

FORENSIC SCIENCE REGULATOR AND BIOMETRICS STRATEGY BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Forensic Science Regulator and Biometrics Strategy Bill as introduced in the House of Commons on 5 February 2020 (Bill 11).

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

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Overview of the Bill

- 1 Despite its titles, the Bill does not include any provisions on a biometrics strategy. Paragraph 28.13 of Erskine May (25th edition) makes specific provision for Private Members' Bill presented under the ballot procedure (such as this Bill) to be printed without provisions on purposes referred to in the titles. The Bill 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 Bill 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 current arrangement has provided flexibility, there are limitations on the powers available to the Regulator. The Regulator has no statutory powers to investigate quality issues or take enforcement action. This poses 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.” 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 provision 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 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

¹ Written Ministerial Statement, July 2007

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 Bill, that is the jurisdictions which the Bill forms part of the law of. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect. The Bill 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 As a Private Member's Bill, the English votes provisions in the Standing Orders of the House of Commons relating to Public Business do not apply.
- 9 There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, Senedd Cymru/Welsh Parliament or the Northern Ireland Assembly without the consent of the legislature concerned.
- 10 The matters to which the provisions of the Bill relate are not within the legislative competence of the Scottish Parliament, Senedd Cymru/Welsh Parliament, or the Northern Ireland Assembly, and no legislative consent motion is being sought in relation to any provision of the Bill. If there are amendments relating to matters within the legislative competence of the Scottish Parliament, Senedd Cymru/Welsh Parliament or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for the amendments.
- 11 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 Bill

Clause 1: The Forensic Science Regulator

- 12 Clause 1 establishes the Regulator as a statutory office holder.

Clause 2: Regulator's duty to publish a code of practice

- 13 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 clause 11.
- 14 Subsection (2)(a) requires that the code specifies the activities it applies to. The Regulator's investigative and enforcement powers in clauses 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.

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

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developments in forensic science, so the Regulator is not obliged to include all activities falling within the definition within the code.

- 15 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.
- 16 Subsection (3) provides that the Regulator must publish the code in an appropriate way.
- 17 Subsection (4)(a) provides that the Regulator keeps the code under review.
- 18 Subsection (4)(b) provides for the Regulator to make alterations to the code, or to replace the code, as necessary.
- 19 Subsection (5) defines “the code” as being the Code of Practice, as defined under this section, that is currently in force.

Clause 3: Code of practice: procedure

- 20 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.
- 21 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.
- 22 Subsection (4) provides for the code to come into force on the day specified for that purpose.
- 23 Subsection (5) specifies that when alterations to the code come into force.
- 24 Subsection (6) allows different parts of the code to come into force on different days.

Clause 4: Status of the code

- 25 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.

Clause 5: Investigations by the Regulator

- 26 Clause 5 sets out investigative powers of the Regulator.
- 27 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.
- 28 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).

- 29 Subsection (6) protects information that could not be required to be provided in proceedings before the High Court.
- 30 Subsection (7) provides that the Regulator may apply for an injunction to enforce a requirement for information. Subsection (8) defines “proceedings” as proceedings before a judicial authority in England and Wales.

Clause 6: Compliance notices

- 31 Clause 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 (clause 6(5)).
- 32 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)).

Clause 7: Completion certificates

- 33 Clause 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)).
- 34 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 (clause 8).

Clause 8: Appeals

- 35 Clause 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.

Clause 9: Other functions of the Regulator

- 36 Clause 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 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 clauses 5 to 8 do not bind the Crown though they do bind the police (clause 12(3) and (4)). The Regulator can provide advice on forensic science activities to persons outside the United Kingdom (subsection (2) and (3)).
- 37 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.

- 38 Subsection (7) sets out a standard provision conferring incidental powers related to the exercise of the Regulator's functions. The Regulator cannot borrow money.

Clause 10: Disclosure by the Regulator

- 39 Clause 10 provides the Regulator with a power to disclose information received to public bodies, and sets out conditions on such disclosure.
- 40 Subsection (1) allows the Regulator to disclose information to other public authorities ('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.
- 41 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, 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.

Clause 11: Meaning of "forensic science activity"

- 42 Clause 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/Welsh Parliament. Regulations specifying additional purposes are subject to approval by Parliament via the affirmative resolution procedure.

Clause 12: Crown Application

- 46 Subsections (1) and (2) provide that Crown bodies (such as government departments) are bound by the provisions of the Bill, except clauses 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 clause 9 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 Bill. 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.

Clause 13: Extent, commencement, and short title

- 48 Clause 13 makes provision in respect of the extent of the provisions of the Bill (see paragraphs 7 to 11 above), commencement of those provisions (see paragraph 50 below) and the short title of the Bill.

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 Clause 13 provides for the provisions of the Bill to come into force on any day appointed by the Secretary of State, with the exception of clauses 11 and 13, which come into force on Royal Assent.

Financial implications of the Bill

- 51 An impact assessment was conducted by the Home Office in 2018 to support the Chris Green private members bill. More recent analysis by the Home Office in 2019 estimates that the statutory powers of the Regulator will cost an average of £400,000 per year in addition to the costs of the non-statutory Regulator. This sum includes providing the Regulator with additional staff.
- 52 A more detailed analysis is available in the impact assessment.

Parliamentary approval for financial costs or for charges imposed

- 53 A money resolution is required for the Bill. (A money resolution is required where a bill authorises new charges on the public revenue – broadly speaking, new public expenditure).
- 54 There is potential expenditure by the Secretary of State under various provisions of the Bill. In particular, there is a power in paragraphs 4 and 5 of the Schedule to pay the Regulator such expenses, remuneration, pension, allowances or gratuities, that the Secretary or State may determine. There is also a power in paragraph 6 of the Schedule to provide the Regulator with such staff, accommodation, equipment and other facilities as the Secretary of State considers necessary.
- 55 A ways and means resolution is not required for the Bill. (A ways and means resolution is

required where a bill authorises new charges on the people – broadly speaking, new taxation or other similar charges.)

Compatibility with the European Convention on Human Rights

56 The bill is considered by the Home Office to be compatible with the ECHR.

Related documents

57 The following documents are relevant to the Bill 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/cmsctech/501/50102.htm>
- 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/ldsctech/333/333.pdf>

Annex A - Territorial extent and application in the United Kingdom

The provisions of the Bill extend and apply to England and Wales.

In the view of the Government of the UK, the provisions of the Bill are not within the legislative competence of Senedd Cymru/Welsh Parliament but are within the legislative competence of the Scottish Parliament and the Northern Ireland Assembly.

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?	Would corresponding provision be within the competence of Senedd Cymru/Welsh Parliament?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clauses 1 to 13	Yes	Yes	No	No	No	Yes	Yes	No
Schedule	Yes	Yes	No	No	No	Yes	Yes	No

Minor and consequential effects

Paragraphs 8 to 11 of the Schedule make amendments to various enactments consequential upon the provisions in the Bill 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.

Subject matter and legislative competence of devolved legislatures

The provisions of the Bill deal with the regulation of forensic science activity. This is a matter within the legislative competence of the Scottish Parliament and Northern Ireland Assembly as forensic science activity is not a reserved matter under Schedule 5 of the Scotland Act, 1998 or an excepted or reserved matter under Schedules 2 and 3 of the Northern Ireland Act, 1998.

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