Forensic Science Regulator

Report: Summary of key changes proposed for the Forensic Science Regulator's Code of Practice

FSR-Report-002

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This document is issued by the Forensic Science Regulator in line with Section 3.1 of the Forensic Science Regulator Act 2021.

Contents

1. Introduction

1.1.1 The Forensic Science Regulator Act 2021 (“the Act”) requires the Regulator to prepare and publish a code of practice about the carrying on of forensic science activities in England and Wales. In accordance with the provisions of the Act, the statutory Code of Practice was approved by Parliament, published in March 2023 and came into force on the 2nd of October 2023.

1.1.2 The Act states the Regulator:

a. must keep the Code under review, and
b. may from time to time prepare and publish alterations to the Code or a replacement Code.

1.1.3 As forensic units implement the Code, queries have been raised leading the Regulator to propose amendments to the Code to:

a. clarify existing clauses;
b. make editorial changes;
c. update references;
d. correct inaccuracies and ambiguities;
e. contextualise existing requirements;
f. remove requirements in line with the Regulator’s Notification: No. 01-2023;
g. add FSA specific requirements for incident scene examination; and
h. build on the FSA specific requirements for video to clarify existing requirements for speed estimation from video.

1.1.4 A summary of the key changes is provided, all changes to text other than renumbering and deletion are highlighted in the draft Code of Practice published for comment. One notable deletion, is that the Regulator is pleased to correct the unintentional discriminatory language in section 28.2.2 of the Code version 1 covering competence to no longer expect ability to explain both in 'writing and orally'. No additional FSAs have been made subject to the Code in the draft prepared for version 2.

1.1.5 This is a summary of changes which were consider of most significance, however forensic units may find less even minor changes significant and therefore should look at the consultation draft carefully and make their own assessment and should not assume that all changes are listed here. The consultation draft highlights changes in the text.

1.1.6 The Regulator will give careful consideration to all comments made in response to this consultation and consider the most appropriate way to implement the revised Code. The Regulator will take into account the need for processes and systems to be changed to ensure a smooth transition from version 1 to version 2. The Regulator will also take into account the views of the accreditation body on the impact of any changes on accreditation status and the need for additional assessment. The Regulator will publish any transitional arrangements including time scales prior to the Code being put forward for approval by the Secretary of State and parliament.

2. Key changes proposed to main body of the Code of Practice (i.e. parts A to D)

2.1 Control of non-conforming FSA related work

Proposal

The definition of what non-conforming work the Regulator requires to be notified about, to better reflect the requirements in the Act. Essentially any

non-conforming work involving an FSA covered by the Code if it has potential to:

a. adversely affect any investigation;
b. impede or prejudice the course of justice in any proceedings;
c. create adverse public comment; or
d. be against the public interest.

2.1.2 In addition, the Code lists what information the Regulator expects in a report on the review of the non-conformity.

Impact

2.1.3 The definition is essentially as before and should not trigger any additional referrals but is clearer, the detailing of what information the Regulator seeks should reduce iteration in the referral process and therefore speed up decision making.

2.1.4 The Code does not specify the approach of report form required, however as many police forces use a structured form which covers the categories mentioned the impact for those already providing the information upfront should be negligible.

2.2 Regulator's consideration of quality issues

Proposal

2.2.1 Version 1 of the Code stated that the existence of a Regulator's investigation or compliance action (i.e. the issue of a compliance notice, the application for and/or granting of an injunction, the initiation of contempt proceedings or finding of contempt) may need to be disclosed in reports.

2.2.2 Based upon discussions with the Crown Prosecution Service, Ministry of Justice and others, the draft now clarifies that investigation under s5 of the Act, is an information gathering stage. It is a formal process but does not of itself constitute an adverse finding by the Regulator. This is not the case with any compliance action taken by the Regulator under s6-8 of the Act.

Impact

2.2.3 At the time of the consultation, no investigations under s5 of the Act had been conducted therefore no practitioners could have been impacted. Setting out the clear threshold removes ambiguity and aligns better with the wording of the Act to provide a route for challenging decision made by the Regulator with respect to these enforcement powers.

2.3 Determination and Interpretation of International Standards

Proposal

The normative section of the Code that makes reference to the requirement to achieve accreditation to international standards such as ISO/IEC 17025 has been clarified to make clear the Regulators role in determining and interpreting international standards. The Regulator will determine which international standards are required for FSAs that are subject to the Code. The Regulator will provide an interpretation of international standards, including the relevant clauses of international standards as they apply to the FSA that are subject to the Code. This will be achieved through the general and FSA specific requirements that are set out in the Code, these requirements will form the basis for achieving accreditation where this is a requirement for an FSA that is subject to the Code.

Impact

This change will ensure that the achievement of accreditation for FSAs that are subject to the Code will be based on the requirements set out in the Code particularly the FSA specific requirements.

2.4 Infrequently commissioned experts

Proposal

2.4.1 The title of this section was considered confusing and was only intended to set out a route for specialists from outside the forensic science profession to provide advice/evidence where aspects of that would involve conducting part

of an FSA covered by the Code. The proposed new title is “Specialists from outside the forensic science profession”.

2.4.2 In addition, it has been made clear that the commissioning party is responsible for ensuring that specialists from outside the forensic science profession are aware of the requirements set out in this section of the Code.

Impact

2.4.3 The requirements as set out in version 1 of the Code expressly exclude for example those representing themselves as a forensic practitioner operating within the CJS in England and Wales, this would include but not be limited to websites and registers so it should not impact any active practitioners.

2.5 Types of report in the Criminal Justice System (CJS)

Proposal

2.5.1 Version 1 of the Code required a declaration of compliance with the Code on all reports, including but not limited to the MG22a form. It was silent on whether in instances of non-compliance, the mitigation was required.

2.5.2 The Code sets out the wording for declarations about compliance and although it allows for the declaration to be tailored it still requires where there is non-compliance that mitigating steps are given in the annex.

2.5.3 The Code is therefore amended to now state in section 38 that all “reports require a declaration of compliance with the Code, and mitigation in cases of non-compliance”.

Impact

2.5.4 The requirement has not been changed, however it has been brought to the attention of the Regulator that it was being interpreted differently by various organisations so some inadvertent impact might be introduced by this clarification. It is not known at the point of the consultation how many MG22a forms or other information reports might be impacted and those commenting on the consultation are invited to supply this information if known.

2.6 Personnel - level of clearance

Proposal

2.6.1 Version 1 of the Code suggested the required level of clearance for prolonged or unsupervised access to case material is usually ‘Security Check’ [32] or ‘Non-Police Personnel Vetting level 3’, or equivalent.

2.6.2 It has been put to the Regulator that for police personnel who are also subject to other checks, that ‘Security Check’ was disproportionate level to apply outside of those working in counter terrorism and is contributing to backlogs in processing clearance applications. It should be noted that version 1 of the Code allowed for the clearance level to be varied by the commissioning party, so the senior accountable individual (SAI) in policing was already able to select a different level of clearance if they chose to.

2.6.3 The proposed new section reads:

> The clearance level required should be defined by the commissioning party, the controller of the data or the SAI of the commissioning party (where the party and the forensic unit are part of the same organisation) and may be varied in writing. The level of vetting required for prolonged or unsupervised access to case material will be dependent upon the environment. Within policing, for police personnel, a minimum of Recruitment Vetting (RV) will be required as other checks are included. For external personnel who require access to police premises, information or other assets, a minimum of Non-Police Personnel Vetting level 2 full (NPPV2 full) will be required. Outside of policing, those who require prolonged or unsupervised access to case material will normally be expected to be cleared to the National Security Vetting level of Security Check (SC).

2.6.4 The rationale is that National Security Vetting clearances make passing reference to police conviction databases and do not check against police non-conviction databases, such as intelligence, arrest records, child abuse records etc.

Impact

2.6.5 Compliance figures against this clause are not available, so impact is not quantifiable at this time. Those responding to the consultation are invited to comment on the impact as they perceive it.

3. Key changes proposed to the Forensic Science Activity Definitions

3.1 Covert policing recovery activities

Proposal

3.1.1 Version 1 of the Code excluded covert policing recovery activities under the general section titled “Secretary of state approval”.

3.1.2 The exclusion remains, however it is now incorporated under FSA - INC 100 - Incident scene examination. It is intended as an exclusion for physical forensics recovery; note that a separate exclusion remains for the acquisition of communications data performed in accordance with the Investigatory Powers Act 2016 and related codes of practice.

Impact

3.1.3 The exclusion has not changed and has been moved to the relevant section for clarity therefore the impact is deemed to be insignificant.

3.2 Clarification on presumptive testing for public safety purposed (FSA – DTN 500)

Proposal

3.2.1 An exception has been added to say although presumptive testing conducted at incident scenes is included, this is unless it is conducted for public safety reasons by first responders rather than for directing evidential recovery.

Impact

3.2.2 No identifiable impact.

3.3 Removing activity level propositions from specific FSAs - Incorporating Regulator's Notification: No. 01-2023

Proposal

3.3.1 The Regulator issued Regulator's Notification: No. 01-2023 [1] as some FSAs set out in version 1 of the Code, included an accreditation requirement for activity level interpretation and opinion. The Regulator's Notification: No. 01-2023 clarified that there is no requirement to declare non-compliance where a forensic unit reports on activity level interpretation and opinion about the accreditation status. This relates to activity levels only, based upon the 'hierarchy of issues' of sub-source, source, activity or offence levels. The change only affects the FSAs that specifically mention activity level propositions.

3.3.2 Following a query to the Regulator regarding activity level reporting based on the location and type of biological material on an item, activity level reporting has also been proposed as an addition to FSA – BIO 200 – Human biological material and analysis.

3.3.3 All FSAs affected have such sub-activities put under a heading of "Sub-activities not required to be included in accreditation scope", others with already such an exclusion from the accreditation requirement have had text added to make it clear that the Code still applies.

3.3.4 An amendment to support this change is included in section 47 FSA definitions - general provisions section, section 47.2.9 of the draft states:

> 47.2.9 Due to the practicalities of achieving accreditation, or the availability of an accreditation scheme for the whole FSA and/or sub-activities within it, in certain FSA specifications:
>
> a. the date to achieve accreditation is set after the date the Code came into force, and this is clear in those FSAs.
> b. an alternative to accreditation is clearly set out, with requirements for declarations identified,

c. not all sub-activities listed in the specification require to be included in an accreditation schedule, although should be performed in compliance with the Code (including declarations).

Impact

3.3.5 The clarification adds no additional resource implications, the change states accreditation is not required although compliance with the Code remains the requirement as per version1 of the Code.

3.4 Removal of requirement for accreditation for body fluid distribution analysis (FSA – BIO 300)

Proposal

3.4.1 Version 1 of the Code included the requirement for accreditation to ISO 17025 to demonstrate compliance for FSA - BIO 300, however the FSA specific requirement for Bloodstain pattern analysis allowed for either ISO 17025 or ISO 17020 accreditation.

3.4.2 Organisations have achieved accreditation to both standards as a testing and as an inspection activity, with variations in the scope of accreditation, particularly in relation to activity level opinions. Given this, the Regulator is of the opinion that a review of the requirements for demonstrating compliance with the Code is required and pending completion of this review it is proposed that the requirement for accreditation is removed.

Impact

3.4.3 This is a suspension of the accreditation requirement, therefore the change for this version is a reduced requirement.

3.5 Clarification on data review by the investigator (FSA – DIG 100)

Proposal

3.5.1 The FSA definition in version 1 of the Code had the purpose of a sub activity to supply data for further review as part of an investigation (e.g. a Cellebrite reader file (.UFDR) to the investigating officer i.e. the commissioning body). It was silent on whether the Code applied to this further review. The following exclusion has been added to the FSA:

> 82.4.1 Review by the investigator of data supplied by the forensic unit using an SAI approved review method (e.g. a Cellebrite reader, eDiscovery tool, DEMs) for purposes other than detailed in 82.3.1b - 82.3.1c does not fall within the current definition of FSA - DIG 100 - Data capture, processing and analysis from digital storage devices.

Impact

3.5.2 It is either neutral or could reduce the regulatory requirements if forensic units were considering this activity by investigating officers to be in scope. However, comments are invited on any potential scope creep and/or support for the change.

3.6 Cell site analysis for geolocation

Proposal

3.6.1 Although the compliance requirement is deferred until October 2025, various questions about scope indicated that evidence using call data records to attribute location suspect device either through co-location with an attributed device or inferring from call and/or data evens at a location.

3.6.2 The change is as marked:

80.3.1 c Any of the above sub-activities (or products of activities, e.g. maps) to determine the geolocation and/or for the attribution of the suspect device.

3.6.3 Interpreting call data records and giving an opinion on such a complex and presumably central issue to a case is expert opinion evidence and is therefore under this forensic science activity.

Impact

3.6.4 This is an inference from determining geolocation based on call data records, which was already included in the scope and therefore should have no additional impact on organisations performing cell site analysis and acting as an expert witness with the intention to comply with the Code.

3.7 Audio analysis – consolidation of requirements (FSA – DIG 400)

Proposal

3.7.1 The FSA technical audio operations contained several very similar sub-activities, they have been combined and simplified.

The application of filters, speed and/or level control may be included in an accredited process if a forensic unit wishes to include it, however the accreditation in no longer a requirement. Clarifications in the related speech and audio analysis FSA were also made.

Impact

3.7.2 The consolidation added no additional requirements, and removing a related processing activity reduced the requirements. The proposed changes were recommended by the only forensic unit holding accreditation for this FSA.

4. Proposed changes to the FSA specific requirement section (part F3)

4.1 Incident scene – new FSA specific requirement

Proposal

4.1.1 The Regulator established an Incident Examination Specialist Group to review the Code and propose amendments to ensure that the Code reflects the requirements for incident scene examination.

4.1.2 The group has identified where clarification of existing requirements or addition of requirements for performing forensic science activities at incident scenes are needed. The amendments and additions cover considerations on the application of professional judgement and the undertaking of forensic scene management, particular in complex incidents.

Impact

4.1.3 The additional FSA specific requirement covers activities specific to incident scene examination, such as scene management, and provides additional and contextual requirements on areas that were already covered in the Code, such as strategy setting and technical records. The FSA SR also provides detail on the expectations for delivering quality incident examination, such as requirements around competency, environment, and validation.

4.1.4 There has been engagement with relevant groups in the development of these requirements, through the Incident Examination Specialist Group. Stress testing of these requirements against realistic casework examples and environments will be undertaken in parallel with, and will form part of, the consultation on version 2 of the Code. Feedback is welcomed on the impact of this additional section.

4.1.5 A guidance document will be produced to assist with interpreting and implementing the new FSA specific requirement.

4.2 Video processing and analysis – additional detail on estimation of vehicle speed from video footage

Proposal

4.2.1 Speed estimation from video footage is included in the FSA covering specialist video multimedia, recovery, processing and analysis (DIG 301) and requires compliance with the Code and accreditation; the Code excludes the use of Home Office approved speed detection devices etc.

4.2.2 Variable performance in speed estimation from using night-time CCTV footage has been reported to the Regulator and identified that further detail explicitly for speed estimation was needed to ensure more consistent implementation of the Code requirements. The FSA specific requirements for video processing and analysis (section 109) included detail relevant to speed estimation from CCTV, and the requirements for validation, estimation of uncertainty and other requirements were set out in the body of the Code but putting the requirements into context was believed worthwhile.

4.2.3 If the FSA specifies compliance with the Code, the whole Code applies, including, additional clarifying detail is proposed on the following.

a. Checking and primary review.
b. Review of requests, tenders and/or contracts.
c. Developing an examination strategy.
d. Selection of methods.
e. Validation.
f. Estimation of uncertainty.

4.2.4 The Code requires unexpected performance to be treated as non-conforming work and for the Regulator to be informed. The term unexpected has been substituted for unsatisfactory; an incorrect result being sent out of a forensic unit is a non-conformity and is required to be treated as such.

Impact

4.2.5 The statutory Code required that the organisations undertake the sub-activity of FSA 301 speed estimation from video to hold accreditation to ISO/IEC 17025, with the Code on the schedule of accreditation. The additional text adds no new accreditation requirements, all requirements are contextualisation of requirements already in the Code,.

4.2.6 No organisations in England and Wales held accreditation to cover speed estimation from video at the time of consultation on the change. This means no forensic units will need to change their quality management systems already assessed by the accreditation body, and those introducing quality management systems would have better clarity of what was expected.

4.2.7 The majority of forensic units carrying on this sub-activity are within policing, the Regulator will continue to work with the Forensic Collision Investigation Network to assist them to produce standard operating procedures which comply with the requirements set, should organisations choose to adopt them.

4.2.8 The issuance of additional detail does not reset any previously set out accreditation requirement or compliance deadline, it remains as per version 1 of the Code. Forensic units carrying on the FSA sub-activity are required to declare compliance or non-compliance with the requirements set out in the Code.

5. Other areas under consideration

5.1 DTN 103

5.1.1 The option to demonstrate compliance by holding accreditation to ISO/IEC 15189 has been removed for DTN-103, as the Regulator is not aware of any context where ISO 15189 is held in place of ISO/IEC 17025 for this FSA. If there is any situation where this is relevant, the Regulator welcomes feedback via the consultation on this.

5.2 DTN 102 FSA-specific requirements

5.2.1 Although feedback was received in the previous consultation regarding the FSA-specific requirements for DTN-102 Section 5A drug driving, no changes have been made to the proposed requirements in Version 2. This is because the Regulator has established a working group to consider these requirements in detail and advise the Regulator accordingly. The comments received previously have been logged and are under consideration by the working group. If you have any queries regarding this working group, please contact the Office of the Forensic Science Regulator.

5.3 Section 41 - Accreditation

5.3.1 The Code has a section which points to general requirements typically elsewhere in the Code related to accreditation. It is not the section that sets accreditation requirements, accreditation including the Code is all procedures and not just those pointed to in this section. In proposing an update to the Code, it is queried if this section assists or if the few additional clauses which are contained in this section are transferred to the sections that it points to. The Regulator welcomes feedback via the consultation on this.

5.4 Section 21 – Opinion evidence

5.4.1 The Regulator has established a specialist group that is considering the various approaches to interpretation that are in use across the forensic science community in order to enhance the transparency and understanding of opinion evidence in the Courts and to improve the alignment in interpretation between different disciplines.

5.4.2 The Regulator may introduce additional requirements in terms of opinion evidence in a future version of the Code.

6. References

[1] Forensic Science Regulator, “Regulator’s Notification: No. 01-2023,” [Online]. Available: www.gov.uk/government/publications/regulators-notification-01-2023-accreditation-requirements-and-making-a-declaration-of-compliance/regulators-notification-01-2023-accreditation-requirements-and-making-a-declaration-of-compliance-accessible-version.

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