**Forensic Equity Ltd – Written evidence (FRS0039)**

We respectfully write to the inquiry as CEO (Simon Franc) and Principal Scientist (Anne Franc) of Forensic Equity Limited, the second/third (dependant on the metric) largest private forensic services provider (PFSP) with a focus on the provision of services to the defence. Formed in 2010, our mission is to ensure that quality, sound and impartial forensic science services are accessible to all. This has inherently meant a focus on the defence, ensuring that they have access to forensic services which are as comprehensive and robust, if not more so, than those readily accessible to the prosecution. Today, eight (8) years on, we report over one thousand (1000) cases per annum in cases where there are concerns, given the defendants stated case, regarding the forensic evidence being put forward by the prosecution.

Given such and with departments covering the entire spectrum of forensic evidence, we believe that we are very well positioned to offer authoritative, educated and sound commentary regarding the grave issues at hand and hopefully also to suggest some sensible solutions, to aid in diverting the CJS from the present potentially damaging course that we currently find it on. We have chosen to comment on those areas of the inquiry which we believe we can directly apply our specific and expert knowledge.

**Understanding and use of Forensic Science in the Criminal Justice System**

4. **How can the criminal justice system be equipped with robust, accurate and transparent forensic science?** What channels of communication are needed between scientists, lawyers and the judiciary?

4.1 **How can the criminal justice system be equipped with robust, accurate and transparent forensic science?**

4.1.1 In relation to the issue of obtaining the most robust and transparent forensic science we must address the very serious issues of bias. PFSPs do not have upon them the same pressures as internal police laboratories. The tangible gap between the PFSP and the instructing police force used to act as a significant barrier to any overt of inherent evidential biases.

4.1.2 There is however, now a significant and perhaps widely unrecognised and concealed issue of bias, given the consistent drive to move services previously provided by highly experienced Forensic Scientists at PFSPs, to in-house police laboratories.

4.1.3 The move to in-house services has led to a loss of independence in the collection, interpretation and presentation of evidence. The police are instructing the police, funded by the police.

4.1.4 The police are undoubtedly less well trained than their ‘counterparts’ at the PFSPs. Just as a Forensic Scientist would be unlikely to make a good police officer, ordinary police officers (outside specialist scientific officers) in our
experience, make poor scientists, and the age-old adage of ‘a little knowledge is a dangerous thing’ is an entirely relevant summation.

4.1.5 In a recent case in which we were involved R v H – ILCC – Trial 2018, a police officer reported that, from the CCTV imagery, the defendant could be seen holding a knife (media reports that the prosecutor told the Jury that the defendant was “armed with a knife”). The officer sought to qualify this analysis, not through detailing his methods or qualifications in relation to imagery analysis, but by stating that he had “...spent in excess of 300 hours engaged in CCTV activities”.

4.1.6 The officer gave no acknowledgement of the poor quality of the footage, compression, or subject to camera geometry.

4.1.7 Having reviewed the footage, it was our conclusion that [7.3] The available CCTV Imagery does not support the assertion that H had a knife in his hand at any time.

4.1.8 [7.3.3] Additionally, the size and shape of the item in his hand is more consistent with an item such as a mobile phone.

4.1.9 Given our evidence, it was ruled this item could have been anything, possibly a mobile telephone and the defendant was found not guilty, after the Judge ruled that there was not sufficient evidence against Mr H to try him.

4.1.10 Yet due to the ‘expert’ witness statement of a police officer, this case reached trial.

4.1.11 Without PFSPs engaged on behalf of the defence, there are absolutely no checks and balances in the system. Such prosecution evidence (which is a matter of opinion) would be presented to the Jury as fact, leading undoubtedly to significant and widespread miscarriages of justice.

4.2 What channels of communication are needed between scientists, lawyers and the judiciary?

4.2.1 Presently, channels of communication are poor, particularly when it comes to stakeholders contacting the CPS. In our experience (perhaps due to understaffing) the CPS do not respond in a timely manner to disclosure requests or requests for engagement to resolve issues relating to a case. In our experience, a majority of requests and communications are only dealt with at the eleventh hour. The CPS’ aptitude in this regard must be improved if we are to have a more efficient and productive system. Without such, we will not be able to uphold the overriding objective of the Criminal Justice System (CJS), that being to acquit the innocent and convict the guilty (Part 1.1 (2) (a)) Criminal Procedure Rules 2018).

4.2.2 Far from the recent very public outing of issues regarding disclosure in sexual offence cases focusing the minds and reversing the trend, the ability and perhaps desire of the police and CPS to disclose evidence in a timely manner, if at all, only seems to be deteriorating further, at an alarming rate.
4.2.3 More and more often we have to waste public funds, requesting that our instructing solicitors list cases before the Courts to have such disclosure issues dealt with.

4.2.4 Just recently we had to go before the Court, as the CPS would not release to us, a scientific file, the likes of which we see c. 5 times a week and which is very common and standard disclosure covered wholly by S.19.3 CPR ((3)(d)(i),(ii)).

4.2.5 It would seem that instances of non-disclosure have increased rapidly since a) the police moved to take forensic services in-house and b) the seeming deterioration in the number and quality of CPS staff: Both of which are exacerbated by what, in our experience, can only be described as a chronic lack of effective communication between the CPS and Police and thereafter, other stakeholders.

4.2.6 In our opinion, there needs to be a greater allowance for scientists (from the prosecution and defence) to communicate directly with each other. It has been the case that when CPS involvement takes place in relation to requests for evidence, a process of Chinese whispers coupled with a chronic lack of knowledge and understanding from CPS personnel, quickly distorts the request, so much so that much of the communication and explanation becomes completely lost in translation.

5 What is the level of understanding of forensic science within the criminal justice system amongst lawyers, judges and juries? How can it be improved?

5.1 Presently, the level of understanding amongst the majority of stakeholders in CJS is very poor, with a lack of knowledge being especially prevalent in relation to non-traditional evidence types such as digital forensics.

5.2 The most significant area of concern when it comes to a lack of forensic awareness is in regard to Counsel, both for the defence and prosecution. In many recent cases we have experienced Counsel making representations to the Court regarding the reporting mechanisms of forensic science and the related conclusions, without first consulting the scientists themselves. We have unfortunately also seen many examples of Counsels, whether knowingly or unwittingly, misleading the court on cases of great importance regarding the provision and value of forensic evidence.

6 Is the current training available for practitioners, lawyers and the judiciary appropriate?

6.1 Overall, it is evident that there is currently, simply not enough training throughout the system. FSPs are not seeing enough investment to allow them to train new staff and retain those existing, which if allowed to continue will undoubtedly lead to a fundamental skill deficit. In our experience, lawyers often find that their case schedules and commitments are such that the time available to engage in training is restricted. In our experience, the judiciary are often educated though the ‘hearsay’ of Counsels before them and as discussed
previously much of that represented is at some level, inaccurate and misinformed.

Standards and Regulation

7 Is the current market for forensic services in England and Wales sustainable? Are changes needed to ensure forensic science provision is maintained at the level required? What are the risks of a market approach, for example what happens if a provider goes out of business? And what is the impact on quality?

7.1 Is the current market for forensic services in England and Wales sustainable?

7.1.1 In our opinion, the current market is not sustainable at a base level because the highest level of expertise exists within the private sector. However, their revenues are being degraded by the police moving services in-house. The effect of which is to negatively affect the quality of science service provision on both sides; the private providers not having capability to invest and retain their senior staff, the police providing inferior services, due to a lack of training, knowledge and experience.

7.2 What are the risks of a market approach, for example what happens if a provider goes out of business?

7.2.1 The market approach in essence is sound. However, it will only remain sound if it not disrupted by monopolistic competition. By this we mean the withdrawal of contracts from the private providers, in favour of gifting the contract to the ‘competition’ (the police) who do not have the same commercial, financial and regulatory pressures as the private providers.

7.3 And what is the impact on quality?

7.3.1 As previously mentioned, given their longstanding role within the CJS, particularly having taken up the slack post the closure of the Forensic Science Service (FSS) the highest level of expertise sits and remains in the private sector and therefore if these companies go out of business, such expertise is lost, which undoubtedly effects the quality of science. The issue is that scientists are being made redundant and are not returning to the industry. The fact of the matter is that forensic scientists from the private sector will seldom move to an in-house police laboratory for a number of reasons, but in part, due to the pay divide between the private and public sectors. Unfortunately, police services simply do not have the budget to support their salaries and thus skills are simply lost.

7.3.2 Dr Tully when she appeared in front of the Science and Technology Committee – Tuesday 6 February 2018, agreed that there were significant concerns around the sustainability of the market, particularly in relation to the continuity of supply and in relation to the retention of enough expertise remaining within the field (with scientists having been made redundant time and time again).
7.3.3 Yet Dr Tully then offers what we consider to be a completely counter intuitive solution, with her drive for statutory powers and the proposed use of such powers, to impose effective tariffs on the provision of forensic science services, which is likely to make previously commercially viable entities (PFSPs) providing important and critical expertise to the CJS no longer viable.

8 Is the system of accreditation working successfully to ensure standardised results and the highest quality analysis and interpretation of significance of evidence?

8.1 Whilst we, as a major PFSP, are fully supportive of the need for accreditation for all Stage 1\(^1\) primary processes, in the form currently outlined, the further ‘down-stream’ regulation proposed is incredibly costly and is completely focused on process. Processes do not however, at the higher level of opinion-based evidence (Stage 2\(^2\)), ensure the quality of science.

8.2 Every issue in the public domain, that we are aware of, has come to light, not due to the direct actions or interventions of either of the main regulatory bodies (Forensic Science Regulator (FSR) or UKAS), but in whole or in part because of re-examinations undertaken on behalf of the defence.

8.3 This includes the failing identified in the methodologies being used by a provider engaged in the provision of toxicological analyses to the prosecution, whose actions have resulted in many hundreds of samples having to be re-tested. This particular laboratory was however, to all intents and purposes, regulated by the FSR and was fully accredited by UKAS, yet this major failing still occurred and would have continued to do so, had it not been for effective defence reviews, which uncovered and reported the issues to the governing bodies.

8.4 Such an event shows that regulation and accreditation are by themselves a blunt instrument and they do not work without effective checking and validation on a case by case basis. Dr Tully, at a meeting with the Science and Technology Committee on Tuesday 6 February 2018, seemed to concede this point, accepting that UKAS are only checking laboratories compliance with standards and that a functioning quality system is in place, once a year and therefore do not check absolutely everything, nor can they check every case.

8.5 We do not believe that the FSR are truly aware of the breadth and depth of the fundamental issues within our Criminal Justice System, not least the issues of disclosure and fundamental bias, and we believe that their focus is presently, we are afraid, entirely misplaced.

8.6 The first focus must be on preserving the integrity of evidence i.e. accrediting all processes used in the initial collection and processing of evidence; in processes that can only be undertaken once, it is absolutely essential.

\(^1\) Stage 1 – The collection and processing of evidence

\(^2\) Stage 2 – The interpretation of the evidence (opinions on what the evidence actually means)
However, instead of such a focus, we seem to be heading for the most fundamentally dangerous situation of all, where a blanket approach is adopted to have all of the PFSPs regulated and accredited (the costs of which would price a vast majority of them out of the market) when acting for either prosecution or defence, but where the police in-house laboratories do not adhere to the regulations and do not have accreditation. The police have claimed to be working towards accreditation for the last 10 years and very little progress has been made.

In this scenario, what we are left with is the police, instructing the police, funded by the police and all of the potential inherent bias synonymous with such a system, but without any form of effective independent review of the evidence and opinion which they choose to present; as the cost of enforcing further regulation on the PFSPs would likely result in most, if not all, being no longer commercially viable entities.

Nothing exemplifies the validity of this concern more than a comment reportedly made by Chief Crown Prosecutor Adrian Foster who reportedly said: “Statutory powers for the Regulator do offer an opportunity to increase awareness of the Regulator’s code of conduct across the Criminal Justice System; to courts, prosecution and defence.” Not that the prosecution will adhere to the regulations imposed, but that it will ‘increase their awareness’ that they should be being followed. It is an option for the prosecution (police forces), but will become a mandatory requirement for the PFSPs. We do not know of any PFSP of any significant size, who does not already follow to the letter, the regulators code of conduct.

Any further Regulation and accreditation requirements must be focused on those who play a primary role in the initial preservation, collection and processing of evidence. If, as suggested by the FSR, regulation and accreditation are truly the answer, then any PFSPs offering services to the defence would become superfluous, as the evidence should all be completely and wholly sound.

But it will not, as you cannot accredit opinion and sound opinion can only be ensured by having such opinion and the analysis on which it is based, checked and scrutinised by an independent and highly experienced scientist, on a case by case basis.

What role should the Forensic Science Regulator have? If the Forensic Science Regulator is to have statutory powers, what should these be?

We believe the regulator should have oversight and provide a mechanism for issues to be raised and investigated. They should not be given blanket statutory powers as is the current proposal. We believe that any statutory powers given to the Regulator would be unduly focused on the Private Forensic Science Service Providers (PFSP) since they, unlike the Police, would not have any other Laws and Rights which they could fall back on. Yet the PFSP are those in a far lower risk category, when it comes to the presentation of forensic evidence used within the CJS.
9.2 Regulatory powers in this regard should be considered in the below areas:

9.3 Group 1 – Police in-house services

9.4 Given the drive by many police forces to take previously independent forensic services in-house, and the inherent and fundamental biases systemic in such an arrangement, it is they who present the most significant risk.

9.5 If any further accreditation requirements are to be put in place, then they must be, first and foremost, focused on such prosecution entities: Many of which are, at present, completely unregulated and unaccredited for any procedures and processes.

9.6 The risks presented by this Group 1 are further increased by the fact that it is now largely in-house police services who deal with the collection, preservation and processing of primary evidence. If failings occur at this stage, then no level of regulation or accreditation further down-stream can correct such.

9.7 Only once we have complete confidence that the base foundation evidence is sound and complete, can we move on to deal with the analysis and opinion aspects.

9.8 Group 2 – PFSPs providing services to the prosecution

9.9 Since they present the greatest inherent risk, only once any in-house police laboratories and police ‘expert witnesses’ are fully regulated (whatever form such regulation takes) should one then focus on the PFSP providing services to the prosecution.

9.10 Such providers present a far lower risk, since they are independent of those instructing them, and are already ‘regulated’ by the FSRs code of practice, UKAS, reputational risk, commercial market forces, the Criminal Procedure Rules (CPRs) and by the Courts themselves, to name but a few.

9.11 Group 3 – PFSPs providing services to the defence

9.12 Finally, attention should be given to assessing whether further ‘regulation’ is required for PFSPs who accept instructions from the defence to check evidence. Such entities present a very low risk, in fact the lowest risk of all. When instructed on behalf of the defence, PFSPs are effectively ‘secondary processors’ (with no involvement in generating primary evidence) and are effectively quality checkers, and therefore, do not need to be accredited for processes.

9.13 Furthermore, they are wholly independent of those instructing them, particularly as they are instructed on a case by case basis and therefore, there are no inherent issues of contractual bias. Furthermore, they are again, already ‘regulated’ by reputational risk, commercial market forces, the Criminal Procedure Rules (CPRs) and the FSR’s code of practice, by the prosecution’s
own Scientists and Legal Counsels (who can challenge in return their opinions), and by the Courts themselves.

9.14 In fact, PFSPs offering services to the defence, at present, play the most critical role in ensuring that the science and opinions given by the police in-house laboratories and by the PFSPs providing services to the prosecution, are, in every case, up to standard, fair, sound and just.

9.15 This waterfall approach should ensure (if backed by the correct forms of regulation and accreditation) a significant improvement in the quality and reliability of the science presented by the prosecution in our CJS, and if, as suggested by the FSR, regulation and accreditation alone are truly the answer, then the system would no longer require the third group (the PFSP’s offering checking services to the defence) as there would be such confidence in the soundness of the evidence presented by the prosecution, that the defence service requirement would become ‘surplus to requirements’.

9.16 We doubt, however, if this will ever truly be the case, as the interpretation of forensic evidence is fundamentally based on opinion. Much of the evidence presented in our CJS is, whilst based on fact, coloured by opinion and therefore it is essential that any opinions given have been effectively scrutinised. Just as prosecution counsel and defence counsel will always be required to maintain a fair adversarial system, we will always require and must ensure an equality of arms, in terms of the opinion based scientific evidence being presented. We therefore must ensure that both sides are effectively funded and retained.

9.17 Any action which affects the defence’s ability to access Forensic Science Services could completely undermine our entire Justice System and move us into unacceptable territory, where the guilty and the innocent will be found guilty.

9.18 If given statutory powers, to enact and enforce their current proposals, we fear that the FSR will unwittingly completely destroy confidence in our Criminal Justice System.

9.19 The two lower risk entities (Group 2 and 3), responsible for the analysis and presentation of evidence, namely the PFSPs, will cease to be commercially viable and will cease to exist.

9.20 We will be faced with the stark reality of George Orwell where “All animals are equal, but some animals are more equal than others.”

10 What lessons can be learned from the use of forensic science overseas?

10.1 Due to a number of issues, as have been outlined above and the already over burdening regulation, the UK is falling far behind in research and development, when compared with our US counterparts and other scientifically advanced nations.

Digital Forensics
17 Is enough being done to prepare for the increasing role that digital forensics will have in the future? Does the Criminal Justice System have the capacity to deal with the increased evidence load that digital forensics generates?

17.1 The short answer is absolutely not. The system is simply not prepared for the quantity of data we now recover in association with criminal investigations. The CPS are not set up to receive and thereafter disperse to the necessary parties, digital evidence in its correct form. A prime example of this, on a most basic level, is the service of excel files (which are created as excel files for a good and specific reason). Instead of being retained and served on other involved parties in the form in which they were received, excel files are regularly converted by the CPS into pdf files and served upon the defence in a completely un-useable format.

14 September 2018