

FORENSIC SCIENCE REGULATOR ACT 2021

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Forensic Science Regulator Act 2021 which received Royal Assent on 29 April 2021 (c. 14).

- These Explanatory Notes have been provided by the Home Office in order to assist the reader Act. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.

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Overview of the Act

- 1 The Act establishes the Forensic Science Regulator (the Regulator) as a statutory office holder. The Regulator can exercise functions in respect of forensic science activities for the purposes of the criminal justice system in England and Wales, and the Act includes a power for the Secretary of State to extend this remit by regulations. The Regulator is required to publish and keep under review a code of practice about forensic science activities, subject to approval by Parliament. Amongst other powers, the Regulator can investigate and take enforcement action in relation to forensic science activities carried on in a manner that risks prejudicing the course of legal proceedings.

Policy background

- 2 The Regulator was created in July 2007. The Regulator is a non-statutory public appointee funded by the Home Office but operating independently of it. The role of the Regulator is to:

“advise Government and the Criminal Justice System on quality standards in the provision of forensic science. This will involve identifying the requirement for new or improved quality standards; leading on the development of new standards where necessary; providing advice and guidance so that providers will be able to demonstrate compliance with common standards, for example, in procurement and in courts; ensuring that satisfactory arrangements exist to provide assurance and monitoring of the standards and reporting on quality standards generally.”¹
- 3 While the previous arrangement provided flexibility, there were limitations on the powers available to the Regulator. The Regulator had no statutory powers to investigate quality issues or take enforcement action. This posed a risk to both public confidence in, and the overall quality of, forensic evidence used in court proceedings.
- 4 In the Forensic Science Strategy published in 2016, the Home Office committed to “develop proposals to give the Forensic Science Regulator statutory powers, put the current remit and the associated Codes of Practice on a statutory basis and enable the Forensic Science Regulator to investigate non-compliance where necessary.”² The Government committed to giving statutory powers to the Regulator as soon as a legislative opportunity arises. This was reiterated by the Government in the joint review of forensics provision³ published on 23 April 2019.
- 5 There is broad support for the introduction of statutory powers. In its 2011 report The Forensic Science Service, the House of Commons Science and Technology Committee recommended that the Regulator have statutory powers to enforce compliance with quality standards. The Committee reiterated this recommendation in reports on forensic science in

¹ [Written Ministerial Statement](#), July 2007

² [Forensic Science Strategy: A national approach to forensic science delivery in the criminal justice system](#), Home Office, March 2016, Cm 9217

³ [Joint review of the provision of forensic science to the criminal justice system in England and Wales](#), Home Office, April 2019

July 2013 and September 2016. Sir Brian Leveson’s Review into efficiency of criminal proceedings, published January 2015, repeated the call for statutory powers. The Lords Science & Technology Committee also called for this in its report Forensic science and the criminal justice system: a blueprint for change on 1 May 2019.

Legal background

- 6 The relevant legal background is explained in the policy background section of these Notes.

Territorial extent and application

- 7 Clause 13 sets out the territorial extent of the Act, that is the jurisdictions which the Act forms part of the law of. The extent of an Act can be different from its application. Application is about where an Act produces a practical effect. The Act extends to England and Wales only, with the exception of Clause 13 and paragraphs 8 to 11 of the Schedule. Clause 13 extends to the whole of the United Kingdom. Paragraphs 8 to 11 of the Schedule contain consequential amendments that have the same extent as the enactment amended. Where a provision may have effects beyond England and Wales, this is reflected in the commentary on that provision.
- 8 See the table in Annex A for a summary of the position about territorial extent and application in the United Kingdom.

Commentary on provisions of Act

Section 1: The Forensic Science Regulator

- 9 Section 1 establishes the Regulator as a statutory office holder.

Section 2: Regulator’s duty to publish a code of practice

- 10 Subsection (1) requires the Regulator to publish a Code of Practice (the code) about forensic science activities in England and Wales. “Forensic science activity” is defined in Section 11.
- 11 Subsection (2)(a) requires that the code specifies the activities it applies to. The Regulator’s investigative and enforcement powers in Sections 6 and 7 are limited to activities that are covered by the code, so it is important that those activities are clearly identified in the code.
- 12 Subsection 2(b) provides that the code does not need to cover every forensic science activity. The definition of “forensic science activity” allows the statutory regime to keep pace with developments in forensic science, so the Regulator is not obliged to include all activities falling within the definition within the code.
- 13 Subsection (2)(c) means that the code does not need to make uniform provision in respect of forensic science activities and different provision can be made in respect of an activity in different situations. This affords flexibility to the Regulator when preparing the code. For example, the code may make different provision in respect of a particular forensic science process depending on whether the process is being performed at a crime scene or in a laboratory.
- 14 Subsection (3) provides that the Regulator must publish the code in an appropriate way.
- 15 Subsection (4)(a) provides that the Regulator keeps the code under review.
- 16 Subsection (4)(b) provides for the Regulator to make alterations to the code, or to replace the code, as necessary.

- 17 Subsection (5) defines “the code” as being the Code of Practice, as defined under this section, that is currently in force.

Section 3: Code of practice: procedure

- 18 Subsection (1) requires the Regulator when preparing the code of practice to consult those persons the Regulator considers appropriate. Subsection (2) requires that those consulted must include persons who are, or are likely to be, performing activities covered by the code.
- 19 Subsection (3) provides that a draft of the code must be approved by the Secretary of State and laid before Parliament. The code cannot be published (and therefore cannot come into force) until the draft code has been approved by Parliament under the affirmative resolution procedure.
- 20 Subsection (4) provides for the code to come into force on the day specified for that purpose.
- 21 Subsection (5) specifies when alterations to the code come into force.
- 22 Subsection (6) allows different parts of the code to come into force on different days.

Section 4: Status of the code

- 23 Subsection (1) provides that a failure to adhere to any aspects of the code of practice would not, of itself, render a person liable to civil or criminal proceedings. The code is admissible in criminal or civil proceedings (subsection (2)) and a court or tribunal may take into account any failure to act in accordance with the code (subsection (3)). However, it remains for the courts to make decisions as to the admissibility of forensic evidence.

Section 5: Investigation by the Regulator

- 24 Section 5 sets out investigative powers of the Regulator.
- 25 Subsections (1) and (2) confer on the Regulator the function to investigate a forensic science activity if the Regulator believes that the activity is being carried out in a way that risks prejudicing the course of legal proceedings in England and Wales.
- 26 To support this function, subsection (3) confers on the Regulator the power to require the person carrying out the activity in question to provide copies of documents or other information that they hold. This could include requiring the person to provide information orally (subsection (4)). The Regulator may require the person to provide copies of the documents by giving a written notice, which will need to specify the details set out in subsection (5)(a) to (c).
- 27 Subsection (6) protects information that could not be required to be provided in proceedings before the High Court. Subsections (7)-(9) ensure that a person who is required to provide information to the Forensic Science Regulator does not breach any restriction on disclosure in doing so, but may not be required to disclose information in breach of the data protection legislation or the Investigatory Powers Act 2016.
- 28 Subsection (10) provides that the Regulator may apply for an injunction to enforce a requirement for information. Subsection (11) defines “proceedings” as proceedings before a judicial authority in England and Wales.

Section 6: Compliance notices

- 29 Section 6 sets out enforcement powers of the Regulator. If the Regulator believes that a forensic science activity is being carried out in a way that risks prejudicing the course of legal proceedings in England and Wales, the regulator can give the person performing the activity a compliance notice (subsections (1) and (2)). A compliance notice requires the person to take

specific steps and may prohibit the person from carrying out a forensic science activity until the Regulator is satisfied that the steps have been taken or do not need to be taken (subsections (3) and (4)). The regulator may take into account any failure to adhere to the code in deciding whether to issue a compliance notice (Section 6(5)).

- 30 A compliance notice needs to be in writing and specify the details set out in subsection (6)(a) to (c). Subsection (7) provides that the Regulator may apply for an injunction to enforce a compliance notice. The Regulator can vary or cancel a compliance notice in writing at any time after the notice has been served (subsection (8)).

Section 7: Completion certificates

- 31 Section 7 makes provision for the Regulator to issue completion certificates, which cease the effect of the compliance notice in respect of which the certificate is issued. The Regulator must issue a completion certificate if the Regulator considers that the steps specified in the compliance notice have been taken or do not need to be taken (subsection (2)). The completion certificate will state the date on which the compliance notice is no longer in force (subsection (5)).
- 32 The recipient of a compliance notice may apply for a completion certificate (subsection (3)). The Regulator must give written notice of the decision to the applicant within 14 days of receiving the application (subsection (4)). An applicant can appeal a refusal to issue a completion certificate to the First-tier Tribunal (Section 8).

Section 8: Appeals

- 33 Section 8 provides for the recipient of a compliance notice to appeal to the First-tier Tribunal (General Regulatory Chamber) against a decision of the Regulator to serve a compliance notice or to refuse to issue a completion certificate (subsections (1) and (4)). Subsections (2) and (5) set out the reasons for which an appeal can be brought and subsections (3) and (6) set out the powers of the Tribunal. Subsection (7) provides that the Tribunal may suspend any part of a compliance notice pending an appeal in respect of that notice. Subsection (8) enables the Upper Tribunal to suspend a requirement or prohibition in a compliance notice where a person appeals against a decision of the First-tier Tribunal under Section 8.

Section 9: Other functions of the Regulator

- 34 Section 9 sets out a variety of other functions and powers of the Regulator. Subsections (1) to (3) make provision for the Regulator to prepare and publish guidance or reports on, and provide advice or assistance relating to, forensic science activities in England and Wales. In particular, these powers will be available to the Regulator if he or she considers that a Crown body (such as a government department) is not acting in accordance with the code of practice; the investigative and enforcement provisions in Sections 5 to 8 do not bind the Crown though they do bind the police (Section 12(3) and (4)). The Regulator can provide advice on forensic science activities to persons outside the United Kingdom (subsections (2) and (3)).
- 35 Subsections (4) to (6) require the publication of an annual report about the work carried out by the Regulator. The Regulator must provide a copy of the report to the Secretary of State, who must lay the copy before Parliament.
- 36 Subsection (7) sets out a standard provision conferring incidental powers related to the exercise of the Regulator's functions. The Regulator cannot borrow money.

Section 10: Disclosure by the Regulator

- 37 Section 10 provides the Regulator with a power to disclose information received to public bodies and sets out conditions on such disclosure.

- 38 Subsection (1) allows the Regulator to disclose information to other public authorities, including the public authorities of the Devolved Administrations, if the disclosure is made for the purpose of enabling or assisting the other public authority to discharge any of its functions ('public authorities' is defined in subsection (5)). The power only covers information received in connection with the Regulator's functions. The power can only be exercised to disclose information that helps the public body exercise its functions or is otherwise relevant to those functions.
- 39 Subsections (2) to (4) make standard provision as to the exercise of this type of information sharing power. The Regulator's power to provide information will override any obligation of confidence or any other restriction on the disclosure of information (however imposed). However, this provision will not authorise a disclosure, in contravention of the data protection legislation (as defined in Section 3 Data Protection Act 2018), of personal data which are not exempt from those provisions or a disclosure which is prohibited by any of Parts 1 to 7 or Chapter 1 of Part 9 of the Investigatory Powers Act 2016.
- 40 The Regulator would typically share data in relation to investigations into concerns about the quality of work in forensic science. The sorts of personal data which may be shared include, but are not limited to:
- Information about practitioners who are believed to have failed to work to the standards expected. This could include information about criminal investigations into the work of that person.
 - Information about persons who were the complainant or suspect in the criminal investigation. This may be in the form of statements, reports etc.
 - Information about people involved in the investigation of concerns (e.g. experts commissioned to review cases).
- 41 Such information would only be shared to the extent necessary to effectively deal with the investigation or the consequences of the particular issue at hand. Examples would include, but are not limited to:
- sharing the information with NPCC led Gold Groups,
 - communications with the CPS about the cases and potential impact of the events on the case,
 - communications with the police investigating the matter,
 - communications with the Criminal Cases Review Commission, and
 - briefing relevant Government Departments/Ministers.

Section 11: Meaning of "forensic science activity"

- 42 Section 11 defines the meaning of "forensic science activity", in respect of which the Regulator can exercise functions.
- 43 Subsection (1) defines "forensic science activity" to be "an activity relating to the application of scientific methods" for a purpose in subsection (2). Such activities can include the recording, analysis and reporting of the application of such processes, and the development, validation and auditing of such processes.

- 44 Subsection (2)(a) and (b) provides that "forensic science activity" is the application of scientific methods for purposes relating to the detection and investigation of crime in England and Wales or to giving forensic evidence in criminal proceedings in England and Wales. The initial remit of the Regulator is therefore limited to forensic science for the purposes of the criminal justice system in England and Wales (the same remit as the non-statutory Regulator).
- 45 Subsection (2)(c) gives the Secretary of State a delegated power to extend the Regulator's remit by specifying in regulations other purposes for which a "forensic science activity" can be undertaken. The intention is that this power could be used to extend the Regulator's remit to the application of forensic science in other fields such as the civil courts. Subsection (3) sets out the scope of, and Parliamentary procedure for, the regulation making power in subsection (2)(c). The power cannot be used to confer on the Regulator functions that fall within the competence of Senedd Cymru. Regulations specifying additional purposes are subject to approval by Parliament via the affirmative resolution procedure. Subsection (4) ensures that the Act does not affect the exercise by any person other than the Forensic Science Regulator of functions in relation to the regulation of forensic science activities.

Section 12: Crown Application

- 46 Subsections (1) and (2) provide that Crown bodies (such as government departments) are bound by the provisions of the Act, except Sections 5 to 8 on investigative and enforcement powers; the Regulator will be exercising functions on behalf of the Crown (Schedule paragraph 1). The Regulator can exercise the general powers in Section 10 in respect of adherence by Crown bodies to quality standards. Subsection (3) confirms that a person serving or employed for policing purposes is not to be treated as a servant or agent of the Crown in relation to subsection (2).
- 47 Persons serving or employed for the policing purposes specified in subsections (4) to (5) are bound by all provisions of the Act. This ensures that Crown immunity does not apply to the police in respect of an exercise by the Regulator of investigative or enforcement powers, and that the Regulator can enforce compliance notices and requests for information.

Section 13: Extent, commencement, and short title

- 48 Section 13 makes provision in respect of the extent of the provisions of the Act, commencement of those provisions and the short title of the Act.

Schedule: The Regulator

- 49 The Schedule makes provision as to the status, appointment, remuneration and resourcing of the Regulator. Paragraph 3(4) and (5) provides for the holder of the non-statutory office of the Regulator to become the holder of the statutory office (the holder of the non-statutory office is appointed under a fair and open competition).

Commencement

50 Section 13 provides for the provisions of the Act to come into force on any day appointed by the Secretary of State, with the exception of Sections 11 and 13, which come into force on Royal Assent.

Related documents

51 The following documents are relevant to the Act and can be read at the stated locations:

- Home Office Forensic Science Strategy, March 2016
<https://www.gov.uk/government/publications/forensic-science-strategy>
- House of Commons Science & Technology Select Committee report on the Home Office Forensic Science Strategy, September 2016
<https://publications.parliament.uk/pa/cm201617/cmselect/cmsstech/501/50102.htm>
- Joint review of the provision of forensic science to the criminal justice system in England and Wales, April 2019
<https://www.gov.uk/government/publications/joint-review-of-forensics-2018-and-implementation-plan>
- House of Lords Science & Technology Select Committee report on Forensic science and the criminal justice system: a blueprint for change
<https://publications.parliament.uk/pa/ld201719/ldselect/ldsstech/333/333.pdf>

Annex A - Territorial extent and application in the United Kingdom

52 The provisions of the Act extend and apply to England and Wales.

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?
Sections 1 to 13	Yes	Yes	No	No
Schedule	Yes	Yes	No	No

Minor or consequential effects

Paragraphs 8 to 11 of the Schedule make amendments to various enactments consequential upon the provisions in the Act placing the Forensic Science Regulator on a statutory footing. The remit of the Regulator is confined to England and Wales only; as such, the amendments to these other enactments do have not practical application in Scotland or Northern Ireland

Annex B - Hansard References

53 The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

Stage	Date	Hansard Reference
<i>House of Commons</i>		
Introduction	5 February 2020	Not referenced
Second Reading	25 September 2020	Vol. 680 Col. 1245
Money Resolution	10 November 2020	Not referenced
Public Bill Committee	11 November 2020	Col. 1
Report and Third Reading	12 March 2021	Vol. 690 Col. 1197
<i>House of Lords</i>		
Introduction	12 March 2021	Vol. 810 Col. 1984
Second Reading	19 March 2021	Vol. 811 Col. 588
Order of Commitment discharged	15 April 2021	Vol. 811 Col. 1452
Third Reading	22 April 2021	Vol. 811 Col. 1968
Royal Assent	29 April 2021	Vol. 811 Col. 2413

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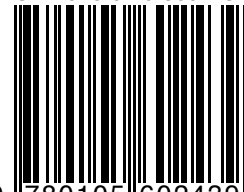
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