

Accreditation of Forensic Science Providers.

The introduction in 2007 of a Forensic Science Regulator was intended to establish quality standards for all forensic science providers (FSPs) in the UK, creating a level playing field in the forensic services market, and grant assurances that all providers were producing reliable and robust scientific evidence. Yet questions over the effectiveness of this model of forensic regulation must be posed.¹ While there has been progress on initial objectives and broad stakeholder engagement, significant gaps in regulation remain and failings have not been prevented or detected. A long awaited Private Members Bill proposes statutory powers for the Forensic Science Regulator (FSR) providing investigative powers, and enabling compliance and prohibition notices to be issued. If the Bill eventually becomes law (and the FSR is resourced to use these powers), this should quieten those who have long called for such powers, albeit there may be unintended consequences, and the benefits could prove imperceptible and/or equivocal.

While bemoaning the Regulators lack of ‘teeth’, it is posited that such powers should be used to force compliance with accreditation requirements, suggesting that the ‘problem’ with forensic regulation is incomplete accreditation and lack of compliance with the Regulators Codes of Practice across the entire spectrum of forensic provision. Indeed the regulators themselves have repeatedly highlighted concerns that sole/small providers, and police ‘in-house’ provision remain unaccredited, referring to the challenges with non-compliance compared to large(r) commercial providers. ‘Non-compliance’ in this context of course, could mean either absolutely no accreditation or accreditation just to ISO standards but not to the Regulator’s Codes (the latter more often the case).

This problem has taken on a new urgency when, on 25th March 2019, a new statutory regulation, the Accreditation of Forensic Service Providers Regulations 2018, came into force.² This regulation transposes the EU Council Framework Decision 2009/905/JHA,

¹ For an assessment see: McCartney, C & E. Amoako (2018) ‘The UK Forensic Science Regulator: A Model for Forensic Science Regulation?’ 34 (4) *Georgia State University Law Review*.

² The Accreditation of Forensic Service Providers Regulations 2018; http://www.legislation.gov.uk/uksi/2018/1276/pdfs/uksi_20181276_en.pdf

mandating the accreditation of forensic science providers undertaking laboratory activity which results in a DNA-profile or dactyloscopic (fingerprint) data.³ Originally implemented in 2009, this regulation had fallen foul, until now, of the UK's 'pick-and-choose' attitude towards EU regulations after the Treaty of Lisbon (and pre-Brexit).⁴ The UK regulation requires DNA and fingerprint laboratories to be accredited by UKAS as complying with ISO/IEC 17025, a lower bar than that set by the FSR who, since 2014, obliges all such laboratories to also adhere to the FSR Codes of Practice and Conduct. The UK regulation also, unlike the parent EU Framework Decision, has no deadlines or sanctions for non-compliance (albeit the Crown Prosecution Service have stated that they will no longer use unaccredited labs). Yet it is reported that the (re)introduction of this regulation has been a driving force for police trying to raise the number accredited police fingerprint bureaux from three (as of October 2018).⁵

Of course police provision of forensic services has grown since the closure of the Forensic Science Service, and in addition to 'traditional' police crime scene investigation and fingerprint comparison, they now undertake many other forensic services. It is reported that accreditation has been achieved by the police in fingerprint enhancement, blood screening, DNA profiling and some aspects of digital forensic investigation. However, to extend the accreditation, and include the FSR Codes is proving challenging for some digital forensic units, fingerprint comparison, collision investigation and crime scene units.⁶ For digital forensics in particular, the process has been described as extremely difficult due to validation problems caused by the ever-changing digital space. On the basis of this supposed evidence of 'widespread non-compliance', the remedy prescribed appears to be statutory powers for the FSR. But is this remedy going to be curative? And of what ills? A closer look at the supposed malady, its diagnosis and cure may be required before treatment commences.

³ OJ L 322, 9.12.2009, p. 14–16.

⁴ This regulation being one that the UK 'opted-out' of in July 2013 after it became apparent that the police could not meet the deadlines for implementation. See: McCartney, C. 'Opting – In and Opting – Out: Doing the Hokey Cokey with EU Policing and Judicial Cooperation' (2013) 77(6) *Journal of Criminal Law* 534-561.

⁵ DNA laboratories were ordinarily already accredited owing to the long-standing accreditation requirements for those uploading DNA profiles to the National DNA Database.

⁶ James Vaughan; National Police Chiefs' Council – Written evidence (FRS0053);

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/science-and-technology-committee-lords/forensic-science/written/89780.pdf>

Why (not) accreditation?

Both the police and FSR acknowledge major factors preventing accreditation are financial constraints and limited resources. This holds true for sole/small-scale specialists. With a UKAS visit costing at least £8000 (and up to £30,000), how can police/ smaller organisations be on a par with large providers, with equivalent levels of quality management systems etc. in order to gain accreditation? Given the current problems within the sector, which includes even large providers reporting financial dire straits, there must be questions asked regarding the precipitously high costs of accreditation. Compliance competes with other priorities, with quality standards and accreditation included in costs-benefit analyses. Insufficient funding will always stifle accreditation, and for low-income organisations accreditation may be considered an inefficient use of resources, and may even force closure.⁷ Within policing, in addition to the huge decline in police budgets, multiplying competing priorities impact significantly upon such cost-benefit analyses.

Funding and resourcing to gain accreditation, and the pricing schedule of UKAS, clearly falls outside the domain of the regulator. Yet there are steps the regulator could take to further facilitate accreditation. Common indicators of effective regulatory schemes include clarity of purpose and appropriateness of approach and objectives. Just as with DNA laboratories, the majority of fingerprint laboratories in UK have gained accreditation, so the police do not universally reject accreditation. The ‘problem’ lies predominantly with digital forensics units, who may have justifiable complaint with the appropriateness of the accreditation system, and with fingerprint bureaux, most of which have been in existence for decades with no real challenges to their work.⁸

While the costs of accreditation and the associated quality management systems required are substantial, the ‘benefit’ side of the equation looks meager. It continues to be the case

⁷ Sutherland, K and S. Leatherman, *Regulation and Quality Improvement: A Review of the Evidence* (Health Foundation 2006). See page 41

⁸ Albeit this is not uncontroversial, and for an infamous exception, see *The Fingerprint Inquiry Report*, (Scotland 2011) available at https://www.webarchive.org.uk/wayback/archive/20150428160106/http://www.thefingerprintinquiryscotland.org.uk/inquiry/files/TheFingerprintInquiryReport_High_res.pdf

that the Criminal Procedure Rules do not require forensic evidence to come from an accredited body. Further, the Regulator has no powers to penalise non-accredited organisations, who are free to continue contracting for work (it is unclear if simply being unaccredited will be sufficient justification for the FSR to use their new powers). During interviews at two police forces,⁹ one view was expressed that: *“fingerprint bureaux across the country have been doing the same kind of thing for decades and are not going to do anything different because they are accredited [to the Regulator’s Codes].”* However, an expert from a recently accredited force admitted that: *“at one time the only work that was checked was, if someone matched a fingerprint that it was definitely correct. If someone didn’t match a fingerprint, we didn’t have any good checking procedures to make sure nothing has been missed. So that wasn’t so good prior to the accreditation. Now we have had to put a lot more work in around that, making sure that we are doing everything right.”* Although both interviewees regarded accreditation as important, the high cost of accreditation with little evidence of benefits, frustrated the first interviewee but the second interviewee could see a tangible improvement after accreditation of which the first may remain unaware.

Accreditation: ensuring quality?

Within ‘wet’ forensic science labs, maintaining ISO accreditation was standard, even before establishment of the FSR, and most large commercial providers accept the costs of FSR accreditation as the price of doing business. Yet ‘forensic science’ does not wholly reside within such traditionally conceived ‘laboratories’. Much of the forensic ‘process’ falls outside laboratories, and not undertaken by anyone resembling a ‘scientist’. Indeed, more pressing concerns about forensic evidence centre upon issues such as police investigatory ‘strategies’, including the collection and selection of evidence/ exhibits for testing, as well as the Streamlined Forensic Reporting process, areas left largely untouched by accreditation. Some unaccredited specialist providers state that they rely upon the Criminal Procedure Rules as benchmarks for quality and where quality failings have occurred, have still come forward and escalated cases to the FSR. While using the Criminal Procedure Rules (Part 19)

⁹ Anonymised interviews conducted as part of doctoral research by Emmanuel Amoako, Northumbria University.

guidance cannot ensure quality, and it is clear that many practitioners may not be forthcoming with their failings (albeit this is not limited to police/small providers), it still suggests that there is professional 'quality culture' that can be nurtured, with a sense of duty towards principles of justice within the forensic science community.

In such a context, behavioural change could be more likely effected through greater use of persuasion rather than autocratic standard setting and reliance upon threats and penalties. The near-collapse of Key Forensic Services and the necessary re-investigation of 1000+ cases due to the Radox scandal has demonstrated the risks of a precarious forensic science market. Regulatory interventions that could further destabilise the market and inhibit the sustainability of FSPs would be seriously ill advised. Interventions that ensure cooperation between providers and the regulator, and breed a culture of trust and transparency would be more constructive. It is important to find methods of ensuring quality that account for the challenges faced by all FSPs, and secure the survival of those regulated.

To accredit or not to accredit... Is that the question?

In a climate of recent high-profile quality-failings, a 'one size fits all' approach to regulation (i.e. requiring accreditation) has proven ineffective. What is required then is a consideration of what *could* work for forensic regulation.¹⁰ In the midst of growing criticism of police and sole/small providers 'avoiding' accreditation, it is pertinent to ask why there is non-compliance, and the impact that this may actually have on forensic provision. Despite the resources expended in trying to ensure compliance (which must surely increase with FSR statutory powers), there have been no formal evaluations that demonstrate a causal link between accreditation and improved quality in forensic science. In the absence of such evidence, compliance will always be difficult to secure if there is no appreciation of benefits to be accrued. A 'quality culture' must surely be the aim of the regulatory system, and it is questionable whether forcing accreditation will stimulate and support such a culture.

¹⁰ And forensic science more widely, see Coyle, T. 'Forensic Science UK — We need solutions, let's hear them' (Dec. 2018) *Forensic Science International*, 293, pp101-103.

Further, the coverage of accreditation, with only parts of the forensic process scrutinised, and its lack of universal applicability, makes it questionable whether accreditation even ensures quality. Indeed, the biggest risks with respect to forensic science are most often the decisions taken by non-scientists (police/lawyers), which have nothing to do with laboratory quality systems. Too often accreditation has proven to be superficial, unable to prevent or detect failings, and sometimes verges on extortion. There can be some sympathy then for those that express sentiments, which belie a belief that accreditation is not worthwhile, and not the remedy for forensic science's ills. The question is whether giving statutory powers to the FSR is a fig leaf to cover much bigger problems in forensic science in the UK.