本期企劃

齊頭式平等真的是正義嗎？論刑事訴訟法修正後產生之醫事鑑定困境及可能解方

Is the Formal Justice the Real Justice? On the Dilemma of the Medical Expert Opinion and Its Solutions According to the Amendment of the Criminal Procedure Law

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摘　要

我國刑事訴訟法於2024年5月15日施行修正條文，新增鑑定人須具結、具名及出庭說明之規定，藉以呼應2017年司法改革國是會議之決議開啟了鑑定制度改革。但司法院立意良善的法律修正案，卻低估了制度

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關鍵詞：刑事訴訟法（criminal procedure）、刑事醫事鑑定（criminal medical expert opinion）、醫療爭議（medical dispute）、醫療爭議處理機制（medical dispute resolution）、醫療專業意見（medical expert opinion）
DOI：10.53106/241553062025070105003

落地後的醫事鑑定可行性問題。在缺乏對制度配套的全面規劃，單靠強制具名與出庭，恐造成「刑訴改革成功、醫療實務崩壞」的鴻溝。鑑定醫師因身分揭露可能面臨請託、壓力或報復等風險，加上臨床工作繁重，參與鑑定意願大幅降低，導致衛生福利部醫事審議委員會無法持續辦理刑事醫事鑑定，進而影響檢察機關偵查及民眾釐清訴訟真相之權益。為解決此困境，相關部會積極溝通協調，推廣醫療爭議調解制度之先行適用，並推動「醫療專業意見」試辦計畫作為過渡性解方。本文旨在分析刑事訴訟法修法後，醫事鑑定制度所面臨的困境及因應措施，並期盼未來透過修法完善醫事鑑定之相關機制。

The Criminal Procedure Law was amended on May 15th 2024, to add the requirement that the expert examiner must give a statement, name, and explanation in court, in response to the resolution of National Conference on Judicial Reform in 2017, which initiated the reform of the expert examination. However, the Judicial Yuan's well-intentioned amendment to the law underestimated the feasibility of medical expert examination after the implementation of the institution. In the absence of comprehensive plan for it, relying solely on mandatory expert examination and court appearances may lead the success of the criminal persecution reform, but the collapse of medical clinic. As a result of the risks that physicians may face due to disclosure of their identities, such as trust, pressure, or retaliation, coupled with their heavy clinical workloads, their willingness to participate in expert examination has decreased dramatically, making it impossible for the Medical Review Board of the Ministry of Health and Welfare to continue to conduct criminal

medical examinations, which in turn affects the interests of prosecutor's investigations and the public in determining the truth of the litigation. To solve this dilemma, the relevant ministries have actively communicated and coordinated with each other to promote the application of the mediation system for medical disputes and to promote the "Medical Professional Opinion" pilot program as a transitional solution. The purpose of this essay is to analyze the dilemma faced by the medical expert examination after the amendment of the Criminal Procedure Law and the corresponding measures, and to hope that the mechanism of medical expert examination will be improved through the amendment of the law in the future.

為解決過往醫療爭議訴訟所衍生醫病關係對立、高風險科別人才流失及防禦醫療等問題，衛福部推動「醫療事故預防及爭議處理法」以建立完善「非訟化」醫療爭議處理機制，旨在保障病人權益、促進醫病和諧及提升醫療品質，於2024年1月1日正式上路。但訴訟權是人民確保自身權益獲得保護的重要機制，它不僅僅是請求權利救濟的手段，也是維護國家法治與民主的基礎。在我國醫療爭議案件訴訟實務上，醫事鑑定制度長期為司法和檢察機關醫療爭議案件事實認定之重要工具。然而，司法院為呼應2017年司法改革國是會議決議之強化鑑定程序保障，於2024年5月15日施行之刑事訴訟法部分修正條文，規定鑑定人須具結、具名及到庭以言詞說明[1]。對醫事鑑定的運作與人力參與造成衝擊，使衛生福利部（下稱衛福部）醫事審議委員會（下稱醫審會）之鑑定業務面臨嚴峻挑戰。本文將從我國醫事鑑定之發展背景出發，進一步探討刑事訴訟法修

1 刑事訴訟法第202條、第206條及第208條。

法後刑事醫事鑑定之困境及因應策略，並說明「醫療專業意見」試辦計畫之運作目的與意涵。

壹、我國醫事鑑定之發展背景

早期我國醫療糾紛案件之鑑定，多由地方醫師公會設立的醫療糾紛鑑定委員會負責辦理，此一體制雖在初期為醫療鑑定提供基礎支撐，但由於此類委員會隸屬於醫師公會體系，易使外界對其在處理醫療爭議時之客觀性與公正性產生疑慮，進而影響鑑定結果之公信力。鑑於此，社會輿論及法律界漸呼籲建立中立及制度化之醫療鑑定機制，以提升司法程序中醫療鑑定之可信度。

為回應上述需求，我國於1986年制定公布之醫療法第73條第1項第4款（現行第98條第1項第4款）中明文規定，中央主管機關應設置「醫事審議委員會」，以供司法或檢察機關得依據需要，委託其辦理醫療糾紛之專業鑑定業務。此制度設計，反映我國醫療鑑定機制由早期依賴醫界自律運作，轉向由政府設置之制度化行政協助機構，目的在於引入具中立性與專業性的第三方機構，協助司法機關釐清醫療爭議中的事實爭點，以提升鑑定結果之公信力與正當性。

然而須予說明的是，依據衛生福利部組織法及處務規程規定，衛福部之法定職掌範圍並未涵蓋醫事鑑定業務，故目前衛福部醫審會所辦理之醫事鑑定，性質上屬於行政協助，其目的在於協助司法或檢察機關釐清案件事實，而非法定義務所應執行之業務。