



Forensic Science Regulator

O v e r s e e i n g Q u a l i t y

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The Rt Hon Norman Lamb MP
Chair
Science & Technology Committee
House of Commons
London
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By e-mail via the Clerk to the Committee

Dear Chair

Further to my evidence to the Committee on 6 February, I write to provide information regarding judicial criticism of expert witnesses, the impact of data protection provisions and increasing protection for whistleblowers.

Judicial Criticism

The work of Trimega and its scientists was exposed as erroneous in two public judgements in the family courts¹, but the company continued to provide toxicology services to the family courts with no further checks on its performance. At least two of its scientists were subsequently employed by Randox Testing Services, which provided toxicology services to the criminal courts.

This raises several issues. The first is that, absent a regulator for the family court system, there was nobody to whom the judicial comment about the performance of Trimega could be reported. I have spoken with officials at the Ministry of Justice, who are preparing options for Ministers to consider in relation to regulation of forensic science provided to the family, coronial and civil jurisdictions.

The issue of judicial criticism of expert witnesses is a complex one even within the Criminal Justice System.

Knowledge

¹ [2012] EWHC 2548 (Fam), in which Trimega conceded that its analysis was erroneous and unreliable and its attitude was criticised; and Case number SG12C00045 In the Principal Registry of the Family Division Sitting at Kingston upon Thames County Court, in which Trimega admitted human error but was not criticised.

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The criticism may be made at a point in the process where the expert is not directly involved, for example during the summing up in the trial or at a subsequent appeal hearing. It follows that the expert may not be aware of the fact the criticism has been made.

Validity

The senior judiciary understand the significance, and potential impact, of criticism of expert witnesses. They are therefore, generally, reticent of making such a criticism and careful about the wording of such criticism. However, even with senior judiciary there is a risk that the criticism is not justified.

In the less senior courts the risk the risk of unjustified criticism appears greater.

It follows that there is a risk of unfair criticism and there must be a means to address this issue. In the case of *W (A Child), Re* [2016] EWCA Civ 1140 the Court of Appeal accepted expert witnesses could mount a legal challenge to criticism. This was a civil action and it is not clear the same approach could be applied in the Criminal Courts. However, the use of a legal challenge does not appear a pragmatic approach.

Individual/Organisation

In many circumstances it is difficult to differentiate between the conduct of the individual and the organisation for which they work. As such it may be difficult to judge whether there is a doubt over the competence of the individual even though the criticism may be worded as such.

Nature of Criticism

In some cases the criticism may be a comment on the methods employed which imputes no improper conduct on the part of the expert and does not suggest a lack of competence/integrity.

Recording/Escalation

There does not appear to be any system in place for the recording of criticism and bringing them to the attention of those that could address the issues raised. Absent such a system there is the opportunity for major issues to be identified but no action triggered.

I intend to write to the Lord Chief Justice of England and Wales in order to seek his views on whether and/or how judicial criticism in the Criminal Justice System could be brought to my attention, to enable evaluation of risk to the criminal justice system posed by the continued provision of expert evidence by companies or individual experts.

Data Protection Provisions

As a result of representations made by my office, officials at the Home Office have been in correspondence with officials at the Department for Digital, Culture, Media and Sport (DDCMS) in relation to the new data protection provisions and my work as Regulator.

I am confident that I have the lawful authority to process data across the range of activities undertaken. There is some debate as to the application of certain provisions due to my role being established under the Royal Prerogative but I do not think these are of concern.

In relation to the rights of data subjects I believe complying with these provisions may cause significant problems in relation to the investigation of complaints and referrals. My role is not listed as exempted in paragraph 7 of Schedule 2 of the current Data

Protection Bill (that appearing on the Parliament Internet site dated 18 January). DDCMS is of the view that more general exemptions in the bill will provide the necessary legal basis for me to continue to process data in relation to complaints and referrals.

I am not yet fully confident in this position as the more general provisions have conditions which may not apply easily to forensic science. For example, the provisions of section 2 of the table in paragraph 7 of Schedule 2, which otherwise may apply, require that the activity involved must be one which brings the individual in contact with the general public. As you will appreciate few forensic scientists deal directly with the general public.

Home Office officials are awaiting formal legal advice on the issue. A more straightforward way to manage the issue would be to include the Forensic Science Regulator in paragraph 9 of Schedule 2. The current Forensic Science Regulator Bill before Parliament does not deal with this issue. I suspect this is due to the difficulty of attempting to modify a bill currently before Parliament by a second bill.

Whistleblowing

I noted in my evidence to you that although there is already provision for anyone to report concerns to the Regulator, there may be no statutory protection under the Employment Rights Act 1996, as amended by the Public Interest Disclosure Act 1998. The Regulator is not a prescribed person under the provisions of s43F of the 1996 Act (see the Public Interest Disclosure [Prescribed Persons] Order 2014) and there is no guarantee that the provisions of s43G would apply. I have raised the matter with Home Office officials to request that my role is prescribed under s43F. In parallel, I have commissioned work to design an appropriate method for anonymous reporting of concerns.

Legislation

In my evidence I noted that I believed it was likely that legislation would be brought forward in the near future.

The Forensic Science Regulator Bill was introduced in the House of Commons, on the 8th March, by Mr Chris Green MP.

Yours sincerely



Dr Gillian Tully