

Forensic Science Advisory Council (FSAC)

Note of the meeting held by Skype on 17 September 2020

1. Welcome and apologies

- 1.1 The Chair, the Forensic Science Regulator (the 'Regulator'), welcomed all to the meeting. See Annex A for a list of representatives present.

2. Outstanding actions

- 2.1 The members were provided with an update on an outstanding action from the previous meeting as follows.
- a. Action 4: AFSP representative to share the "heat map" after the SFR group meeting.
 - b. The heat map would highlight regions where the misuse of SFR1 forms in court were high. The heat map was almost complete and identified two issues:
 - i. Inappropriate use of streamline forensic reporting (SFR) templates in the Criminal Justice System (CJS). The SFR1 form was designed to provide an early result for a charging decision. A detailed follow up statement should be completed if the case proceeded to court, however in some cases the SFR1 form was used in court by expert witnesses.
 - ii. The defence requesting full data laboratory data packs, which was time-consuming, and impacted the outputs from the laboratories. The information provided was rarely used.
 - c. The new NPCC Forensic Capability Network (FCN) would act as an independent commercial collator of the data and collate examples of SFR1 forms being misused in court (often road traffic toxicology cases), and

requests for data packs from the defence. This information would then be populated into the heat map.

2.2 All other actions were complete.

3. Evaluative Opinion Appendix

3.1 A priority for the Regulator has been to develop a standard for the interpretation of evidence “Development of Evaluative Opinion”. An early draft of the standard had been circulated to the stakeholders who had assisted the Regulator with developing the standard. This included forensic science practitioners, the Home Office Chief Scientific Adviser, members of the judiciary and academics with backgrounds in, interpretation of evidence, the law and statistics.

3.2 The initial consultation proved to be challenging as there was a broad range of views and opinions. Comments had been received on the draft from the stakeholders but had not yet been incorporated in the draft. It was anticipated the next consultation would be wider, and comments would be sought from the wider judiciary.

3.3 The AFSP representative queried the purpose of this guidance. The Regulator explained the standard would address concerns the courts have raised on interpretation of evidence provided by expert witnesses. The standard would provide; more guidance around transparency; and address questions on how the opinion was reached, what research/data the opinion was based on, quality of the data, and whether the opinion was based only on experience. If an opinion was provided based on the expert’s own experience, the expert would be required to explain if they had any validation of this, for example from blind proficiency trials. This would ensure the court could understand the basis of opinion provided.

3.4 It was highlighted the standard could be difficult to implement in some disciplines within forensic science. Interpretation of source level DNA would be a straightforward discipline to start with, and the most challenging discipline could be digital forensics. Other traditional forensics could also be considered challenging, especially where there was a lack of blind proficiency trials and culture of gathering data. Fingerprint comparison was identified as another

challenge due to a change from a classification approach using specific terms such as; identify, insufficient, and excluded, to a probabilistic approach.

- 3.5 The Regulator proposed implementing this standard within the next five years for all forensic science disciplines. The Council were asked if they agreed with the five-year implementation plan for this new standard.
- 3.6 The Council were supportive of the new standard and agreed this would ensure forensic science was considered robust. It was agreed more ground truth data collection and research were essential to ensure experts had the data and research to support their opinions. It was also highlighted it was important to educate the judiciary and the public, and creation of a safe space for discussion between stakeholders and the public to ensure understanding of the new standard was suggested.
- 3.7 The Council agreed with the proposal to implement the easier disciplines first, but also recommended engaging with the challenging disciplines at the same time. The five-year implementation time line was considered a challenge; however, it was a good starting point. Implementing review points during this period to assess the progress across the disciplines was suggested and agreed.
- 3.8 The “Development of Evaluative Opinion” draft document did not include forensic pathology within its forensic science disciplines. The Regulator explained the standards for forensic pathology were set jointly by the Regulator, the Home Office, the Royal College of Pathologists, and the Department of Justice for Northern Ireland. The Regulator queried if the standard should include forensic pathology. The British Association in Forensic Medicine representative noted there were areas within forensic pathology that would require the same considerations as forensic science. It was also highlighted it was important to set clear boundaries with the forensic scientist’s evidence to ensure forensic pathology conclusions did not interfere with the conclusions of other experts that were following the interpretation methods. The British Association in Forensic Medicine representative stated that an interpretation standard for forensic pathologists could be quite useful.

- 3.9 The Regulator would update the current draft version and circulate it to wider stakeholders; members of the judiciary, legal professionals, forensic scientists, and possibly members of the public.

4. BFEG paper on Genetic Genealogy

- 4.1 The Biometrics and Forensic Ethics Group (BFEG) had written a report on the feasibility of using genetic genealogy resources for the identification of suspects in criminal cases in the UK. The Council agreed it was a very good paper that highlighted the key challenges and ethical issues of using this technique.
- 4.2 The NPCC Forensic Science Portfolio representative stated that this could be a useful technique for policing, but use would depend on; the seriousness of the crime, which would be a small number of cases; the technique having the correct safeguards in place; and clarity over the legal requirements concerning permissions for use of this specific technique.
- 4.3 The AFSP representative highlighted if the technique was used only for a small number of cases, it would be difficult for organisations to invest in the technique as there would not be a consistent volume of cases to justify costs. It was agreed that the safeguarding, ethical and legal issues raised in the report, must be considered and addressed before this method was considered for use.

5. Examination of data

- 5.1 The Regulator drew the Council's attention to a recent Court of Appeal judgment in R v. Bater-James [2020] EWCA Crim 790, which set out matters of principle relating to when, and how, data (for example on a device such as a mobile phone) belonging to an individual (e.g. a complainant or witness) should be examined.
- 5.2 The Regulator was asked by a group in the Home Office (HO) that is leading on the cross-CJS work on digital forensics for her views on the judgement and in particular the use of screen shots. The Regulator had shared her response with the Council and sought the members views on this response.
- 5.3 The Regulator had responded that the approach to digital forensic evidence recovery needed to be considered as part of a forensic science strategy.

- 5.4 The representative from the NPCC highlighted the issue in policing was one of case-by-case proportionality and simple cases would emerge where the use of screen shots may be proportionate to the offence. However, this would be inappropriate for complex cases. The representative highlighted the importance on boundaries and professionalisation of digital data recovery and was supportive of a drive towards improved standards.
- 5.5 The representative from ASFP noted the need to link this response to the ICO report on data downloaded from mobile phones and asked if the issues were related. The Regulator replied that the two issues were very similar but that the judgement had come before the ICO report and does not refer to the ICO report. The generic issues about proportionality are similar in the judgement and in the report and the ICO report did not suggest that screen shots were an appropriate method to collect digital evidence.
- 5.6 The UKAS representative drew the Council's attention to the fact that while the use of screen shots may not be deemed to be scientific, and they are an accredited practice as part of data extraction. The Regulator asked if any organisations held this accreditation and the representative replied that it may not be specifically listed on the schedules but is part of the methodology used.
- 5.7 The UKAS representative also pointed out that digital forensic units would need to consider how this judgement impacts on the declaration of what has and hasn't been examined, part of the contract review process, particularly for the kiosk set up.
- 5.8 Part of the Regulator's response will be in an editorial for a special digital forensics issue of a Policing journal that will be coming out in due course.

6. DNA-only cases

- 6.1 The Regulator drew the Council's attention to the issue of cases coming to court where DNA was the sole evidence type or where there was little other evidence and the risks associated with this. The Regulator also noted that more was known about potential errors in DNA profiling than for any other evidence type because of the data reconciliation activities carried out by the Forensic Information Database Service (FINDS). The Council were informed that a PACE

DNA sample was linked to the wrong demographic information around 100 times per quarter. It was known that sample switches occurred very rarely and that samples were removed from NDNAD after being identified as resulting from contamination approximately twenty times per quarter. In addition, assuming there were no errors in the DNA analysis, there were also issues with how DNA would have got onto a surface.

- 6.2 The Regulator asked the Council to consider whether there was a need to further flag the risks in cases where DNA was the sole evidence type or whether there was a need to provide any guidance to forensic scientists on this issue and what should be covered in their reports, or whether the CPS should be expected to flag this issue. The Regulator also asked if this issue should be covered in the Regulator's annual report.
- 6.3 The representative from the Scottish Police Authority Forensic Services noted that in Scotland cases must have corroborative evidence, DNA could not be presented as the only evidence. In addition, a confirmation sample would be required from a suspect which would remove the risk of incorrect demographic information. The representative highlighted that the issue with the possible errors would only arise if they were not identified prior to the trial, and if identified before trial then there was no risk to the case. Any possible risk should be flagged to the judiciary. The limitations of DNA profiling is something that should form part of judiciary training. In terms of highlighting in the annual report evidence would be required to support statements in the report as this may lead to a number of questions.
- 6.4 The representative from the ASFP noted that the forensic scientist may not know DNA was the only evidence, and that the presentation of the evidence would not change so would not be for the scientist to flag. Highlighting the risk of errors or contamination may place unnecessary doubt on the evidence. The Regulator commented that highlighting the risks of DNA analysis is not routine but perhaps should be.
- 6.5 The representative from Forensic Science Northern Ireland felt that it would be for the investigating and legal teams to highlight.

6.6 The representative from the NPCC commented that if a charging decision were to be based on DNA only, there would be discussions between the investigating officer and CPS. For this reason it would be important to raise this issue with the judiciary and providing guidance to forensic scientists as it is not clear how aware they would be of this potential issue.

6.7 The representative from the NPCC also suggested that the Regulator check whether a confirmatory DNA sample would be taken in cases where DNA was the only evidence, which would resolve the demographic issue. If this was not the case then this recommendation should be included in best practise guidance. Given the number of likely cases this would not be an onerous or expensive requirement.

Action 1:

6.8 The representative from the Criminal Bar Association would review the relevant law reports and send any relevant comments to the Regulator.

Action 2:

6.9 The Regulator would follow up on the issue with the CPS as the representative from the CPS was unable to attend the meeting.

7. **Statutory Powers**

7.1 The Regulator informed the Council that a private members bill from Darren Jones MP proposing statutory powers for the Regulator would be published next week. The bill is due for a second reading in Parliament on the 25th of September 2020.

7.2 If the bill passes the second reading then it would move into the committee stage at which point amendments could be made.

7.3 The Regulator raised concerns that statutory powers could negatively impact on openness and transparency if the FSRU became subject to FOIA requests. The Regulator would seek to raise this at the committee stage.

7.4 Once the bill had been published the Regulator may invite council members to make comments on the bill, this could be done through their local Member of Parliament.

8. Recruitment of new Regulator, transition and consideration of critical issues for valedictory comments

- 8.1 The Regulator reminded the council members that her term was due to end on the 16th of November 2020. The closing date for applications for a new Regulator has passed. A number of potential candidates had contacted the Regulator to discuss the role.
- 8.2 The Regulator would like to take the opportunity over the end of her term to speak out for forensic science, forensic scientists, and quality in forensic science and would like to seek input from the members on the key issues she had identified as follows.
- a. Shortfalls in the provision of digital forensics and toxicology.
 - b. Some elements of forensic provision remain price driven, particularly in the legal aid sector and forensic medical services.
 - c. Mainstream forensic science marketplace has been stabilised however there is further work to do in this area for a longer term solution.
 - d. Acceptance of gaps in knowledge and need for further research and innovation.
 - e. Non-compliance in standards in some areas particularly digital media investigation.
 - f. Concerns about CCTV image comparison.
 - g. Governance around forensic science and biometrics still remained a concern.
- 8.3 The members were all supportive of the Regulator's list.
- 8.4 The UKAS representative highlighted the Regulator had been right to challenge the provision of accreditation standards particularly for smaller organisations. There are workable solutions and this needs to be continued to be championed.
- 8.5 The representative from the AFSP commented with regard to the Criminal Justice Board sub group activities, this group had previously spoken about

studies around the value of forensic science. These studies were important as they could lead to funding and investment. The AFSP representative asked for the Regulator to highlight the need to support and encourage this work.

- 8.6 The representative from the NPCC asked the Regulator to emphasise the need to help stakeholders understand the fragility of the forensic market place and the need for good, clear policy in support of it and the need for proper intervention and support.

9. AOB

- 9.1 The representative from the NPCC announced that as he was retiring from police service this would be his last FSAC meeting. The NPCC representative would suggest a new representative for the Council. The representative took the opportunity to thank the Regulator for a clear and robust approach and for the tremendous amount of progress that had been made and noted that it had been a privilege to be part of the Council.
- 9.2 The Regulator thanked the representative very much for his contributions to the Council and wished him well for the future.
- 9.3 Next meeting would be held in December 2020 or January 2021 and the date would be confirmed in due course.

Annex A

Representatives present:

Forensic Science Regulator

Forensic Science Regulation Unit (FSRU)

The Chartered Society of Forensic Sciences

Criminal Bar Association

NPCC Forensic Science Portfolio

UK Accreditation Service

Crown Prosecution Service

Forensic Science Northern Ireland

Association of Forensic Science Providers

Scottish Police Authority

British Association in Forensic Medicine

HO Science Secretariat

Apologies received from:

Coroners' Society of England and Wales

NPCC National Quality Managers Lead

Chief Coroner

Judiciary

The Chartered Society of Forensic Sciences