

Who guards the guards?

Professor Jim Fraser, President

As England and Wales appears set to embark on the unique experiment of entirely private provision of forensic science to the criminal justice system, a number of searching questions need to be posed. The proposed changes¹ to the Forensic Science Service could place the largest provider and the only remaining public sector provider in private hands. The rationale and processes for the possible privatisation of the Forensic Science Service were rightly challenged by the recent Select Committee on Forensic Science but this is not the fundamental issue. There are currently two other private strategic suppliers of forensic science in an already existing market place. The real question is how do we ensure that the rapidly expanding private market in England and Wales meets the needs of the criminal justice system? Furthermore, can it be in the interests of justice for the supply of forensic science services to be exclusively governed by the demands or standards of the private sector? Given the views of the Select Committee on Forensic Science² and the response of the Government to their report,³ the answer to this question appears to be: no.

The perceived benefits of a competitive market as distinct from the benefits of privatising the FSS need to be clearly distinguished. In a private market companies have flexibility in terms of their structure, financing, products and services but fundamentally, they are in business to make money. They are also in business to compete with their rivals. There are two primary means by which competitive advantage can be achieved,⁴ differentiation - having products or services more desirable than those of your competitors, or cost - supplying the same things more efficiently than your competitors. Both of these approaches bring benefits to customers but they also present them with new risks. The ultimate in differentiation is to be the sole supplier of a unique product (ideally patented) for your exclusive use. But if this is a product that the criminal justice system overall would benefit from, how can this be right? A further difficulty is how one balances the intellectual property rights of an individual company with a competitive market place and the overall needs of criminal justice. Cost advantage allows businesses to supply the same products while gaining a better surplus than their competitors. Often this is translated into lower prices. Since the largest user of forensic science in England and Wales is the police service, savings in public money are to be welcomed. But these are not widgets being bought by the police service. In addition to the normal requirements of good public sector procurement (value for money, fairness, transparency etc), detailed knowledge of many aspects of forensic science is also needed. However, with the exception of some specialist roles (e.g. Senior Investigating Officer and Senior Crime Scene Investigator) ignorance of forensic science in the police service is well known and documented.⁵ Consequently, there is a danger that procurement in some instances may be made exclusively on the basis of price as opposed to value for money and quality. We can agree that two examples above are worst case scenarios but given these risks and others that are readily identified, what are the expected benefits of a private forensic science market? It appears that the main drivers for a private market are

freedom from public sector constraint for the FSS and equality of arms for their strategic competitors, Forensic Alliance and LGC. Tangible benefits to customers are harder to identify.

Nevertheless, there is one key area that distinguishes forensic science provision in England and Wales: speed of delivery. In many instances drugs analysis and DNA profiling are carried out within a few days of submission and in a significant proportion of cases, on the same day. This contrasts strongly with the public sector provision of forensic science around the world which is almost universally characterised by backlogs. In some countries this is also compounded by lack of resources and poor infrastructure. A recent American report⁶ estimated the backlog of cases in US publicly funded laboratories at just over 500,000 – an increase of 70% on their backlogs at the beginning of the same year (2002). The report also estimated the need for an additional 1900 staff at a cost of \$70 million to achieve a 30 day turnaround time. If justice delayed is justice denied, then with the correct safeguards, perhaps there are benefits from a competitive market that are in the interests of justice.

Despite this the public is likely to be sceptical of the full scale privatisation of something so close to the criminal justice system. Recent high profile miscarriages involving expert witnesses and tragedies on the railways, whatever the objective evidence, are likely to act as a stimulant to the public imagination of what may go wrong.

There is therefore, on the face of it, an unassailable case for regulation of forensic science in England and Wales in order to manage the risks and issues likely to be encountered in a new and developing market. These are likely to include: anti-competitive behaviour and predatory pricing, cartels, ensuring continuity and scope of service provision, equality for providers, maintenance and development of standards and prevention market distortion or collapse. The regulation of such a complex enterprise is no trivial matter and will require the cooperation of a large number of stakeholders with often divergent interests. The prize to be won is the continued development of what is widely recognised as world class forensic science. The cost of failing to deal with these issues does not bear contemplation.

¹House of Commons Select Committee on Science & Technology (2005). *Forensic Science On Trial*. London, HMSO.

²ibid.

³*Forensic Science on Trial: Government response to the Committee's Seventh report of Session 2004–05*, The Stationery Office Ltd, London 2005.

⁴Grant, R, M. *Contemporary Strategy Analysis* 2nd Ed, Blackwell, 2002.

⁵Her Majesty's Inspectorate of Constabulary (2000). *Under the Microscope: Thematic Inspection Report on Scientific and Technical Support*. London, Home Office.

⁶Census of Publicly Funded Forensic Crime Laboratories, 2002, U.S. Department of Justice, Bureau of Justice Statistics, 2005.