are wrong.

No evidence has been offered to support the first of these assumptions. Furthermore, the high-profile problems in the criminal courts, which have been popularly ascribed to the failings of expert witnesses, have actually, according to the Court of Appeal (*R -v- Cannings* [2004] *EWCA Crim 1*), reflected a failing in the way the courts have handled conflicting scientific evidence. This is a view supported by 81% of our expert contributors.

Even if there was a general problem with the quality of expert evidence, we reject the proposition that the CRFP accreditation scheme would be able to remedy the situation by delivering "quality assured" experts. Quality assurance can only come from looking carefully at each expert, in each case and from many angles. That is precisely the system already in place in the form of the lawyers, the judge and the other expert witnesses in a case. Perhaps this is the reason why 83% of our expert contributors agree that the current quality assurance system is the best way of ensuring competence amongst expert witnesses.

Implicit in much of the debate on accreditation is the assumption that the skills of the expert witness, as opposed to those of the expert, are susceptible to accreditation. But, what is there in a person's ability to form an opinion and bear witness to it that is susceptible to meaningful accreditation? The basic skills specific to report writing and the giving of evidence are not that onerous, and are easily acquired through training, although experience is a better tutor.

Insofar as an individual's competence as an expert might be in need of accreditation, this is a task best performed by the expert's professional body. Such bodies will generally already have the disciplinary powers in place to deal with an expert whose expertise is found to be below some defined standard.

Introduction

This is a discussion document prepared by Dr Chris Pamplin, editor of the *UK Register of Expert Witnesses*. It is intended to foster debate amongst those attending the Civil Justice Council's Expert Forum meeting on accreditation. It draws heavily from our response to the 'The Use of Experts' consultation paper issued by the Legal Services Commission (LSC) on 25 November 2004. It brings together contributions from 654 expert witnesses listed in the *Register*.

The UK Register of Expert Witnesses

J S Publications has published the *UK Register of Expert Witnesses* since 1988. The *Register* has developed over the years from a simple directory publishing project into a support organisation for expert witnesses. Most of our time is now spent on the professional support and education of expert witnesses.

An important feature of the *UK Register of Expert Witnesses* is the vetting we've undertaken since the product's inception way back in 1988. Indeed, our many conversations with lawyers have highlighted the importance they place on knowing that listed experts are vetted. In the past year we have introduced re-vetting. Now, all experts have the opportunity to submit to regular scrutiny by instructing lawyers in a number of key areas, such as report writing, oral evidence and performance under cross-examination. The results of the re-vetting process are published in the printed *Register*, in the software and on-line.

The printed *Register* is distributed free of charge to a controlled list of around 10,000 selected litigation lawyers. The on-line version of the *Register* is also available free to anyone with an Internet connection, and currently attracts around 25,000 searches per year.

We provide registered experts with a variety of free educational resources. These include our quarterly *Your Witness* magazine (now approaching its tenth anniversary), a series of more than 50 factsheets, court reports on cases that have implications for expert witnesses, CPR Viewer software and our expert *e-wire* service. This information flow ensures that experts in the *Register* have the opportunity to be amongst the best-informed experts, with respect to expert witness-specific issues, in the country.

We have also helped experts to deal with some of the problems that have arisen from the unfortunate inability of the expert witness associations to work together productively, the most notable being our work to produce a *Combined Code of Guidance for Experts* from the two competing codes.

However, we also recognise that the quality of expert evidence is in large part controlled by the quality of the instructions received. Sadly, we have observed a marked decrease in the quality of

instructions to expert witnesses in recent times. To try to help combat this trend, we have published *Practical Guidance for Expert Witnesses in Civil Cases*. Subtitled "What lawyers think experts should know but seldom get round to telling them!", this guide helps lawyers and experts to work together more productively.

Our daily contact with expert witnesses – drawn from across all disciplines, and including some who undertake an occasional instruction and others who work almost exclusively as expert witnesses – has given us a detailed understanding of this 'litigation support industry'.

The CJC Accreditation meeting

The very fact that the CJC is hosting a meeting to discuss the accreditation of expert witnesses demonstrates how events over the past few years have acted to raise this issue to the top of the agenda. However, our analysis suggests that the current push towards accreditation is not supported by evidence of a lack of quality in expert evidence. Even if it were, accreditation is neither capable of solving that problem nor of delivering the type of quality assurance sought by the LSC in its recent consultation paper.

The LSC consultation paper makes the following assertion:

> *"We believe that solicitors should be encouraged to use accredited (quality assured) experts, i.e. experts who are on the register maintained by the Council for the Registration of Forensic Practitioners (CRFP) [and our] long-term aim is to arrive at a position where all experts, who are regularly instructed in Commission-funded cases, are accredited."*

We will consider this proposition under three heads – need, quality assurance and feasibility – before looking at the structural reasons why scientific evidence can cause problems in the courtroom.

Is there a need for improved quality?

The LSC desire to achieve a position where virtually all experts are CRFP accredited, which accords closely with the stated ambitions of the CFRP, implies that the quality of expert evidence, across the board, is in need of improvement. However, not one piece of evidence has been offered to demonstrate this.

Survey response				
	Survey	**Agree**	**Neutral**	**Disagree**
Do you agree that there is no evidence of a general problem with the quality of expert evidence?	LSC (n=190) CJC (n=654)	79.6% 65.2%	8.8% 21.3%	11.6% 13.5%

NB: The LSC survey provided lots of background to the questions we posed. The CJC survey simply posed the questions in isolation. We feel the larger neutral camp for the CJC survey reflects this, and that most of the neutral experts would tend to agree with the proposition once they had an appreciation of the issues.

The civil arena

In the civil arena, following the introduction of the Civil Procedure Rules (CPR) in April 1999, we have seen:

- expert evidence placed under the complete control of the court
- the adoption of a cards-on-the-table approach to litigation
- absolutely clear guidance for expert witnesses on their overriding duty to the court.

In the system of case management that existed pre-CPR, lawyers held sway and often used expert evidence as part of their case management strategy. All too often this strategy involved finding the most circuitous route to court, and misuse of expert evidence was just one tactic they adopted. It was, perhaps, understandable, then, that the 'hired gun' was seen from time to time.

This has all been swept away. As Graham Bennett, Solicitor, put it in his letter to *The Times* (30 Nov, 2004):

> *"The present law requires the judge to satisfy himself that the witness is expert in the field in which the witness proposes to give evidence. This is done by reference to the witness's professional qualifications, his experience and, if need be, by questioning him as to his expertise.*
>
> *"It is only if the judge considers that the witness is properly an expert, and that the witness evidence will assist the jury to make its findings, that such evidence can be allowed. Courts can and do refuse to allow evidence to be given by those who cannot prove themselves to be expert, so there is already proper scrutiny of the witnesses' credentials."*

One effect of CPR has been to develop a self-regulating meritocratic system within the civil arena, with the occasional bad expert being readily identified and widely reported, and the good experts no longer used as pawns in the lawyers' games of brinkmanship.

Survey response				
	Survey	**Agree**	**Neutral**	**Disagree**
Do you agree that the effect of the Civil Procedure Rules has been to solve many of the past problems that solicitor-based case management caused with expert evidence in civil cases?	LSC (n=190) CJC (n=654)	75.6% 56.6%	14.9% 31.5%	9.5% 11.9%

NB: The LSC survey provided lots of background to the questions we posed. The CJC survey simply posed the questions in isolation. We feel the larger neutral camp for the CJC survey reflects this, and that most of the neutral experts would tend to agree with the proposition once they had an appreciation of the issues.

The criminal arena

We recognise that those who have based their assessment of the quality of expert witnesses on media reports over recent months will have been likely to conclude that all expert witnesses are unprincipled Mammon-worshipping rogues! We have lost count of the number of times Trupti Patel has been reported as having been convicted on Professor Sir Roy Meadow's evidence – she was, of course, acquitted - even the Chairman of the Criminal Cases Review Commission was reported to have said as much in *The Guardian* (30 Nov, 2004).

The recent high-profile miscarriages of justice in child death cases do not, we believe, reveal a general problem with the quality of expert evidence – and the Court of Appeal agrees.

In its decision in the Angela Cannings Appeal, it made it plain that the reason for quashing the conviction was not the expert evidence, but the emergence of some new and previously unavailable evidence that had been identified (recent SIDS studies and the possibility of a genetic factor). Whilst the Court of Appeal warned experts of the dangers of being 'over-dogmatic', the main problem it identified was the way in which the courts handle conflicting expert evidence. The decision concludes (*R -v- Cannings* [2004] *EWCA Crim 1*):

> *"If the outcome of the trial depends exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed."*

So, turning to the Sally Clark case, we finally have an example of an expert who maybe got it wrong – Dr Williams. He failed to make reference to the laboratory report that ultimately led to Mrs Clark's release. We don't know this was. Maybe he saw the report and failed to understand its importance. Perhaps he never saw it because it had been mis-filed by someone else. Whatever the reason, the fact that the report became lost was a failing by someone. It had dreadful consequences. But can it really be symptomatic of a general problem of quality amongst expert witnesses? We do not think so.

Professor Sir Roy Meadow has been vilified in the media. In the Clark trial it was reported that:

- his 73,000,000:1 statistic was "wrong" (*see BMJ* 2002;324:41-43 [5 Jan] for Meadow's account of the background on this statistic and its use in the Clark trial)
- the application of "Meadow's Law" ran the risk of switching the burden of proof to the defendant
- he brought to the court an air of infallibility.

Our conclusion is that none of this ought to have been allowed, *by the trial court*, to result in a criminal conviction where the 'outcome of the trial depended exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts'. The Court of Appeal subsequently thought likewise.

Leading-edge science

There is a fundamental incompatibility between what science can offer and what the English legal system seeks. And that is 'certainty'. The courts want it; science cannot provide it. For any hypothesis to be scientific it must be capable of being proved wrong – if only the evidence proving it wrong could be found. This fundamental principle of science means it can never provide absolute certainty.

Much of the vitriol that has been poured on Professor Meadow flows from this incompatibility. He was a world-acclaimed authority, and by all accounts his mere presence in court had a way of winning over juries. What was more, the Court of Appeal noted that he had a certain arrogance. What is arrogance if not a species of self-belief? What do lawyers and the courts crave? Certainty. Is it any wonder that Professor Meadow was called back time after time after time?

Does that make him alone the perpetrator of an injustice? We think not.

Conclusion

Based on our observations we see no evidence of a present problem with the quality of expert evidence in general.

Quality assurance

By putting ‘quality assured’ and ‘accredited experts’ side-by-side, the LSC consultation paper implies that the accreditation of expert witnesses will achieve quality assurance. We do not accept this premise, for the following reasons:

- Accreditation does not prevent people ‘having a bad day’.
- There is nothing to accredit in the ability of experts to bear witness to their opinions (see below).
- We know of no system of accreditation that would have excluded Professor Meadow or Professor Southall (we name these individuals simply to exemplify our point to a wide audience, and not because we believe they ought to have failed to pass any system of accreditation).
- If accreditation is to function as a gatekeeper, it can only improve quality by excluding those who fall below some agreed standard. We have argued in the previous section that we can find no evidence of a general problem with the quality of expert evidence. Accordingly we fail to see the need for a gatekeeper, and will argue in the next section that meaningful accreditation of expert witnesses is not actually possible.

Feasibility – what to accredit

In the current context, an expert is anyone with knowledge or experience of a particular discipline beyond that to be expected of a layman. An expert witness is an expert who is asked to form an opinion (based on the material he or she is instructed to consider) and bear witness to that opinion.

There is, currently, no precondition imposed by English law on the qualities required of an expert witness. It is for the courts, case by case, to make a judgment of the individual’s qualities and to weigh the expert’s evidence in accordance with this judgment. It is clear to us, therefore, that the only relevant distinction between experts and expert witnesses is that the latter undertake to bear witness to their expert opinions.

What is there in a person’s ability to form an opinion and bear witness to it that is susceptible to accreditation? The basic skills and knowledge specific to giving evidence are really not that onerous, and are easily acquired through training. In fairness to the CRFP, even it does not suggest that such accreditation is possible. According to the CRFP literature, what it is doing is checking that experts:

"Take all reasonable steps to maintain and develop [their] professional competence, taking account of material research and developments within the relevant field and practising techniques of quality assurance."

So, the question now becomes: Is the CRFP more competent than existing professional bodies to check an expert's qualifications and understanding of current practice and new developments in the field? To consider this question properly, we need to review the way professional bodies operate.

Survey response CJC (n=654)				
Criteria for judging the competence of an expert witness as an *expert*		**Agree**	**Neutral**	**Disagree**
Do you think competence with respect to expertise is determined by professional qualifications and relevant experience alone?		50.2%	46.5%	3.3%
Do you think it also requires current membership of a self-regulating professional body (e.g. RICS, IMechE, etc.)		65.3%	29.1%	5.6%
Do you think it necessitates accreditation by:	an organisation like the CRFP?	5.2%	7.8%	61.3%
	one or more of the three expert witness bodies (AE, EWI, SEW)?	20.4%		
	Some other body?	5.3%		

Survey response CJC (n=654)				
Criteria for judging the competence of an expert witness as a *witness*		**Agree**	**Neutral**	**Disagree**
Do you think competence in the skills of a witness should be determined by the individual expert, on the basis that poor communicators would not choose to be expert witnesses?		34.6%	55.2%	10.2%
Do you think it should be determined by those who instruct the expert?		73.6%	20.9%	5.5%
Do you think it should be determined by demonstration of CPD relating to such skills (e.g. training, conferences, etc)?		50.0%	41.1%	8.9%
Do you think it should be determined through checks carried out by a self-regulating professional body (e.g. RICS, IMechE, etc.)?		37.0%	52.8%	10.2%
Do you think it necessitates accreditation by:	an organisation like the CRFP?	7.3%	9.0%	48.6%
	one or more of the three expert witness bodies(AE, EWI, SEW)?	30.2%		
	Some other body?	4.9%		

Professional bodies

If there is a reason to move to a system of preselection of experts into those who are 'sufficiently expert' to accept expert witness instructions and those who are not – thereby removing the court's freedom to determine on a case-by-case basis which expert witnesses it considers were worthy of

hearing – why is it thought proper to hand this duty to an *ad-hoc* body, such as the CRFP, rather than encouraging the existing professional qualifying bodies to undertake the task? Indeed, some professions have already taken steps to clearly identify those of their membership suitably qualified to undertake expert witness work, e.g. RICS (Chartered Surveyors) and ICAEW (Chartered Accountants).

The lesson of Michael Wilkey

One of our expert correspondents, who is a speciality assessor for the CRFP and naturally supportive of its system of accreditation, raised the case of Michael Wilkey as an example of why accreditation by professional qualifying bodies was not acceptable. Our correspondent said:

> *"As you are aware there have been cases where judges have been critical of the way that experts have acted in court, the celebrated case being that of an architect adversely commented upon by Justice Jacobs. He referred the conduct of the architect to his professional body, who indicated that the architect's work as an expert was no business of theirs."*

That is not the position.

Michael Wilkey was an architectural expert witness in the case of *Gareth Pearce -v- Ove Arup Partnership Ltd and Others*, which concerned alleged similarities between the Kunsthal Exhibition Centre in Rotterdam and some designs drawn up by Gareth Pearce. Mr Wilkey was brought to public attention by Judge Jacob when, in delivering his judgment in November 2001, he held that Wilkey's evidence of similarities in the designs was manifestly fanciful. Judge Jacob said that 'so biased and irrational' was Wilkey's evidence that he had failed in his duty to the court, under CPR Part 35(3), and bore a heavy responsibility for the case ever coming to trial. Judge Jacob referred the matter, through the defendant's solicitors, to the Wilkey's professional body.

The matter went to a full hearing before the Professional Conduct Committee of the Architects Registration Board (ARB). The decision of the Committee was given on 5 February 2003. In the event, the whole question of the alleged similarities in the two buildings was not considered by the Committee – the parties' lawyers having agreed that 'an architect acting reasonably could have found similarities in the drawings'.

Instead, the Committee investigated the alleged breaches of duty by Mr Wilkey:

- his failure to visit the Kunsthal or mention that fact in his report
- his failure to properly consider the design brief document for the Kunsthal, and
- his failure to inspect the drawings at the Netherlands Architectural Institute (NAI).

These were all considered within the larger question of the solicitor complainant's case that Mr Wilkey had failed to provide an unbiased opinion and had failed to consider material facts.

In every case the Committee found Mr Wilkey not guilty of the charges of unacceptable professional conduct or serious professional incompetence.

The Committee disagreed with Judge Jacob about the need for Mr Wilkey to visit the Kunsthal as the case involved the alleged graphic copying of plans. The Committee found that the judge had been inadvertently misled into thinking that the design brief for the Kunsthal had been exhibited to Wilkey's original report and that he had failed to read it properly. In fact, the design brief was never exhibited to the report and had not been relied on by Wilkey.

So far as the visit to the NAI was concerned, the Committee accepted that Wilkey had never been *instructed* to make such a visit, although he had, at one point, suggested that he should so do. It was pointed out that the claimant was publicly funded and it was unlikely that the Legal Services Commission would have agreed to finance such a trip. The same could be said, incidentally, for a visit to the Kunsthal itself.

So, rather than the ARB, the architects' professional qualifying body, indicating that the architect's work as an expert was "no business of theirs", the Board carefully investigated the judge's criticisms and found them to be unfounded.

If the quality of the expert evidence given by Wilkey was impaired, then the quality of the expert's instructions and the limitations of public funding had a major role to play.

The attributes of an accrediting body

The LSC consultation paper helpfully sets out attributes of the CRFP that, it argues, make it the ideal accrediting body. These include:

- putting the public interest first
- independence from Government and sectoral interests
- rigorous entry requirements based on an assessment of current competence against criteria developed for each specialty
- a published code of conduct
- a disciplinary procedure.

The last two points are not unique to the CRFP. Any professional body could implement them, and many do. Indeed, the power a professional qualifying body has to deal with a member found wanting is more effective than any sanction available to the CRFP.

The apparent problem for the CRFP's model of rigorous assessment is that, in recognition of the futility, as we see it, of attempting to accredit the witness-specific elements of the expert witness's performance, it has had to revert to peer review of the applicant's primary expertise.

Where professional qualifying bodies already exist, the CRFP approach duplicates peer review (possibly to a different standard), which will inevitably draw in the same sorts of people who would undertake peer review within these professional bodies. Having set up a parallel system, the CRFP has no power beyond removal of an individual from its register – whereas the professional body has more extensive and potent disciplinary powers.

The credibility of a claim by the CRFP 'to have independence from government' is rendered nugatory by its dependence on Home Office funding. In September 2001, writing in *Your Witness*, the CRFP said:

> *"Our Government start-up funding is tapering off sharply. As with other regulators, our income will soon come from registration fees alone."*

How have they done in the intervening 4 years? With a reported 1,500 or more individuals on its register, the CRFP is probably still dependent on Home Office funding. This is because the vast majority of those 1,500 is likely to be employed by police authorities – and their budgets come from the Home Office. So the CRFP funding has simply switched from direct to indirect Home Office funding. That is not independence.

Any claim 'that the CRFP is free of sectoral interests' is also flawed. The fact that the CRFP assessment regime for each specialty is developed through consultation with the experts in that specialty, and operated by experts drawn from that specialty, inevitably means that sectoral interests are drawn into the assessment process. This is not a criticism of the efforts of these people, just an inevitable consequence of the fact that the witness-specific elements of the expert witness are not susceptible to accreditation.

We turn now to the issue of the CRFP putting the public interest first. We would be more willing to consider this as a unique selling point in the CRFP's favour if there was not a strong sense apparent in the expert witness community that the prime motivation for the CRFP's push into the civil arena is its desire to achieve financial independence from the Home Office. We have already set out the basis for our view that, since introduction of the CPR, the use of expert witnesses in the civil arena has been put in good order. Yet it is only in the civil arena that the CRFP will find a sufficient volume of expert witnesses not employed by the State to give it financial independence. If this motivation is real, then the CRFP is simply putting self-interest before public interest.

The CRFP was originally conceived as a means to ensure that forensic scientists working for the prosecution in criminal cases met a basic standard of competence – because it was these professional experts (rather than expert witnesses) who had been found wanting in the previous

two decades. It laid no claim to experts in the civil arena, and, significantly, its procedures were designed to meet its stated purpose of providing (mostly) state-employed forensic scientists, scenes of crime officers, and the like, with a professional qualifying body. In its original role, the CRFP has a valuable, and welcome, function to perform – it should not be encouraged to dilute it.

The Expert Witness Associations

The final point to be made is that there are other bodies that match virtually all the attributes. For example, the three expert witness associations — the Academy of Experts (AE), the Expert Witness Institute (EWI) and the Society of Expert Witnesses (SEW). These bodies have many of the attributes identified by the LSC, although traditionally it has been only the AE and EWI who have held any regulatory aspiration. We can see no justification from the arguments presented by the LSC, or others, for the elevation of the CRFP to the supreme accrediting body, especially when it acknowledges that the intended role would present the CRFP, with its limited public resources, with a huge task.

Survey response CJC (n=654)				
	None	**AE**	**EWI**	**SEW**
Membership of the Academy of Experts (AE), the Expert Witness Institute (EWI) and the Society of Expert Witnesses (SEW)	40.5%	21.3%	23.7%	35.0%

Overall, 59.5% of the experts belong to at least one of the three bodies. Of these, 41.6% belong to just one of the three, 15.3% belong to two out of three and 2.6% belong to all three.

The lesson of Barion Baluchi

It has been suggested that the case of Barion Baluchi supports calls for CRFP accreditation of expert witnesses. We reject this because of the distinction between an expert witness who falls below some measure of quality and a criminal who impersonates an expert witness. It is no more appropriate for the CRFP to attempt pre-emptively to detect the criminal impersonation of an expert witness than it would be for the GMC to attempt pre-emptively to detect a murderer who happened to be a practising doctor.

How can any professional body be expected to prevent criminals from committing crimes? The GMC's revalidation scheme, recently put on hold because of severe criticism by the Shipman Inquiry, is incapable of preventing, or detecting, a future Shipman because revalidation was designed as a way of testing whether a doctor is fit to practice. That has nothing whatever to do with a doctor's propensity to commit murder.

Likewise, it must be highly unlikely that CRFP accreditation could have stopped Baluchi. Once he had fraudulently adopted the identity of a Spaniard to gain GMC registration, his job was done. The CRFP checks at the GMC would have been satisfied. To trap him at that point would require the CRFP to have checked the authenticity of the GMC records. Maybe they 'check the checkers', but as Alan Kershaw, CRFP Chief Executive, is fond of saying, you have to trust someone.

Baluchi was ultimately caught by a vigilant lawyer. Quality assurance for expert witnesses cannot, as implied by the consultation paper, come from CRFP accreditation. It can only come from a system that looks carefully at each expert, in each case, from many angles. That is precisely the system we have in place already (the lawyers, the judge, the other experts), and probably the reason why no one has put forward evidence of a general problem with the quality of expert evidence.

The meaning of 'mandatory'

Everyone says they believe that the accreditation of expert witnesses should not be mandatory. Yet people show a certain self-contradiction on the subject. Take just two examples, the first from Alan Kershaw, Chief Executive of the CRFP, writing in *Your Witness* in 2001. Compare

> *"Registration is – and will remain – voluntary: it is not for us to tell the courts who they can or cannot admit as witnesses."*

with

> *"But naturally we hope the courts will come to see the register as a definitive indicator of professional competence."*

Is it possible for the CRFP register to be 'definitive' if it does not deal with every expert witness?

The second example comes from the LSC consultation paper, November 2004. Compare

> *"One point that we would like to make clear, as it is often a source of misunderstanding, is that we do not regard the compulsory registration of all expert witnesses as practicable."*

with

> *"The Commission's long-term aim is to arrive at a position where all experts, who are regularly instructed in Commission-funded cases, are accredited."*

So, presumably the LSC intends to make accreditation compulsory for those experts whose fees it will reimburse to the publicly-funded party.

The confusion, it seems to us, arises from the belief that mandatory accreditation, whether *de facto* or by diktat, is only unwelcome when it applies to *all* expert witnesses, but acceptable when applied only to a subset of expert witnesses. We disagree. That way lies the establishment of a professional class of expert witness. That should be anathema to anyone who is concerned with the proper administration of justice.

Survey response CJC (n=654)			
If accreditation of *expertise* was to become mandatory in the civil courts would you:			
	Agree	**Neutral**	**Disagree**
welcome it as a means of raising standards?	30.9% *(-18.6)*	63.1% *(+22.0)*	6.0% *(-3.4)*
be concerned by the potential narrowing of the pool of experts?	76.3% *(+3.8)*	20.2% *(-2.8)*	3.5% *(-1.0)*
regard it as anti-competitive?	57.5% *(+7.3)*	33.6% *(-8.4)*	8.9% *(+1.1)*
see it as a move towards creating 'professional experts'?	82.4% *(+31.6)*	13.6% *(-29.0)*	4.0% *(-2.6)*
stop practising as an expert witness yourself?	18.2% *(+7.6)*	71.1% *(-10.8)*	10.7% *(+3.2)*

The numbers in parentheses show the change in per cent since we last posed the question in June 2001

Conclusion

We should remind ourselves that the CRFP arose out of concern following a 'number of high-profile miscarriage of justice cases'. However, those cases are not the recent high-profile criminal trials centred on child deaths, but cases reported in the 1970s and '80s.

The CRFP, in creating an overarching system of professional skills accreditation, usurps the function of the professional bodies and the courts by preselecting experts who are 'sufficiently expert' to be instructed. Yet it will not prevent miscarriages of justice like those perpetrated in the 1970s and '80s.

Leaving aside the fact that no accreditation scheme would exclude a man with the highest professional stature, an accreditation scheme will not prevent a thoroughly competent expert getting it wrong on the day.

Survey response LSC (n=190)			
	Agree	**Neutral**	**Disagree**
Do you agree that no system of accreditation can prevent a first-class expert witness getting it wrong on the day?	91.6%	3.1%	5.3%

All that is left to consider is the ability of the CRFP to deal with an expert found wanting after the event. The courts have a perfectly good, if slow, system of appeals to deal with such instances. Furthermore, those who have a natural power to accredit experts, the professional qualifying bodies, already have far greater powers to discipline their members than those commanded by the CRFP.

If we had any evidence that there was a general problem with the quality of expert witnesses, it is possible that we would consider the attempts to regulate worth pursuing, even the scheme operated by CRFP with significant changes. Since we see no evidence of a quality control problem, we do not see why experts should be made to subject themselves to accreditation.

Losing the argument?

Our survey work suggests that the CRFP is losing ground. We asked our experts whether they felt happy with the existing system of checking an expert witness's competence. They strongly agreed with us.

Survey response LSC (n=190)			
	Agree	**Neutral**	**Disagree**
Do you agree that the existing system of combined control from professional qualifying bodies and the courts is the best way of ensuring competence amongst expert witnesses?	82.8%	7.9%	9.3%

We then asked whether the CRFP scheme should be extended into the civil arena. Only 16% thought it should. This result is of particular interest since, when we first asked the question, in 2001, we had 32.9% say 'Yes'. This encouraged Alan Kershaw, writing in *Your Witness 25*, to say:

> *"Of your respondents, 32.9% supported CRFP registration for civil law practitioners. My debate is with the others – of whom nearly a quarter express no view as yet."*

Since that proportion of experts has now more than halved, it would appear the CRFP is losing the argument amongst experts.

Survey response CJC (n=654)			
	Yes	**No**	**n/a**
Do you think that the conduct of civil litigation would benefit from the extension to it of the registration system currently offered by the CRFP for criminal litigation?	15.7% *(-17.2)*	65.9% *(+14.8)*	18.4% (+2.4)

The numbers in parentheses show the change in per cent since we last posed the question in June 2001

Science in the courtroom

Based on our analysis of the problems that have arisen within the criminal courts, we suggest that the real culprit in the child death miscarriages of justice is the fundamental incompatibility between science and the courts, as discussed previously.

Understanding the problem

Tragic as the consequences have been for the Clark and Cannings families, these types of case represent a tiny fraction of the litigation in the UK. A feature of these prosecutions was that they were based almost entirely on post-mortem medical opinion evidence. What other corroborating evidence can there be when a child dies in its own home under the sole care of its mother?

In criminal cases, the court has to be sure beyond all reasonable doubt before returning a guilty verdict – say something in excess of 90% certainty. By contrast, in the civil arena the standard of proof is on the balance of probabilities – so 51% is fine. Clearly, it is only in the criminal arena that the nature of science – namely scientific hypotheses must be capable of being shown to be wrong – has scientific evidence the potential to cause problems.

Secondly, it is notable that in both the Clark and Cannings cases, the expert evidence was disputed. The defence teams put forward experts who cast doubt on the opinions of the experts instructed by the Crown. These were criminal trials. The court has to make a finding 'beyond all reasonable doubt' before reaching a guilty verdict. Yet all it had to work with was a mass of conflicting scientific evidence.

Accept the Courts bear much of the blame

The Court of Appeal, ruling in the Cannings Appeal, recognised that it was the trial court's handling of scientific evidence, not the evidence itself, that was the problem. We quote again the conclusion of that judgment: "If the outcome of the trial depends exclusively, or almost exclusively, on a serious disagreement between distinguished and reputable experts, it will often be unwise, and therefore unsafe, to proceed."

The central tenet of the Court of Appeal decision is that where a court is presented with evidence that is solely, or mostly, opinion evidence, and where there is a strong divergence of opinion amongst the experts, the court should not feel confident to arrive at a verdict of guilt.

If this sensible advice had been followed in the Sally Clark case, the barrage of conflicting scientific evidence would have prevented her conviction. Likewise, in the Cannings case, the array of defence experts disagreeing with the views expressed by the Crown experts should, in

the absence of corroborating evidence, have introduced sufficient doubt to lead the judge to direct the jury to acquit or to halt the trial, it being 'unsafe to proceed'.

Survey response				
	Survey	**Agree**	**Neutral**	**Disagree**
Do you agree that the problems that have arisen in the criminal courts are the result of the way the courts handled conflicting scientific evidence?	LSC (n=190) CJC (n=654)	80.8% 62.7%	15.0% 30.3%	4.2% 7.0%

NB: The LSC survey provided lots of background to the questions we posed. The CJC survey simply posed the questions in isolation. We feel the larger neutral camp for the CJC survey reflects this, and that most of the neutral experts would tend to agree with the proposition once they had an appreciation of the issues.

Take the expert out of the courtroom

Whilst calls for accreditation are easily made, they are also cheap. The real answer lies in changes to court procedure. Legitimate areas of enquiry concerning expert evidence are:

- the suitability and qualification of an individual expert and the reliability of that expert's evidence
- the problem of frontier science or pseudo-science, and what happens when there are new developments
- risk evaluation in relation to expert evidence that is not guaranteed to be free from error.

In the United States Supreme Court, *Daubert -v- Merrell Dow Pharmaceuticals Inc* (1992) 509 US 579 laid down a four-part test to be applied to all expert evidence that was scientific in nature. These four parts are:

- whether the theory or technique 'can be (and has been) tested'
- whether the 'theory or technique has been subjected to peer review and publication'
- in the case of a particular technique, what 'the known or potential rate of error' is or has been
- whether the evidence has gained widespread acceptance within the scientific community.

As a result of *Daubert*, expert evidence in the US is more likely to come under closer scrutiny, and at an earlier stage, than in UK proceedings. The parties are aware of the requirements from the outset, and it is common for the court to hear interlocutory applications in relation to the admissibility or relevance of such evidence.

Daubert is not without its own problems. However, US lawyers have made some attempt to address the difficulties surrounding the nature of scientific evidence and its relationship to the judicial process. If our courts were to formulate similar rules, they would, in our assessment, be

doing more to tackle the problem of how courts handle expert evidence – rather than forcing experts to subject themselves to expensive, yet ultimately meaningless, accreditation by the CRFP.

Survey response LSC (n = 190)			
	Agree	**Neutral**	**Disagree**
Do you think pre-trial testing of expert evidence would be likely to deal with this problem?	69.8%	16.7%	13.5%

Annex 1: The Surveys

The CJC Survey

Date	15 to 28 February 2005
Constituency	All experts in the UK Register of Expert Witnesses with e-mail addresses. A total of around 2,400 experts.
Format	Self-contained web survey with experts only notified by e-mail. A short survey, with limited background information linked in, which tends to elicit a large response, but opinions on complex issues will show more experts who are undecided.
Location	http://www.jspubs.com/Surveys/Qs/cjc001.cfm
Responses	654

The LSC Survey

Date	3 December 2004 to 21 February 2005
Constituency	All experts in the UK Register of Expert Witnesses (2841) and on the *e-wire* list (6736).
Format	Self-contained web survey with experts notified by e-mail and, for the experts listed in the *Register*, by mail. This survey provided a large amount of background information and would take some time to complete, all of which will tend to limit the number of respondents – but those who do respond will tend to have a clear view on most issues.
Location	http://www.jspubs.com/Surveys/LCD0411/Index.cfm
Responses	190

The Regulation Survey

Date	3 to 15 May 2001
Constituency	All experts in the UK Register of Expert Witnesses in 2001 with e-mail addresses. A total of around 2,500
Format	Self-contained web survey with experts only notified by e-mail. A short survey, with limited background information linked in, which tends to elicit a large response, but opinions on complex issues will show more experts who are undecided.
Location	http://www.jspubs.com/Surveys/reports/010501Reg.pdf
Responses	348