Forensic Science Regulator: 
The Forensic Science Regulator Act 2021*

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Abstract

Deficiencies in performance in forensic science have led to the need for a statutory regulator with powers over standards and performance, investigation, compliance and enforcement.

Keywords

forensic science, failures, miscarriages of justice, powers, regulator, voluntary and compulsory, standards, code of practice, enforcement

The forensic science community has suffered a number of vicissitudes in the twenty-first century. Indeed in the twentieth century there were too, such as the Birmingham Six conviction and eventual quashing of the conviction, arising from substandard forensic science evidence *R v McIlkenny* (1991) 93 Crim App R 287. Then there have been the structural changes. 2002 the Forensic Science Service FSS could take private work, 2005 FSS became a company, in 2008 a Regulator was appointed to advise Government on quality standards and to provide advice and guidance, and then in 2010 the FSS was closed down, the justification being that FSS was losing £2m every month.

Forensic science work has become increasingly “scientific”, technical, specialised, challenging. The very wide scope includes tracing, mycology (ascertaining time of death through fungi), digital searching and interrogation of all kinds (such as phones), fingerprinting (and the acquittal in the Scottish case of *R v McKie* (14 May 1999) and report of the Justice Committee of Scottish Parliament (15 February 2007) showed how experienced experts can easily get it wrong), fibres, bite marks, facial images and automatic facial recognition (AFR), blood, fibre and hair, *R v Norris* [2013] EWCA Crim 7212 and *R v Dobson* [2011] EWCA Crim 1256, Stephen Lawrence, firearms and ballistics, toxicology, drugs, and drug gangs, blood, tool marks, guarding against contamination of DNA samples.

As science and technology advance so does the sophistication of the forensic scientists (the good guys), and unfortunately so does the sophistication of the criminals (the bad guys).

The current difficulties are well known. The culture of the forensic science community is under criticism. Forensic science has become isolated from mainstream science. There are flaws in the skills and capacities of some of those working in the industry. There are considerable delays. Staff are under pressure for quick, cheap results. The inherent risks in the process can be so easily overlooked. The scientist can become over-reliant on “hunch” and the self-fulfilling prophecy. There may have been two or more donors to the sample. The process of analysis can become fragmented, samples passing through several hands, over-reliance upon assistants. Over-rapid turnover. In-house work may impair independence, impartiality, and professional detachment, essential for the expert witness. The scientist must always guard against inflexibility, hubris, a dogged refusal to make a proper concession. The failure of the forensic science expert witness to co-

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1 Helm R. The Anatomy of “Factual Error” Miscarriages of Justice in England and Wales: A Fifty-Year Review [2021] Crim LR 348-370, especially 364-365.

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operate professionally with his opposing expert causes much judicial annoyance and impairs the efficiency of the trial. The concurrent evidence procedure can promote mutual respect and politeness and better identification of the real issues. There is a lack of competition and competitiveness in the industry. Following the collapse of Randox Testing Services in 2018 for drug evidence manipulation and the quashing of many convictions there are now only three large companies offering services. Opportunities for innovation are limited. Non-accredited companies and laboratories exist. Jurors are believed to be more ready to accept forensic evidence from an accredited source. The quality of the work has sometimes been disappointing, e.g. in crime scene, footprints, fingerprints (though mobile fingerprinting has greatly improved), DNA, digital examination and extraction. For financial and other reasons the 43 police forces have been doing an increasing amount of forensic work mostly in-house, with variable consistency in standard and quality. The police spend £500,000 p.a. on forensics, 80% in-house. Scene of crime, fingerprint work and digital forensics have been of a disappointing standard in too many forces. The judges have been expressing dissatisfaction with the expert forensic evidence brought before them. Being able to do so much online has brought many advantages; the documents can be more readily marshalled and accessed, the atmosphere of the trial more relaxed. But the situation carries the risk of a too relaxed and too casual attention to detail and care.

Following the virtual national bankruptcy in 2008–2010, Government was obliged to impose austerity from 2010 onwards, and an annual expenditure on forensic science services fell from some £120m p.a. to some £50m p.a.

There are sensitivities in command and control. The chief constable exercises independent operational control. The Police and Crime Commissioner (PCC) controls overall policy and strategy and the budget, but not the day-to-day work on the ground. The Home Secretary and the Home Office are in political and executive control of the police, and the Secretary of State for Justice and the Justice Department are responsible for the courts (though subject to the independence of the judges at the trial). The Forensic Science Regulator (FSR) has issued a code of practice and attempted to set good standards, but has lacked the power of enforcement.

**Significance of forensic science evidence**

The significance of reputable forensic science evidence can hardly be exaggerated, as it is often pivotal. Accurate, quality, intelligible, well-analysed, well-reasoned and well-presented scientific evidence is often a key to justice, to the conviction of the guilty and the acquittal of the innocent. An error by a forensic scientist can have catastrophic consequences for the innocent and for the victims of crime. The guilty are persuaded to plead guilty, to abandon hopeless not guilty pleas and the need for trials and appeals and retrials, saving time and money. The stakes are high in a serious criminal case. The jurors are impressed with good quality reliable science. They appreciate qualification, skill and experience. The expert must ensure that he is fully and competently commissioned and instructed in a knowledgeable and collaborative manner. Justice is the ultimate aim in the criminal court (and indeed in the civil court), especially for the innocent.

**Summary of criticisms**

Over recent years there have been many investigations and reviews and reports, virtually all saying the same things. So here is a summary:

- Governance and regulation are imperative.
- Enforcement is essential.
- The public have lost confidence in the Service.
- There has been a lack of leadership, strategy, planning. The Service has lurched from crisis to crisis.
- Research and development, fundamentally essential for any scientific endeavour, has been underfunded, undervalued, uncoordinated, with the inevitable consequences, such that the criminals “steal a march”. No National Institute for Forensic Science exists.
- A sound system of administration of criminal justice predicates high quality investigation, detection, prosecution, and the fair administration of justice for the defendant, and at times this has been lacking.
- The work has been too slow, too lacking in quality, too costly. Though one must not condemn a whole service by generalisations.
- The lack of legal aid has not helped an already struggling system.
- The police service continues to face serious forensic science problems. There are 43 police forces. Co-operation and consistency of practice could be much better. Most police authorities do a substantial amount of their forensic work in-house, and not always with due consideration for the needs of the defence.
- Accreditation is not universal in forensic science; indeed a few police authorities are still not accredited. One might have expected obligatory accreditation. Clients are sometimes tempted to go to unaccredited forensic scientists for the cheaper option.
- Security must be of the highest priority in forensic science in criminal cases, and the cyber attack on Eurofins in 2019 came as a nasty shock.
Criticisms have had to have been made too often of the toxicology service.
Inadequate scene of crime work can be fatal for the future forensic work and the proper outcome of the case.
Fingerprint work has all too often fallen below standard.
Over 1,000 samples of DNA have been found to have been contaminated whilst with the police service.
The shortage and inadequacy of capacity and skill to cope with digital material have become an embarrassment, and the situation may even be worsening.

False or misleading forensic science
A recent study of miscarriages of justice\(^1\) shed some light on false or misleading forensic science. Over some 50 years some 55 out of 263 cases were attributed, wholly or partially, to such unsatisfactory evidence. Forensic science was significant in matters such as cause of death, the likelihood of the defendant being present at the scene of the crime, and psychiatric and psychological matters going to mental capacity and relevance for liability. The cot death cases, Sally Clark, evidence from Professor Sir Roy Meadows, and Canning, led to much public concern. Forensic evidence was admitted too readily and with too little scrutiny. Today the judge has to be satisfied that the evidence is reliable before it can be admitted. Nearly half of the unfortunate cases were murder or manslaughter. In the last decade or so the situation appears to have greatly improved.

Liability in employee or employer
If the employee makes a serious mistake, who is liable, the employee or the employer? The answer is both, the employee personally and the employer vicariously for things done by the employee in the course of his employment. The employee should personally measure up to standards; the employer should ensure that his employee is up to scratch, up to the mark, as the employer selects, trains, supervises and employs him, taking the risk.

Privacy
Society is increasingly concerned with the invasion of personal privacy, a not unhealthy concern. For example, people object to facial recording and facial recognition in public places and retention of the images.

Victims of sexual attack object to a digital search of their telephone, because of disclosure of possibly intimate personal information of no or limited relevance to the offence in issue.

The Forensic Science Regulator
The former Forensic Science Regulator (FSR) has sought to maintain and to improve standards, has issued guidance (published by the Home Office), and offered advice. But the process has been voluntary, not compulsory, the FSR has had no compliance enforcement powers, “no teeth”.

In future
The system had become in danger of becoming dysfunctional. Forensic evidence must be accurate, clear, intelligible in the court room, provide transparent methodology, and be reliable. In future the Forensic Science Regulator will exercise statutory powers. He will issue and keep up to date a code setting out safeguards and standards, and monitor performance, including procurement. He can issue a compliance notice, seek an injunction in the event of non-compliance. Compliance will earn a completion certificate (s 7). A failure to comply with the code is not in itself a civil or criminal offence but is admissible evidence in any such proceedings. “Forensic science activity” is defined, namely principally for purposes relating to the detection or investigation of crime and also to the preparation, analysis or presentation of evidence in criminal proceedings. There is provision for appeal. The new system will generate costs but efficiency and effectiveness carry their own reward.

Note
\(^*\)The forensic science service, particularly their problems in the 20th century, and even before, has generated a substantial literature:
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\(^1\)Helm R. The Anatomy of “Factual Error” Miscarriages of Justice in England and Wales: A Fifty-Year Review [2021] Crim LR 348–370, especially 364–365.
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