

# Response to the Home Office consultation on new statutory powers for the Forensic Science Regulator

## 1. General Observations

- 1.1 This response to the Home Office's consultation on new statutory powers for the Forensic Science Regulator has been prepared by His Honour Judge Goymer as the judicial member of the Forensic Science Advisory Council ("FSAC"), and reflects the views of the Lord Chief Justice and Lord Justice Beatson.
- 1.2 The question of giving statutory powers to the Regulator has been discussed at recent meetings of the FSAC. Judge Goymer expressed in those meetings a degree of initial scepticism about the need for statutory powers. The Regulator has produced a Code of Practice which seems to work well. It has for the most part been complied with by the forensic science providers. Where there have been incidents of non-compliance these have been resolved by agreement and guidance.
- 1.3 Having read the proposals, Judge Goymer, the Lord Chief Justice and Lord Justice Beatson are now persuaded that statutory regulation in the manner proposed would be beneficial. It strikes an appropriate balance between maintaining proper standards and imposing an excessive and possibly crippling burden of regulation. It is to be hoped that the Regulator's compulsory powers will rarely be needed but are there to deal with rogue providers.

## 2. Potential deficiencies in the current position

- 2.1 Although the existing code is not statutory this does not mean that there are no sanctions for failure to comply with it. Criminal courts can refuse to admit evidence obtained in breach of it. The power to do so has its limitations. Under section 78 of the Police and Criminal Evidence Act 1984 ("PACE") a court may refuse to admit evidence on which the prosecution seeks to rely if it would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. At common law there is a residual discretion to exclude evidence if its prejudicial effect outweighs its probative value. In addition the contemporary culture of case management under the Criminal Procedure Rules empowers and

encourages judges to control evidence so that the jury's attention is focussed on the essential issues.

- 2.2 This power and discretion does not however extend to excluding evidence for the defence. Defence evidence is subject to the basic legal tests of relevance to the issues in the case and admissibility under the legal rules. In particular for example in a case involving co-defendants there is no discretion to exclude prejudicial or damaging evidence that one defendant seeks to adduce either in his own favour or against the other defendant. If it is relevant and admissible it cannot be excluded. Judges have to be cautious about invoking the case management powers to curtail defence evidence because of the risk of a successful appeal on the ground that the trial has been unfair.
- 2.3 Under the current rules that govern expert evidence it may be excluded if a) it is not a matter on which the jury members need expert evidence because they are able to decide from their own ordinary knowledge and experience or b) the matter is not a sufficiently recognised scientific discipline or c) the witness is not sufficiently qualified to be able to speak as an expert. These rules apply irrespective of whether it is the prosecution or defence that seeks to adduce the evidence. They contain a measure of inherent flexibility to ensure that the law does not lag behind scientific development.
- 2.4 In these circumstances, we would like to emphasise one very important point. In order to ensure that the statutory basis is effective, it will be necessary for the statute to give a court general power to refuse to admit evidence obtained in breach of the Code where it would be contrary to the interests of justice to admit it. Automatic exclusion for a breach is too inflexible. Each case may turn on its own facts so there must be a measure of judicial discretion to enable justice to be done. It may be that this is thought to be outside the scope of the current proposals and to require separate legislation. If, however, such a provision is not considered, and not included, there is a real and substantial risk of large amounts of unsatisfactory defence scientific evidence being admitted which a court would have difficulty in controlling. This would be contrary to the interests of justice and impede the fair and proper conduct of trials. On an issue as significant in trials as forensic evidence, it is only fair and proper that the defence and the prosecution are bound by the same basic rules in relation to that

evidence. Without such a power, the prosecution might be at a serious disadvantage.

### 3. The specific consultation questions

- Q1. All of these should be covered
- Q2. All of these should be covered. At present we are not aware of any others that need to be included. There should be power to add to the list by means of statutory instrument so that further primary legislation is not needed. Science by its very nature is dynamic and the law must not become hidebound by refusing to accept new developments that have been tried tested and accepted by the scientific community.
- Q3. Nothing to add
- Q4. The Serious Fraud Office and HM Revenue and Customs should perhaps be added for completeness. Although the role of scientific evidence in fraud trials is not as great as in homicide, non-fatal violence or sexual offences, document examination and forensic accountancy do feature. Experience of the latter tends to be that its value is overstated but it should still be subject to regulation.
- Q5. We tend to agree. The judiciary is primarily concerned with the admissibility of evidence in court and its effect on the fairness of any trial.
- Q6. We strongly agree
- Q7. Nothing to add
- Q8. All of these powers should be given in order to deal with those providers who might see commercial advantage in non-compliance.
- Q9. All of these are necessary. The question addresses the Regulator's role.  
We do not think that there should be any separate reference to admissibility in court; this is best left as part of the general consequences of non-compliance with the code and as part of the judge's duty to ensure a fair trial.

Q10. We agree strongly that there should be a statutory power to obtain information. Without it the statutory framework will be ineffective.

Q11. We agree that statutory powers are necessary to prevent the growth of sub-standard evidence driven by cost-cutting.

Q12. It will be an inevitable consequence of statutory regulation that in some cases the Regulator's powers will be the subject of judicial review proceedings, where it is alleged that they have been exceeded or that irrelevant matters have been considered or relevant matters ignored in exercising those powers. This is not necessarily an unwelcome development because the Administrative Court has sufficient powers to curb unmeritorious applications.

Q13. For the reasons set out in the narrative part of the response at 2.1 to 2.4 it is important that the courts should have power to direct the exclusion of deficient evidence where necessary.

Q14. We do not feel qualified to comment on this

Q15A. Judiciary

Q15B. Not applicable