

# **Marketisation and Forensic Science Provision in England and Wales**

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# Marketisation and Forensic Science Provision in England and Wales

BY

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INVESTOR IN PEOPLE

*This work is dedicated to my father, Gordon Black Richmond.*

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# List of Abbreviations

CAI	Case Assessment and Interpretation
CJINI	Criminal Justice Inspectorate Northern Ireland
CJS	Criminal Justice System
DNA	Deoxyribonucleic Acid
EGPS	Early Guilty Plea Scheme
ERU	Evidence Recovery Unit
FSNI	Forensic Science Northern Ireland
FSP	Forensic Science Provider
FSR	Forensic Science Regulator
FSS	Forensic Science Service
LCN-DNA	Low Copy Number DNA
NDNAD	National DNA Database
NIDNAD	Northern Ireland DNA Database
PSNI	Police Service of Northern Ireland
RMP	Random Match Probability
SFR	Streamlined Forensic Reporting

# Preface and Acknowledgements

The boundaries between this book and my ongoing research are not so rigidly demarcated that I can easily list those to whom I owe thanks. It would not have been possible without the engagement of staff at Edinburgh, Strathclyde, and Dundee, universities in Scotland, and research projects within the Leverhulme Research Centre for Forensic Sciences, Technical University Graz, and my current institution, iCourts (the Danish National Research Foundation's Centre of Excellence in International Courts, University of Copenhagen). I am grateful for their encouragement.

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The greatest thanks must go to my father, Gordon Black Richmond, who passed away before this book could be published, but who never doubted my potential, and whose hard work, resilience, and faith continue to inspire me. This work is dedicated to him.

# Chapter 1

## The Forensic Market

### Introduction

Contrary to the portrayals of the forensic sciences beyond the scientific and legal domains, evidence does not speak for itself. Expert scientific evidence is generated from the convergence of investigatory, analytical, and interpretative processes, involving a diverse array of agencies. Thus, the ongoing stability, durability, and quality of the relationships between these institutional agents are of central importance to ensuring the accurate, efficient, and consistent production of expert scientific reports. It is therefore unusual to encounter a jurisdiction in which forensic science – generally perceived as a matter for public sector provision – is reconfigured around a fully marketised system of delivery<sup>1</sup>: England and Wales are unique in this respect.<sup>2</sup> Given that the scientist’s ability to harness those objective scientific precepts on which the forensic sciences found, are prone to influence from interposing political, economic, and organisational factors,<sup>3</sup> the policy-driven transition from public to private forensic provision raises significant concerns regarding the potential for commercial markets not only to reliably support the criminal justice system (CJS),<sup>4</sup> but also to influence – and even distort – the very processes

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<sup>1</sup>Partial marketisation has been introduced in the Netherlands, where, in 2017, the Dutch Ministry of Justice and Security awarded a contract for DNA testing to the Maastricht Forensic Institute and Eurofins. Retrieved from [www.eurofins.nl/nl/contact-details/the-maastricht-forensic-institute-tmfil](http://www.eurofins.nl/nl/contact-details/the-maastricht-forensic-institute-tmfil). Accessed on May 7, 2022.

<sup>2</sup>For a US perspective, see McAndrew, W. P. (2012a). Are forensic science services club goods? An analysis of the optimal forensic science service delivery model. *Forensic Science Policy & Management: An International Journal*, 3(4), 151–158; McAndrew, W. P. (2012b). Is privatization inevitable for forensic science laboratories? *Forensic Science Policy & Management: An International Journal*, 3(1), 42–52.

<sup>3</sup>See Bijker, W. E., Bal, R., & Hendriks, R. (2009). *The paradox of scientific authority: The role of scientific advice in democracies*. Cambridge, MA: MIT Press.

<sup>4</sup>Hamilton, F. (2018, January 31). Police foot the bill after collapse of forensics firm. *The Times*. Retrieved from [www.thetimes.co.uk/article/police-foot-the-bill-after-collapse-of-forensics-firm-key-forensic-services-limited-bg5nbxkxt](http://www.thetimes.co.uk/article/police-foot-the-bill-after-collapse-of-forensics-firm-key-forensic-services-limited-bg5nbxkxt); Devlin, H. (2018, December 6). Convictions for drug-driving quashed in forensics lab inquiry.

of forensic analysis and interpretation that characterise this public good.<sup>5</sup> Employing a critical realist, comparative case study approach, and utilising a palette of qualitative methods, the instant study – adapted from a doctoral research project – seeks to limn the contours of this unexplored domain of marketised scientific practice, rendering visible the links between novel governance structures and the performative practices of forensic expertise. The study also considers the impact of overarching regulatory incursions, analysing the ways in which forensic regulation seeks to manage risk through quality assurance. The results offer a unique insight into the ways in which institutional agents have adapted to changing relations, shifting priorities, and the imposition of market logics, within a sector historically unaccustomed to the obtrusions of market-based efficiency and external regulation. The data discussed in this monograph thus demonstrate not only how criminal justice agencies failed to respond collaboratively to the nascent introduction of commoditisation and competitive tendering but also illuminates the ways in which the market that developed in their wake began to influence and reconfigure the central processes of forensic strategy-setting and analysis. These market-driven distortions served to generate further challenges and phenomena – triaging, de-skilling, the introduction of inexpert streamlined reports, and research stasis – which together describe a decade-long trajectory from objective scientific analysis to productised ‘regulatory objectivity’.<sup>6</sup> The study thereby demonstrates the ways in which the forensic sector, by reconfiguring itself around these indices of competition and efficiency, rendered itself unable to meet the challenges of a dynamic and evolving field. In such circumstances, the turn away from research-driven biomedicine to data-driven digital evidence – the subject of the final chapter – is no longer viewed as merely opportune but as a pragmatic turn necessary for the survival of the sector at large.<sup>7</sup>

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*The Guardian*. Retrieved from [www.theguardian.com/uk-news/2018/dec/06/forty-convictions-quashed-after-investigation-at-uk-forensics-lab](http://www.theguardian.com/uk-news/2018/dec/06/forty-convictions-quashed-after-investigation-at-uk-forensics-lab)

<sup>5</sup>See House of Lords Science and Technology Committee. (2019, May 1). *Forensic science and the criminal justice system: A blueprint for change*. 3rd report of session 2017–19 (HL Paper 333). Retrieved from <https://publications.parliament.uk/pa/ld201719/ldselect/ldsctech/333/33302.htm>. Accessed on July 23, 2021. At page 3:

The delivery of justice depends on the integrity and accuracy of that evidence, and the trust that society has in it. The quality and delivery of forensic science in England and Wales is inadequate.

See also Forensic Science Regulator. (2019, March 15). *Annual report November 2017–November 2018*. Retrieved from [www.gov.uk/government/publications/forensic-science-regulator-annual-report-2018](http://www.gov.uk/government/publications/forensic-science-regulator-annual-report-2018). At page 3: ‘... profound changes to funding and governance are required to ensure that forensic science survives and begins to flourish rather than lurching from crisis to crisis’.

<sup>6</sup>See Cambrosio, A., Keating, P., Schlich, T., & Weisz, G. (2006). Regulatory objectivity and the generation and management of evidence in medicine. *Social Science and Medicine*, 63, 189–199.

<sup>7</sup>Morgan, R. M., & Levin, E. A. (2019). A crisis for the future of forensic science: Lessons from the UK of the importance of epistemology for funding research and

## Forensic Science Provision in England and Wales

The governance of the provision of forensic science services, alongside the organisation, structuring, and management of individual forensic science laboratories, varies widely across regions and between individual countries and jurisdictions. Nonetheless, across this heterogeneous forensic landscape, forensic providers face shared scientific challenges and similar budgetary constraints.<sup>8</sup> Commercial imperatives have intermitted, to a greater or lesser extent, into a field of relative scientific autonomy, with many public forensic providers now recognising the need to demonstrate a willingness to embrace new management techniques, to internalise – and comply with – regulatory objectives,<sup>9</sup> and to enter into rudimentary forms of competition.<sup>10</sup> Nonetheless, despite the increasing recognition of commercial imperatives, the overwhelming majority of developed countries still choose to deliver vital forensic services through a system of public provision. The current system of forensic science provision operating in England and Wales is thereby exceptional, insofar as provision is achieved through a fully privatised model of delivery, instituted through the winding down and complete closure of the Forensic Science Service (Ltd.; FSS) in early 2012. However, in political and managerial terms, it may be posited that the journey towards privatisation commenced in the early 1980s, at which point the ethos of ‘customer relations’ – central to commercial organisation – gathered discursive power and began to influence the practices of an increasing number of government agencies.<sup>11</sup> This introduction of processes of economic rationalisation to the criminal justice sector and the ‘ascendancy of market imaginaries’<sup>12</sup> thus began to alter the field of forensic science provision, which gradually became reconfigured around new

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development. *Forensic Science International: Synergy*, 1, 243–252; Horsman, G., & Sunde, N. (2022). Unboxing the digital forensic investigation process. *Science & Justice*, 62(2), 171–180.

<sup>8</sup>Not least the shared challenge of establishing the foundational validity of a wide variety of scientific techniques and practices and the regional harmonisation of forensic evaluation. See Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council. (2009). *Strengthening forensic science in the United States: A path forward*. Washington, DC: National Academy of Sciences; President’s Council of Advisors on Science & Technology. (2016). *Forensic science in criminal courts: Ensuring scientific validity of feature-comparison methods*. Washington, DC: Executive Office of the President.

<sup>9</sup>Most notably, the Forensic Science Regulator Act 2021, c. 14. Retrieved from [www.legislation.gov.uk/ukpga/2021/14/contents/enacted](http://www.legislation.gov.uk/ukpga/2021/14/contents/enacted)

<sup>10</sup>See, for example, the 2019 collaboration involving Forensic Science Northern Ireland (FSNI) and private forensic providers, funded through the Northern Ireland Department for Economy (DfE) Small Business Research Initiative (SBRE). Retrieved from [www.justice-ni.gov.uk/articles/tenders-0](http://www.justice-ni.gov.uk/articles/tenders-0)

<sup>11</sup>See Whitehead, P., & Crawshaw, P. (Eds.). (2012). *Organising neoliberalism: Markets, privatisation and justice*. London: Anthem Press.

<sup>12</sup>Albertson, K., Corcoran, M., & Phillips, J. (Eds.). (2020). *Marketisation and privatisation in criminal justice* (p. 1). Bristol: Policy Press.

goals, interests, and incentives. Thereafter, as this study illustrates, the normative objects of England's key public sector forensic agency came to be subsumed by the quantitative indices of marketised service delivery, characterised by entrepreneurial innovation, value for money, choice, and communication between stakeholders. The instant study measured the effect of these policy innovations within the forensic science sector in England and Wales, exploring the ways in which these profound shifts in public policy and management brought about an emphatic reorganisation of the provision of forensic services and of core scientific processes and outputs. The following section describes the privatised English and Welsh model of forensic service provision in greater detail.

### **Marketisation and Privatisation in England and Wales**

For the purposes of this study, both marketisation and privatisation are considered as interrelated phenomena. Specifically, marketisation is understood in terms of a paradigmatic shift away from the values of post-war welfarism and the procedural benefits of centralised provision,<sup>13</sup> an equality of arms, and the objective evaluation of material evidence, towards an ideology of managerialism, competition, and efficiency, advanced through discourses of perceived costliness and a lack of sustainability. As Albertson, Corcoran, and Phillips note,<sup>14</sup>

A market economy logic is evident in a myriad of different case studies having initially been introduced in order to fix a perceived problem such as a perception that the service was too expensive or inefficient, ineffective or lacking in accountability. However, with that came unintended consequences impacting on the delivery of justice and the effectiveness of the system, as well as the legitimacy of the institutions concerned.<sup>15</sup>

Thus, marketisation describes a broader reorganisation process involving the commoditisation of public services and the conversion of scientific labour and forensic processes into saleable products. Privatisation occurs when public resources and employment (generally but not necessarily subject to prior market reorganisation at the macro, meso, and micro levels) are transferred to private

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<sup>13</sup>Centralisation and public ownership are common features of forensic science provision throughout Europe and across common law, and civil law, jurisdictions: for example, *Statens Kriminaltekniska Laboratorium* (Swedish National Laboratory of Forensic Science, SKL); Forensic Science Ireland; Netherlands Forensic Science Institute.

<sup>14</sup>See, for example, Smith, T., & Johnston, E. (2020). Marketisation and competition in criminal legal aid: Implications for access to justice. In K. Albertson, M., Corcoran, & J. Phillips (Eds), *Marketisation and privatisation in criminal justice* (pp.133–150). Bristol: Policy Press.

<sup>15</sup>Albertson, K., Corcoran, M., & Phillips, J. (Eds). (2020). *Marketisation and privatisation in criminal justice* (p. 2). Bristol: Policy Press.

enterprise through sale, lease, or the disposal of public resources in favour of tendering through an open market system. Beginning in the 1980s, the UK witnessed a profound shift in public policy, from autonomous public provision to for-profit enterprise. In its earliest ‘experimental’ phase, privatisation remained subordinate to fiscal policy imperatives, such that the initial phase of structural and cultural transformation focussed on the privatisation of profitable entities in order to reduce public sector borrowing. In later, comparatively aggressive, phases, the reorganisation of public service delivery through market culture was extended to the CJS, where it impacted across a wide range of contexts, from prison and probation to policing, migrant detention, rehabilitation, and community programmes.<sup>16</sup> However, it should be noted that the specific sectoral characteristics of marketisation and privatisation are situational, advancing through diverse processes and structures according to jurisdiction, service, and objective. Nonetheless, it should be stressed that the material calculus of marketisation and privatisation is such that they may distort behaviours and processes in such a way as to ‘undermine the very aims of the organisation or context which the market was intended to “fix”’.<sup>17</sup> That process is the subject of the instant study.

## Forensic Science Marketisation and Privatisation

Following an in-depth inquiry in 2019, focussing on the privatisation of forensic science and its aftermath, the House of Lords Science and Technology Committee concluded the following:

In December 2010 the Government announced the closure of the Forensic Science Service, citing losses averaging £2 million per month as the reason. Following the announcement, the House of Commons Science and Technology Committee conducted an inquiry into the closure. It concluded that the Government did not give ‘enough consideration to the impact on forensic science research and development (R&D), the capacity of private providers to absorb the FSS’s 60% market share and the wider implications for the criminal justice system’ when making the decision and warned of the possibility of serious market instability. They were right.<sup>18</sup>

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<sup>16</sup>Albertson, K., Corcoran, M., & Phillips, J. (Eds.). (2020). *Marketisation and privatisation in criminal justice*. Bristol: Policy Press.

<sup>17</sup>Albertson, K., Corcoran, M., & Phillips, J. (Eds.). (2020). *Marketisation and privatisation in criminal justice* (p. 2). Bristol: Policy Press; Sandel, M. J. (2012). *What money can’t buy: The moral limits of markets*. New York, NY: Farrar, Straus and Giroux.

<sup>18</sup>House of Commons Science and Technology Committee. *The forensic science service* (seventh report, session 2010–12, HC 855), at p. 3; House of Lords Science and Technology Committee. (2019, May 1). *Forensic science and the criminal justice system: A blueprint for change*. 3rd report of session 2017–19 (HL Paper 333), para. 42, p. 17.

The creation of the forensic market (from a system of public provision under the FSS, through an interim phase of quasi-private provision, culminating in the liquidation of the central government-operated forensic science agencies) was emblematic of exposure to new public management techniques and processes of economic rationalisation. The construction of consent to such processes of commercialisation can be traced back to the early 1980s, at which point the Home Office was opened up to discourses of ‘modernisation’ and ‘economic rationality’, and its character transformed by managerialist techniques, which valorised the concepts of ‘economy, efficiency and effectiveness’.<sup>19</sup>

By the end of that decade, the ethos of ‘customer relations’ – central to commercial organisation – had begun to influence the practices of all government agencies, and the turn towards economic rationalisation began to influence, and distort, the field of forensic science provision, which would soon be reconfigured around new goals, interests, and incentives. Thus, the qualitative goals of public sector agencies were gradually subsumed within the indices of marketised service delivery: specifically, entrepreneurial innovation, value for money, choice, and communication between stakeholders. These profound shifts in public policy and management brought about an emphatic reorganisation of the provision of forensic services, the developing discursive framework of ‘added value’ service delivery – as vigorously promoted by the government’s Audit Office – carrying serious implications for the governance of the publicly funded FSS. In 1987, an accounting firm, Touche Ross, was commissioned to draft a report on police scientific support. Prior to the commissioning of the Touche Ross report, forensic biologists related that,

[...] the FSS was funded centrally so the Police didn’t have to pay directly for any of their requested work. This resulted in forces often submitting very large numbers of items from each case, often waiting months for results.<sup>20</sup>

However, following the recommendations of the Touche Ross report, the FSS introduced direct charging to police forces. The costs of forensic services thus became visible to operational forces (henceforth to be regarded as ‘customers’), and the FSS aligned itself with a more ‘business-oriented’ approach to service delivery, with a sustained focus:

[...] on ‘forensic strategy’ and with far more careful triaging of items and agreeing target dates for court. Through all of this time,

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<sup>19</sup>Lawless, C. (2010). *A curious reconstruction? The shaping of ‘marketized’ forensic science*. CARR Discussion Paper 63.

<sup>20</sup>King, D., Stangoe, C., & Cooke, L. (2012). *Scrutinising forensic services*. CPD Presentation to 25 Bedford Row.

it was the scientists who determined what forensic examinations and analyses to make, in collaboration with the Police.<sup>21</sup>

In addition to managing internal change, the FSS was faced with a further challenge, when its monopoly on forensic science delivery in England and Wales came to an end, with two private companies (LGC Ltd. and Scientifics Ltd.) beginning to compete for FSS business. These companies had originated from within the public sector and were joined by the first fully private company, Forensic Alliance, in 1996.<sup>22</sup> During this period, the FSS had undergone a degree of internal reorganisation in order to bring it into line with the emergent market realities. Indeed, the FSS made it clear that the commercial considerations of the new forensic market were paramount in reshaping the relationship between FSS forensic experts and the requirements of the CJS:

It is the belief of the FSS that the perception of such value for money should be that of the customer. These initiatives have the aim of not only providing better value for money, but also of achieving improvement through a genuine partnership in which the customer has a greater participation than hitherto in decisions about what work is done in the laboratory.<sup>23</sup>

The degree to which these changes altered the nature of FSS service delivery can be demonstrated by comparing the FSS ‘mission statement’ from 2001 – in which the agency defined its role in terms of a commitment to crafting a ‘safer and more just society’ – with later versions, which referred to the need:

[...] to retain and reinforce our leading position as the principal provider of forensic science to the UK criminal justice system (UKCJS), and use this platform to become the leading provider worldwide, thereby enhancing long term shareholder value.<sup>24</sup>

The alterations to policy and management – stimulated by both marketisation and productisation – were accompanied by structural changes. The FSS had

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<sup>21</sup>King, D., Stangoe, C., & Cooke, L. (2012). *Scrutinising forensic services*. CPD Presentation to 25 Bedford Row, at p. 5.

<sup>22</sup>Lawless, C. (2010). *A curious reconstruction? The shaping of ‘marketized’ forensic science*. CARR Discussion Paper 63, pp. 3–6; Lawless, C. J., & Williams, R. (2010). *Helping with inquiries or helping with profits? The trials and tribulations of a technology of forensic reasoning*. *Social Studies of Science*, 40, 731–755, at pp. 736–738.

<sup>23</sup>Cook, R., Evett, I. W., Jackson, G., Jones, P. J., & Lambert, J. A. (1998). A model for case assessment and interpretation. *Science & Justice*, 38, 151–156, at p. 152.

<sup>24</sup>See Lawless, C. J., & Williams, R. Lawless, C. J., & Williams, R. (2010). *Helping with inquiries or helping with profits? The trials and tribulations of a technology of forensic reasoning*. *Social Studies of Science*, 40, 731–755.

been awarded Trading Fund status in 1999. Thus, the service was able to recoup funds and to declare a profit, in the short term. However, as new competitors emerged, each reducing the FSS' market share, profits declined. The McFarland Review in 2003 found that the FSS was too heavily burdened by overhead costs and was thus unable to meet clients' needs. The Review recommended a further change in governance, to GovCo status, as a preliminary stage prior to restructuring as a public-private partnership. The McKinsey Review of 2008 further examined the sustainability of the forensic science market, concluding that the market was underperforming and was in need of urgent reform. It also noted that the costs of restructuring the FSS would be significant. As a result, the government announced its plans to wind down the FSS, following the advice of the House of Commons Science and Technology Committee. The service was eventually closed in 2011. With the closure of the FSS, forensic science provision in England and Wales became fully privatised, with work (including the 65% market share of the defunct FSS) now shared between 15 private companies. The consequences and effects of that decision are the subject of this comparative case study. Thus, in order to introduce a suitable comparator, discussion now turns to the public sector approach to forensic provision maintained in Northern Ireland.

### **Forensic Science Provision in Northern Ireland**

In contrast with the privatised system of forensic science delivery currently operating in England and Wales, the provision of forensic science services in Northern Ireland has remained within the public sector. A forensic laboratory was first opened in the Province in 1956: this Department of Industrial and Forensic Science, situated in Belfast, was originally operated under the control of the Ministry of Commerce.<sup>25</sup> It was later renamed 'The Northern Ireland Forensic Science Laboratory'. On 1 September 1995, under the UK Government's Next Steps Initiative, the Forensic Science Laboratory became an Executive Agency within the Northern Ireland Office and was renamed 'The Forensic Science Agency of Northern Ireland'. A further alteration to nomenclature took place in April 2002 when the agency became 'Forensic Science Northern Ireland' (FSNI). Agency status was reconfirmed following a quinquennial review, stage one of which was completed in January 2002, and on 12 April 2010, as a direct consequence of the devolution of policing and justice responsibilities to the Northern Ireland Executive, FSNI became an agency within the newly formed Department of Justice.

These changes reflect the shifting sociopolitical landscape in the province, with its changing operational pressures, shifting priorities, and advancing social conditions. If the foregoing brief account suggest a lack of stasis that is not reflective of forensic-scientific instability. When compared with other parts of the UK, the provision of forensic science services in Northern Ireland has never been subject

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<sup>25</sup>Lawless, C. (2016). *Forensic science: A sociological introduction* (p. 45). London: Routledge.