Consultation on new statutory powers for the forensic science regulator

Response of Peter Sommer

1. Before responding to the specific questions posed by the consultation I thought it would be helpful to set out the thinking behind my responses. If we are to have a forensic science regulator it makes sense to give that entity statutory powers but careful thought needs to be given to the regulator's remit. In particular it must contain strong references to value for money and the delivery to the criminal justice system of adequate levels of research within forensic science.

2. I am currently a Visiting Professor at de Montfort University and a Visiting Reader at the Open University. For 17 years I was first a Visiting Research Fellow and then a Visiting Professor at the London School of Economics. In February 2006 I was appointed a Visiting Research Fellow at the Faculty of Mathematics and Computing, Open University, and have since been elevated to Visiting Reader. I am the Course Consultant for a Masters' course module on Computer Investigations and Forensics – M889. I validated the UK's first computer forensics Master's course at the Defence Academy (Cranfield University). I am currently teaching a digital forensics course at the Cybersecurity Centre for Doctoral Training at Oxford University. During its existence I was the Joint Lead Assessor for the digital specialism at the Council for the Registration of Forensic Practitioners, In 2008 I was appointed to the Digital Forensics Specialist Group which advises the Forensic Science Regulator.

3. The website www.pmsommer.com contains a full CV and also a list of the major instructions I have had as an expert witness.

4. There is an inevitable tendency for regulators, like other bureaucracies, to self-perpetuate. Too often "good regulation" equates to the production of large quantities of regulations and with a great deal of detail within each item. Where regulation relies on external official standards, here too there is a tendency to detail bloat, on the basis that "more" is better. With standards there is also the danger that over time aspects become obsolete, so that a certificate of compliance becomes misleading as to the actual level of comfort provided.

5. Two particular problems with UK forensic science regulation have been, in the first instance, the heavy reliance on ISO 17025, which is standard for laboratories, not for specific forensic activity. Secondly, a preoccupation with DNA, which is also reflected in the current Home Office consultation document. The FSR has sought to go for a one-size-fits-all model for regulation across a wide range of forensic activities but the model is too often based on the specific problems of handling and analysing DNA and then poorly adapted to the many other disciplines.

6. In addition to its benefits, regulation attracts costs – in the running of the regulator's office, and to the regulated in proving compliance, in paying fees and funding independent certification entities.

7. There is a further dynamic: once a regulator exists it will attract blame whenever things go wrong – this creates an incentive to produce ever high levels of regulation to forestall criticism.

8. But nearly all of the funding for forensic science comes directly or indirectly from the public. The government has opted to close down the Forensic Science Service and to rely on competition between commercial providers. Across the board as part of the government's austerity program, fees have been reduced. In addition, fees for those supplying services for criminal defence are being substantially lowered[1]. The danger is that forensic science regulation, far from improving the overall quality of services to the criminal justice system, may because of the costs involved, contribute to a reduction. Competition between providers runs the risk of driving down fees to the point where many services can no longer be provided in terms which will return an adequate level of profit. The only services which may survive are those for very routine, easily commoditised, offerings and at the expense of more complex activities such as the reconstruction and interpretation of events.

9. The solution must be to force the regulator constantly to be aware of the supposed harms the post is meant to rectify and to limit its activity to them. Two considerations should dominate:

   - The most vulnerable forensic procedures are those that are carried out on original source material and are non-repeatable, hence more difficult to re-test and as a result requiring high levels of rigour. DNA examinations on very small samples are an example. By contrast the source material for forensic accountancy is never altered. In digital forensics, the initial acquisition of computer and phone is vulnerable to mistake, but thereafter nearly all work is carried out on agreed copies of the original. In these instances errors can be picked up by other examiners.

   - There is an overlap between the role of the forensic technician / scientist and the expert witness. The courts, and in particular the adversarial procedure, have a key role in testing evidence. [2]

10. A further problem, highlighted in a recent report[3] by the House of Commons Select Committee on Science and Technology is that it is no longer obvious where research into new forms and methods of forensic science is going to take place and how will it be funded. A commercial forensic science provider will inevitably be looking only for the very quickest returns; moreover if some new method is discovered they are likely to want to patent it in order to retain competitive advantage. Thus the forensic science regulator, hitherto apparently concerned with an abstracted, almost-context-free notion of excellence, needs to have a remit which includes policy on costs and value for money and in advising the government on issues in forensic science research.. Formal annual scrutiny of the FSR's activities by the Select Committee on Science and Technology would also seem to be a good idea.

[1] SI 2013 No 2803

[2] http://lawcommission.justice.gov.uk/docs/lc325_Expert_Evidence_Report.pdf;
http://www.solicitorsjournal.com/news/legal-profession/courts/government-rejects-reliability-test-criminal-experts

[3] http://www.publications.parliament.uk/pa/cm201314/cmselect/cmsctech/610/61002.htm

List of questions

(Please excuse some of the eccentricities of formatting, the consequence of the way in which the original consultation document was designed and my attempt to answer questions in a helpful way)

1. For each of the stages in the forensic evidence process listed below, please state whether you think they should, or should not be covered under the remit of the Regulator's statutory powers.

Manufacture of forensic consumables	No, can be subsumed into regulation of labs
Collection of evidence at the crime scene	Yes
Collection of samples from individuals	Yes
Preservation, transport and storage of evidence	Yes
Screening and selection of evidence	Yes
Examination and testing of evidence	Yes, but only up to the point at which copies or additional safe samples can be provided
National forensic databases	Yes
Assessment or review of examination and test results;	Yes, but limited to review of standard procedures and testing that they are being followed
Reporting and presentation of results with associated expert interpretations and opinions	No, this is for the Courts

2. For each of the forensic science disciplines below, please state whether you think they should, or should not be covered under the remit of the FSR and his statutory powers (definition of forensics)

DNA extraction and profiling	Yes
Fingerprint enhancement, development and comparison	Yes
Toxicology (alcohol/drug testing)	Yes
Footwear comparisons	Yes, but initial acquisition only
Trace evidence examination such as fibres, glass and paint	Yes
Facial identification	No, assuming original CCTV has been safely preserved
Other CCTV analysis eg gait analysis (CCTV cameras themselves come under a separate regulatory regime - only scientific analysis of the images is covered here)	No, assuming original CCTV has been safely preserved
Drug identification and analysis	Yes
Firearms and ballistics	Yes
Gun shot residue	Yes
Explosives	Yes
E-forensics (Computer / mobile phone analysis)	Yes, but original acquisition only; subsequent analysis should not be covered
Blood pattern analysis	Yes
Toolmarks	Yes
Tyre examination	Yes
Document analysis	Yes, for original document, no for textual analysis
Medical forensics including victim and suspect sampling in sexual assault cases.	Yes
Forensic pathology	Not sure
Forensic dentistry/odontology	Yes
Fire examination	Yes
Vehicle examination	Yes
Forensic anthropology	No
Forensic archaeology	No
Forensic palynology	Yes

Accident investigation and reconstruction	Yes, but original evidence collection only, not subsequent analysis
Disaster victim identification	Yes
Forensic accountancy	No
Forensic psychiatry	No
Forensic psychology	No

3. If you have any other comments on the role of the Regulator that you would like us to take into consideration, please outline them below:

Please see my remarks above.

4. For each of the groups listed below, please state whether you think they should, or should not be required to have regard to a statutory Code of Practice on forensic standards.

Manufacturers of forensic consumables	No, quality control should be part of Labs's remit
Suppliers of 'DNA free' components to manufacturers	No, quality control should be part of Labs's remit
Police forces	Yes, in so far as they run their own labs
Other law enforcement agencies, such as the Serious Organised Crime Agency and military police.	Yes, in so far as they run their own labs
Police and Crime Commissioners	Yes, consideration of police labs should be part of their remit

Forensic Service Providers – for the police / prosecution	Yes, but only to the extent of services as indicated above
Forensic Service Providers – for the defence	Yes, but only to the extent of services as indicated above
Individual experts	Yes, but only to the extent of services as indicated above
Legal Aid Agency	Yes, but only to the extent of services as indicated above
The Crown Prosecution Service	Yes, but only to the extent of services as indicated above
The Home Office (as the organisation responsible for the national DNA and fingerprint databases).	Yes, but only to the extent of services as indicated above

5. To what extent do you agree or disagree that admissibility of the Code in court, contractual penalties and a power to investigate serious breaches, is sufficient to ensure compliance with the Code?

(a) strongly agree; I can't think of any further measure. Presumably for all of these eventualities there will also be the threat to reputation via publicity

6. To what extent do you agree or disagree that putting the existing Code of Practice on a

statutory footing will be beneficial?

c) tend to disagree: the existing Code is too prescriptive and based too much on the issues of DNA evidence. Applicants for certification under ISO 17025 will have to demonstrate why specific elements should not apply to them – and will bear costs in so doing. They also face the costs of unnecessary interaction with and fees to UKAS. As argued above, these costs out of an ever-decreasing opportunity to make profit. While I welcome the principle of placing the FSR on a statutory basis, attitudes towards the Code will need to be modified. Rather than going for a statutory code, one or more Good Practice Guides may be more beneficial, cheaper to administer, and still be admissible for the courts to consider.

7. If you have any other comments on putting the Regulator's Code of Practice on a statutory basis that you would like us to take into consideration, please outline them below:

See my remarks above: Rather than going for a prescritive formal code tied in to a ISO standard, one or more Good Practice Guides may be more beneficial, cheaper to administer, and still be admissible for the courts to consider.

8. For each of the powers below, please state whether you think they are necessary on a statutory basis:

Powers of entry	Yes, but very exceptional and only where there is prima evidence of substantial wrong
Access to information (documents and records)	Yes
Power to impose an improvement plan	Not sure
Discretionary power to produce a report	Yes, reports should be produced and made public

9. For each of the sanctions below, please state whether you think they would or would not be effective for organisations that refuse to co-operate:

Refer organisation to UKAS for review of accreditation status	No. UKAS's role is to test compliance with a standard, using a check list. Its inspectors know nothing specific about forensic science. Also: see my remarks above about the limitations in the value of standards
Give the Regulator the power to recommend an organisation be suspended from the procurement framework	Yes
Financial penalty per day of non compliance	Yes, in particular circumstances
Removal or suspension of work written into any public sector contracts	Yes, in particular circumstances

Public report or register	Yes, in particular circumstances
Requirement to disclose that subject to an improvement plan	Yes, in particular circumstances
Requirement for contracts with FSPs to require compliance with any FSR investigation.	Yes, in particular circumstances

Please explain your answers, and specify any alternative sanction powers you think the Regulator should be given.

10. To what extent do you agree or disagree that the FSR should have a statutory power to access information supplied to UKAS and subject to its confidentiality requirements? Please explain your answer.

For the reasons set out earlier I see a diminished role for UKAS. But if it is to be involved, then the FSR must have access to all its reasons for granting or not-granting certification. Among other things, it will help shed light on whether the CoP and UKAS are effective routes to improving the quality of forensic services

11. To what extent do you agree or disagree that statutory powers to investigate will be beneficial? Please explain your answer.

Without statutory powers to investigate the FSR will be almost pointless – rather like the ICO before it had investigatory powers.

12. If you have any other comments on giving the Regulator statutory powers to investigate that you would like us to take into consideration, please outline them below.

13. Are there other issues relating to the regulation of standards in forensic science not mentioned in this paper for which new legislation may be required?

The FSR should be collecting from the police and the courts, all reports where forensic science has been deemed inadequate. It should publish an annual report summarising these reports and use the information to modify and develop its regulatory regime. Without this discipline it is very difficult to ,judge whether regulation is effective and value for money.

14. If you have any alternative cost / benefit estimates to those used in the Impact Assessment published alongside this consultation document, please explain them below.

I note the number of occasions in which it has proved impossible to "monetise" some the impacts. But without this information, proper policy decisions are difficult to make. In particular the IA needs to look at the impact on the profitability of forensic science providers and consider whether the range of services and of providers will be reduced, which in turn may impact on the criminal justice system

15A. Which of the following best describes you or the organisation or sector that you represent? Please give details in the box below.

Forensic Service Provider, but chiefly as expert witness and analyst – I only occasionally handle original volatile evidence

15B. If you represent a Forensic Service Provider, please state the size of your organisation, by approximate number of employees:

– 1 but I may employ others on an occasional basis in order to meet particular complex requirements.