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Streamline forensic reporting: Rhetoric and reality

Carole McCartney

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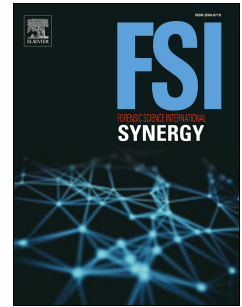
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Streamline Forensic Reporting: Rhetoric and Reality.

The 2005 Criminal Procedure Rules (CrimPR) of England and Wales, were designed to enable courts to manage case preparation to ensure no 'unfair and avoidable delays'.¹ Streamlined Forensic Reporting (SFR), was introduced in 2013, aiming to deliver 'swift and sure justice', by achieving "early agreement with the defence on forensic issues but where this cannot be achieved in the first instance, to identify the contested issues." Essentially, the forensic process is pared back to completion of a 'SFR1 form', usually one page, with 'results/findings' of a test (e.g. a DNA/fingerprint match or toxicology result).² It does not include any evaluation or methodology, quality of sample, collection techniques etc.. Indeed the information provided has perhaps generously been called 'very limited'.³ The defence can 'accept' the SFR1, which then becomes proof of the fact (i.e. an identification). If refuting the SFR1, the defence must raise a 'real issue', which the prosecution must then either challenge as a 'real issue', provide a more detailed report (SFR2), or undertake further testing/ evaluation. An SFR2 report however, is still not a full evaluative report, as it will only be addressing the 'real issue' raised by the defence.

SFR, as stated by the CPS: "has been designed to enable investigators, scientists and prosecutors to comply with the Criminal Procedure Rules, in the interests of justice."⁴ They point to the ability of SFR to ensure time and cost efficiencies, with more (and earlier) guilty pleas; a lower rate of discontinuance and a "reduction in the number of cases requiring additional forensic evidence, saving time and costs," because SFR "takes a more proportionate approach to forensic evidence...".⁵ The aim of SFR has been identified as reducing "the number of defence challenges to forensic science evidence,"⁶ and should be

¹ Ministry of Justice website: <https://www.justice.gov.uk/courts/procedure-rules>

² The Streamlined Forensic Reporting process is detailed clearly in Edmond, G., S. Carr, & E. Piasecki, (2018) 'Science Friction: Streamlined Forensic Reporting, Reliability and Justice', *Oxford Journal of Legal Studies*, 38 (4), pp 764–792.

³ Edmond *at al, supra*.

⁴ CPS SFR Guidance and Toolkit, available at: <https://www.cps.gov.uk/legal-guidance/streamlined-forensic-reporting-guidance-and-toolkit>

⁵ CPS website *supra*.

⁶ See Edmond *et al*, fn2.

understood as introduced during a “crisis of governmentality”.⁷ Such goals (may) seem commendable, if the SFR process does indeed ensure that justice is ‘swift and sure’, but questions are increasingly asked as to whether these aims are being achieved, and even if they are injudicious, and instead, there are deleterious impacts of SFR upon the criminal process, and even forensic science more widely.⁸ To interrogate this issue, the Science and Justice Research Interest Group gathered lawyers, forensic practitioners, judges and academics in November 2018 to the School of Law, Northumbria University. What follows is a brief summary of some concerns raised during this meeting.

SFR and Investigations

There was apprehension surrounding the impact of SFR on police investigations. SFR1 reports are often produced before a suspect is identified. After identification, suspects can be arrested, and only then will it be decided if more work is required (this could be any time later, demanding the diligent collection and retention of all exhibits). A major concern is with the police production of SFR reports. Police personnel are producing a lot of SFR1s (for example, all fingerprint and DNA results, and most digital forensic results) and they are not to the same standard as those produced by Forensic Service Providers (FSPs). Police officers do not have the impartiality, or independence of knowledge to be able to apply the same reasoning as a forensic scientist and a police SFR1 will just report a ‘result’ of a test (e.g. a database search) unaccompanied by any interpretation or caveats. Digital forensic experts also indicated that SFR is being used to halt investigative work, sometimes prematurely. Sufficient ‘testing’ and investigation is done to reach a conclusion for the SFR1 form, and then work is stopped. There is no need for further investigation to examine context, alternate hypotheses or exculpatory evidence, once the SFR1 form is ‘complete’. This means that evidence that could inform decisions about the most appropriate charges, or add to charges, is also missed, as well as possible information for the defence.

⁷ Richmond, K. (2018). Streamlined Forensic Reporting: ‘Swift and sure justice’? *Journal of Criminal Law*, 82(2), 156–177.

⁸ For academic criticism see Edmond *et al* and Richmond, *supra*.

It will often come down to negotiation between police and FSPs, (subject to their contract) as to what will be paid for and whether SFR2s will be done, or a full expert report permitted. If SFR1s or SFR2s are produced by an FSP that has already done the relevant work, then why complete an SFR form rather than write a full (CPR compliant) expert report as nothing is saved by not writing the proper report. The SFR process must aim to save costs because FSPs are no longer doing all the testing required (the 'belt and braces' approach), so savings must arise because there is no 'wastage'. But who is determining what is wastage? In reality, the police are deciding what is, and is not done, and with an eye on budgets, they will rarely be asking for testing that could provide exculpatory evidence, or slow down an investigation. It was reported that some experts have asked the police to undertake testing, which has been refused, only for the testing to be demanded later when it transpires (sometimes at trial), that the testing originally requested was required after all.

Some problems with SFR may stem from the format of the forms and lack of understanding of the process. For example, it is unclear that those receiving SFR forms understand that caveats and/or supplementary information may come later (if at all). Indeed, there is no 'standard' SFR report (examples were given of one of 49 pages while most are 2 pages, such inconsistency adding to misapprehensions). It is often the case that the defence will have to look hard to find important information. In one example, information that a DNA match came from a mixture was in small font right at the end of the report. There is no statistical information, and assumptions must be made about what was tested and why, and no clues are given of what other tests of exhibits were available. Such ignorance is then exacerbated by a lack of communication, which the SFR process discourages, so misunderstandings about the evidence are aggravated. Legal professionals who may only have a basic understanding of forensic science in any event are now faced with even less information, and an expectation that they will understand the complexities of the scientific evidence with the barest of details.

SFR, the Criminal Procedure Rules and 'Expert' reports

There are now two 'modes' of forensic reporting: the 'traditional', where the Criminal Procedure Rules (CrimPR) and Criminal Practice Directions (CPD) apply, and SFR, which (mostly) does not engage the CrimPR/CPD regime. A legitimate question might be raised about why CrimPR compatible report could not also be completed with the SFR2 form, and is there a clear justification for circumventing the CrimPR? These rules were introduced to prevent miscarriages of justice, so why bypass such safeguards? 'Streamlining' the criminal process may be expedient, but not if leading to miscarriages of justice or unjustifiable acquittals.

In particular, SFR exempts evidence from the disclosure obligations in CrimPR Part 19, as SFR forms provide little indication of what was done, whether the specific procedures are valid and reliable, and no hint of limitations, uncertainties, problems, disagreement, exposure to biasing information and so forth. Indeed, CPS guidance on expert reports seems to be contradicted by SFR forms, for example, that there should not be a definitive 'identification'. However, the SFR1 form reports 'matches' identifying an individual (implicitly to the exclusion of all others – though this is not clear). This test result then becomes a 'fact' when unchallenged, but reliance upon tests results as accepted 'facts' is highly problematic, particularly when there are so few details about the testing.

Concerns are heightened when SFR forms are completed by non-experts: while SFR1s in complex biology cases are written by experts who express their opinion in line with the CrimPR, CPS guidance and professional Codes of Conduct, forms completed by non-experts do not express expert opinions, but 'test results'. The difference can be vital, but is rarely understood. In digital forensics, the SFR1 is created by the officer running the case – not the person who examines the exhibit(s), so most often, the investigator will simply report what they believe is 'useful' to their case. Yet they may have no real idea what is meaningful. Yet lawyers may lack sufficient understanding of forensic evidence to overcome the very significant limitations of SFR and not recognise incomplete or insufficient testing, or misleading and/or misinterpreted results. Defendants (and their solicitors) might also believe that they need to make a technical challenge to an SFR1. In fact, they can simply put

their defence and if this challenges the conclusions of the SFR1, then this should lead to an SFR2 report. However, during a SFR pilot in 2017, only 1% of SFR1s led to an SFR2. Why are the defence not challenging SFR1s? Do they (wrongly) believe they have to directly challenge the forensic evidence, say on a technical ground? This is unclear.

Defence experts expressed disquiet, with DNA experts explaining that where 'matches' were declared on SFR1s, the evidential value had diminished significantly when further work was done. They stressed that it is the evidential meaning of a match that matters but the SFR1 does not provide any probative value or context. The relevance of a DNA match may only be revealed if a SFR2 is requested. Very often SFRs had misleading statements included, there were mixed profiles or partial matches, and no statistical calculations have been reported and nothing regarding transfer and/or persistence. Yet SFR1s are being accepted in the context of a criminal process where it is almost impossible to challenge fingerprint or DNA matches and lawyers recommend a guilty plea when a 'match' is declared. Drug analysis/toxicology SFRs are also rarely challenged, or only challenged (unjustifiably often) by those who can finance an expensive defence, leading to illegitimate acquittals where the police cannot finance further expensive testing. SFR makes it more vital that the defence are able to access materials, and test results, and obtain their own testing. Yet financial cuts make this unrealistic, and concerns exist about the availability of forensic evidence to the defence. This deficit is critical when facing SFR1s with the very limited information they provide. It is a mockery of 'equality of arms' if people unable to receive public funding, or draw upon private means, are convicted upon scientific evidence not available to the defence.

The Rhetoric and Reality of SFR?

SFR was introduced to speed-up the criminal process, increase guilty pleas, cut down on forensic testing, and limit the number of experts required to give evidence. These 'savings' increasingly resemble corners being cut. While SFR may be non-problematic when used correctly in the context of a forensic strategy deliberated upon by police and scientists collaboratively, there are serious concerns about the operation of SFR in reality. Some of these relate specifically to the format of SFRs and their use, while others focus upon the

impact of the SFR 'process'. SFR is heavily dependent upon clear communication and understanding between all parties, and this is presently lacking. SFR might be reasonable and proportionate in some cases, but the 'one size fits all' approach is seriously flawed. SFR may be preventing defendants from mounting a proper defence, but also defendants are being charged/convicted on the basis of flawed, or at least, incomplete scientific evidence. In fact, evidence is mounting that SFR is having a negative impact on the criminal process and forensic science, and seriously exacerbating the risk of miscarriages of justice.

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Author: Carole McCartney

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