

BRIEFING

Forensic Science Regulator Act 2021 – Statutory Code

Development from Codes of Practice and Conduct

Introduction

The Forensic Science Regulator (the Regulator) has established the standards in forensic science by means of the Codes of Practice and Conduct (the CoPC). First issued in 2011, these have been updated, a number of times, over the last eleven years.

The Forensic Science Regulator Act 2021 (the Act) requires that the Regulator publish a Code of Practice (the Code) which sets out the requirements.

This document, at a relatively high level, sets out the key actions in converting the CoPC to the draft Code.

Background

The CoPC is formed of three main parts.

The Statement of Requirement attempts to define areas of forensic science and, for each of those areas, set (a) the applicable standards and (b) the means of demonstrating compliance with the standards.

The Code of Conduct set out high level requirements with regard to the conduct of those involved in forensic science.

The Code of Practice sets out the requirements with regard to the undertaking of forensic science.

The three main sections of the CoPC are supported by a series of appendices (considered to be part of the CoPC) which deal with certain issues. These include, but are probably not limited to, the following.

- Standards which are required for specific areas (e.g. fingerprints, DNA or digital).
- Standards which, although not of universal application, cover a general issue (e.g. development of evaluative interpretations).
- Requirements which apply to specific areas (e.g. terminology for fingerprint examination).

Development of the Statutory Code

The aim in developing the Code is, to a significant degree, to maintain the key features of the CoPC. There are, however, aspects of implementing a statutory code which mean that Code must be significantly different from the CoPC.

Restructuring

One Code - Sections

The Act requires the Regulator publish a code of practice. The use of the singular in the Act means that the existing approach of having 'codes' can not be maintained. The Code will therefore change the terminology to 'standards of conduct' and 'standards of practice' which, to a significant degree, reflect the structure of the existing Codes.

One Code – Existing Appendices

The requirement for one code means that the current approach to use of appendices published as separate documents (at different times) cannot be maintained.

All existing standards documents (those appendices bearing an FSR-C-### identifier) will have to be reviewed and either abandoned or incorporated into the Code. This incorporation may be as an appendix to the Code or by including of relevant provisions into the body of the Code.

Statement of Requirements

The Act will set the remit of the Regulator by reference to the concept of Forensic Science Activities (FSA). This means that the Regulator will have to create detailed definitions of every FSA.

The use of the Statement of Requirement to define areas and set the requirements for those areas is not a pragmatic approach when there is a need for the level of detail required in FSA definitions.

The concept of the Statement of Requirement has been abandoned. A table setting out the overview of the requirements is useful so a summary will be incorporated in the Code.

New Sections

The Regulator

The commencement of the Act will create a 'new' Regulator with a specific role and statutory powers.

There is a section in the Code (which was not present in the CoPC) which provides information on the role of the Regulator.

The Code

The Act created the requirements for the Code.

There is a section in the Code (which was not present in the CoPC) explaining the legal basis of the Code and its nature/function.

FSA Explanation

The concept of FSA is key to understanding the Act and the role of the Regulator.

A new section has been added to the main body of the Code to provide information about the nature of the FSA and the legal issues surrounding the FSA.

There is also a section explaining the basic approach, adopted by the Regulator, to defining FSA.

FSA Definitions

The Act requires the Regulator to define what FSA are subject to the Code. This requires detailed definition of each FSA.

The Code must contain a section which defines all of the FSA which are subject to the Code. There is a need, if only to include exclusions in the FSA definitions, to also define (a) FSA which are not subject to the Code and (b) activities which are not FSA.

The approach to the definition of FSA requires a number of sections.

- There will be a section dealing the legal restrictions (e.g. the territorial restriction and the links to investigations etc) on what may be an FSA. This section can also be used to restrict the extent of the Regulator's role at the introduction of the Code.
- There will be a section attempting to cover all of the matters which will be common across all FSA to avoid repetition in the individual definitions.
- There will have to be individual definitions of individual areas (including FSA subject to the Code, FSA not subject to the Code and non-FSA activities).

Requirements

The CoPC sets out the requirements, in relation to both standards and the means of demonstrating compliance, in the Statement of Requirements. Given the creation of FSA definitions it is more practical to have the requirements (both in terms of standards and demonstration of compliance) in the FSA definitions.

The structure still includes a summary table for ease of reference.

Demonstration of Compliance

The CoPC deals with the means of demonstrating compliance with the CoPC as part of the content on standards/requirements.

In the Code the issue of demonstration of compliance is dealt with as a separate issue.

Transitional Provisions

The introduction of the statutory Regulator and the Code will involve a significant change to the approach in place.

The issue of transitional provisions has therefore been dealt with at relevant parts of the Code.

General Changes

The Code will be based on the existing CoPC. There is therefore a need to review the text of the CoPC which is being incorporated into the Code as follows.

Language

The Code will be a legal document and compliance may feature as part of a legal test (see s4 of the Act). This requires a far higher degree of precision in the use of language than the CoPC.

The text is therefore being reviewed to address any areas of ambiguity or lack of clarity.

Single Code

The text has been reviewed to ensure all text refers to one code and the sections which will exist in the new Code.

FSA

The text has been reviewed to ensure the discussion of activities etc related to FSA.

Glossary

There is a glossary in the CoPC but there are also glossaries in the existing standards appendices. Work is therefore underway to produce one consistent terminology for the Code.

Territorial Extent

The text is being reviewed to ensure the territorial extent of the Code is properly reflected throughout the document.

This includes ensuring there is no suggestion that accreditation must be by UKAS.

Scope

The text is being reviewed to ensure it reflects the Regulator's role as set out in the Act.

Standards of Conduct/Practice

The changes made to the content of the CoPC which has become the Standards of Conduct and Practice are set out in the table below.

Standards of Conduct			
Ref	Change	Reason	Most Relevant Sections
1	The incorporation of the Code of Conduct into the Standards of Conduct sought to limit the changes to ensure (a) continuity and (b) simplify transition. There have been some changes to the text.	The text in relation to the requirements to use valid techniques has been amended. This was done as part of the reconsideration (still underway) of how to address the need to declare compliance with a code (see Criminal Practice Directions) and to deal with s4 of the Act.	43.1.1 – clause 10
Standards of Practice			
Ref	Change	Reason	Most Relevant Sections
2	The concept of the Senior Accountable Individual (the SAI) and the role of the SAI have been incorporated into the management section of the Code.	The text was modified to reflect the decision of the FSR to introduce the concept of the SAI.	17.2
3	The text of the Code is being reviewed to determine where reference to the SAI would be the appropriate approach.	The existing issue of the Codes has a number of references to the management of a forensic unit. In some cases, but perhaps not all, it would be more appropriate to refer to the SAI.	
4	The sections on information security and business continuity have been reviewed. These were altered in the last issue of the CoPC following the cyber-attack on Eurofins. A number of issues have been raised by forensic units and these need to be considered in partnership with UKAS and the National Cyber Security Centre.	The section of the Codes on information security and business continuity was introduced in the current issue. It was added after the cyber-attack on Eurofins forensic services. Once the requirements were implemented questions have been raised by forensic units as to the manner in which the rules can be applied and the areas in which they have to be applied. For example, the need for additional back ups of data taken	31

		from an item which still exists and what a separate location means. The text is being reviewed to try and clarify the requirements.	
5	The section on independence, impartiality and integrity has been subject to minor changes to be clearer on what may amount to unacceptable conduct.	There have been cases where the conduct of expert witnesses has been the subject of concern. The text of conflict of interest etc was therefore modified to include examples of (a) having a perceived interest in the case or (b) being asked to hide information from the court.	19.1.2
6	The section on review of requests, tenders and contracts has been modified to include additional issues which need to be addressed when considering whether to accept work.	<p>In light of concerns about the manner in which work was done there have been additions to the section to make clear forensic units should not accept work if:</p> <ul style="list-style-type: none"> • It does not have the legal ability to handle the evidence; • It does not have the quality standards to do the requested work; • It has the relevant security clearance for staff; • The work will address an issue for the CJS. <p>In light of the possible use of overseas suppliers the text has been added to include consideration of relevant issues (e.g. the language and format of any report).</p>	22.1.2
7	The section on sub-contracting has been modified to clarify what is required.	The first noticeable change is the section has been renamed as 23. Externally Provided Products and Services, the second is it deals with FSAs. The last issue of the codes did move towards the newer 17025	23

		section by bringing in external services and included specific requirements for defining, reviewing and approving externally provided services, but stopped short of retitling.	
8	A new section has been added to deal with the Regulator's consideration of quality issues. The aim is to bring such activities within the scope of the Code and allow UKAS and the Regulator to deal with any shortcomings.	<p>The commencement of the Act will give the Regulator the power to investigate and impose compliance. The code was modified to cover how forensic units should approach investigations/compliance by the Regulator.</p> <p>This means that such activities are covered by the code and failure to deal with these properly could itself lead to action by UKAS and the Regulator.</p>	24.3
9	The section on Personnel has been modified to improve the section on competence to report.	Competence was covered in various places in the Codes, and some appendices. These have been pulled together into one section and supplemented with key clauses from G19 to make the document be more self-contained.	27.3
10	The section on validation has been modified. There was a question about the use of non-validated methods, so a new general requirement has added about the need to use valid methods.	<p>There has always been acceptance that there may be cases where methods which are not fully validated/accredited may have to be used in the CJS. The code states this but does not provide clear rules on how this is done.</p> <p>We were faced with two options.</p> <p>The first was to introduce a set of clear rules about use of non-validated methods. That</p>	29.3

		<p>might be viewed as creating a get out clause.</p> <p>The second was to introduce an overarching principle about quality so that, even if using a method which has not been fully validated, there is a requirement to meet the general quality standards.</p>	
11	The text includes references to infrequently used methods. This is too vague to be part of a statutory document, so this is being reconsidered.	<p>The code will have to be approved by the Secretary of State and both Houses of Parliament. Section 4 of the Act will lead to declarations of compliance. It follows that the requirements of the code must be absolutely clear.</p> <p>Without a clear definition of 'infrequently' the code will be too vague.</p>	29.3.48 et seq
12	The section on handling of items has been expanded to cover the scene of crime/incidents which was not well addressed in issue 7 of the CoPC.	The issue was the Code dealt with accepting (or really rejecting) items coming into the laboratory, as the initial document was particularly 17025 oriented. This is a place holder for the mirror requirement of handling prior to submission, there is still however a placeholder note that there is a selecting for submission stage which may be required also.	35.2
13	The section on receipt of items has been modified to clarify the requirements and set out reasons to refuse to accept.	This section has been expanded to cover more circumstances where a forensic unit should refuse to accept submissions. These include:	35.3.1

		<ul style="list-style-type: none"> • Not being legally able to hold material; • Not having the relevant quality standards; • Having health and safety concerns. 	
14	The issue on case assessment and prioritisation is being reviewed to produce something more substantive.	<p>In the existing Codes this section is quite brief and was always seen as a marker for something more substantive.</p> <p>The development of FSR-C-118 created some text which addressed the issues so that text can be copied into the code.</p>	35.4
15	The section on reporting is being reviewed to make the overriding duty to the court far clearer.	There have been criticisms of experts for hiding information from the court so the text has been modified to stress the duty to the court and the need for candour.	37.1.5. et seq
16	The section on reporting has been modified to address the potential disclosure impact of action by the Regulator under s5/s6 of the Act.	The Act provides the FSR with power to investigate or impose compliance. Each of these actions creates a potential disclosure obligation on the forensic unit because this may undermine its credibility. This has been addressed in the text.	24.3.9
17	<p>The section on opinions and interpretation is being reviewed to produce something more substantive.</p> <p>The development of FSR-C-118 created some text which addressed the issues so that text can be copied into the code.</p>	In the existing Codes this section is quite brief and was always seen as a marker for something more substantive.	37.5
18	A new section dealing with demonstration of compliance with the Code and what that means has been added.	The existing Codes elides the issue of standards and demonstration of compliance with those standards. In the code this	38

		position has been reversed and the demonstration of compliance is dealt with as a separate issue.	
19	A new section has been added to discuss accreditation and the relationship between the Regulator and accreditation bodies.	<p>The existing Codes refer to accreditation but don't contain much detail of how that will be used or what it means. A section has therefore been introduced which sets out that the demonstration of compliance may require:</p> <ul style="list-style-type: none"> • Accreditation to an international standard; • Incorporation of other documents (e.g. ILAC G19) in to the requirement; • Incorporation of the statutory code into the requirement; • Require certain entries in the schedule of accreditation; and • Other relevant issues about accreditation <p>As there may be foreign suppliers there is also a section about the relationship between the Regulator and accreditation bodies.</p>	38.2.8 et seq
20	The issue of how to declare compliance with a code (as required by the Criminal Practice Directions) and the requirements of s4 of the Act are being considered and the text will be modified.	The Criminal Practice Directions requires, to ensure compliance with the Criminal Procedure Rules, declaration of compliance with a code of practice. The existing position is that the Codes requires declaration of compliance with the Code of Conduct within the Codes. The statutory code will replace	37.1.10 et seq

		<p>the code of conduct with standards of conduct so this needs to be reconsidered.</p> <p>Separately the Act (see s4) makes compliance with the statutory code an issue for the CJS. There will therefore be a need for forensic units to declare compliance with the statutory code.</p>	
21	<p>There is a section on infrequently commissioned experts. This term is too vague to be used in a legal document so is being reviewed.</p>	<p>The code will have to be approved by the Secretary of State and both Houses of Parliament. Section 4 of the Act will lead to declarations of compliance. It follows that the requirements of the code must be absolutely clear.</p> <p>Without a clear definition of 'infrequently' the code will be too vague.</p>	44