GeneWatch UK response to the Home Office consultation on new statutory powers for the forensic science regulator

December 2013

1. For each of the stages in the forensic evidence process listed below, please state whether you think they should, or should not be covered under the remit of the Regulator's statutory powers.

- Manufacture of forensic consumables YES
- Collection of evidence at the crime scene YES
- Collection of samples from individuals YES
- Preservation, transport and storage of evidence YES
- Screening and selection of evidence YES
- Examination and testing of evidence YES
- National forensic databases YES
- Assessment or review of examination and test results YES
- Reporting and presentation of results with associated expert interpretations and opinions YES

Please explain your answers, and specify any further stages you think should be under any statutory remit given to the Regulator.

Quality assurance is critical throughout the chain of custody, so all these areas should come under the remit of the Regulator's statutory powers. We would particularly welcome a role for the Regulator in overseeing the scientific quality of national forensic databases including the National DNA Database. Some monitoring of issues such as false matches currently takes place but there is little public information. The question of whether DNA profiles stored on the NDNAD have sufficient statistical power, or whether the number of loci tested should be increased, has been the subject of intense scientific debate, particularly in the context of sharing DNA profile matches across borders. When the Regulator was first set up, GeneWatch argued that its role should extend beyond quality assurance within laboratories to include assessing the statistical power of DNA matches in order to avoid miscarriages of justice. We continue to believe that this important issue (i.e. the integrity and functioning of the NDNAD itself) should fall within its remit.

Destruction of samples from individuals and deletion of DNA profiles and fingerprints should be added to the list, as these are issues where the public continue to have a major interest and where compliance with the Protection of Freedoms Act could be monitored and demonstrated in order to improve public confidence.

2. For each of the forensic science disciplines below, please state whether you think they should, or should not be covered under the remit of the Regulator and his statutory powers (definition of forensics)

- DNA extraction and profiling YES
- Fingerprint enhancement, development and comparison YES
- Toxicology (alcohol/drug testing) YES
- Footwear comparisons YES
- Trace evidence examination such as fibres, glass and paint YES
- Facial identification YES
- Other CCTV analysis eg gait analysis (CCTV cameras themselves come under a separate regulatory regime – only scientific analysis of the images is covered here) YES
- Drug identification and analysis YES
- Firearms and ballistics YES
- Gun shot residue YES
- Explosives YES
- E-forensics (Computer / mobile phone analysis) YES

• Blood pattern analysis YES
• Toolmarks YES
• Tyre examination YES
• Document analysis YES
• Medical forensics including victim and suspect sampling in sexual assault cases YES
• Forensic pathology YES
• Forensic dentistry/odontology YES
• Fire examination YES
• Vehicle examination YES
• Forensic anthropology YES
• Forensic archaeology YES
• Forensic palynology YES
• Accident investigation and reconstruction YES
• Disaster victim identification YES
• Forensic accountancy YES
• Forensic psychiatry YES
• Forensic psychology YES

Please explain your answers, and specify any further areas you think should be covered.
Avoiding miscarriages of justice depends on ensuring the quality of all forensic evidence presented at trial. For example, confirming a DNA match is insufficient to prove that an individual was the perpetrator of a crime if there is a possible innocent explanation for the presence of the DNA. Therefore dealing with quality issues around DNA collection and analysis (e.g. contamination issues) is insufficient if other evidence (which might for example, place the individual at the crime scene at a certain time, or indicate that the blood of the victim had been spattered on their clothing while they were trying to help them) is not reliable. Therefore the remit of the regulator should include the quality of all scientific aspects of forensic evidence.

3. If you have any other comments on the role of the Regulator that you would like us to take into consideration, please outline them below:

4. For each of the groups listed below, please state whether you think they should, or should not be required to have regard to a statutory Code of Practice on forensic standards.
• Manufacturers of forensic consumables YES
• Suppliers of 'DNA free' components to manufacturers YES
• Police forces YES
• Other law enforcement agencies, such as the Serious Organised Crime Agency and military police. YES
• Police and Crime Commissioners YES
• Forensic Service Providers – for the police / prosecution YES
• Forensic Service Providers – for the defence YES
• Individual experts YES
• Legal Aid Agency YES
• The Crown Prosecution Service YES
• The Home Office (as the organisation responsible for the national DNA and fingerprint databases) YES

Please explain your answers, and specify any further groups you think should have regard to the Code.
The Code should apply throughout the Criminal Justice Service if it is to have any meaning. The UK Border Agency and Security Services should also be added to the list since both also collect DNA

samples from which DNA profiles are extracted and added to the National DNA Database and other forensic evidence relevant to counter-terrorism cases and border controls.
The proposed annual report to ministers should be published and submitted to parliament to aid transparency and public scrutiny and increase confidence in the regulatory system.

5. To what extent do you agree or disagree that admissibility of the Code in court, contractual penalties and a power to investigate serious breaches, is sufficient to ensure compliance with the Code? (Please select one option a to e):
c) Tend to disagree

Please explain your answer, and specify any additional measures which could be taken to maximise compliance with the Code.
GeneWatch tends to agree that the introduction of legislative sanctions may not be necessary at this stage and that the proposed admissibility of the Code in Court plus contractual penalties should be implemented, whilst allowing for the introduction of stronger sanctions if these prove necessary. However, we would like to see powers to investigate expanded from "serious breaches". The seriousness of a breach may not be immediately apparent and what seem to be minor issues can impact on the stated objectives of avoiding miscarriages of justice and maintaining trust in the system. Some small errors can lead to serious problems which may even be systematic across the CJS (such as contaminated swabs in Germany in the phantom of Heilbronn" case: http://news.bbc.co.uk/1/hi/world/europe/7966641.stm). It is questionable whether this incident would have been viewed as "serious" had it not led to such an embarrassing waste of police time and extensive media coverage. However, if a more minor example of contaminated swabs had been spotted and investigated earlier on, major problems might have been avoided. We suggest that the Regulator should have powers to investigate any breach of standards, but that criteria should be developed to limit and prioritise investigations, which encompass a broad range of types of incident the seriousness of which may not be immediately apparent but which could impact systematically on large numbers of cases. This does not imply a duty to investigate all complaints, but would allow investigation at the discretion of the Regulator in circumstances where a relatively minor incident may have wider implications for the CJS.

6. To what extent do you agree or disagree that putting the existing Code of Practice on a statutory footing will be beneficial?
a) Strongly agree

7. If you have any other comments on putting the Regulator's Code of Practice on a statutory basis that you would like us to take into consideration, please outline them below:

In view of the fact that most providers already comply with the Code, GeneWatch UK recommends that a transition date is specified in the legislation, rather than left to the discretion of the Regulator, and is set to ensure that all relevant bodies comply in a timely way (e.g. within 12 months). We recognise that there may need to be flexibility to make minor changes to the Code without full public consultation but we disagree that the criteria for public consultation should be limited to changes with significant cost implications. Any change to the Code with potential to impact significantly on miscarriages of justice or trust in the CJS should be subject to public consultation.

8. For each of the powers below, please state whether you think they are necessary on a statutory basis:
- Powers of entry YES
- Access to information (documents and records) YES
- Power to impose an improvement plan YES

• Discretionary power to produce a report YES

Please explain your answers, and specify any further powers you think the Regulator needs to carry out an investigation.
The powers to conduct investigations should be similar to those given to the HSE under the Health and Safety at Work Act 1974.
Powers of entry should be "powers of entry and inspection" so that the Regulator can inspect facilities, equipment etc. A power to summon witnesses to give evidence or produce evidence is also needed. For example, in a DNA laboratory, contamination could be caused by a failure of a specific technician to follow procedures, or by a fault in the procedures, or by poor management and training, or by new technology or software or contaminated supplies: the Regulator must be able to carry out investigations and inquiries in order to determine causes whether they are specific to one lab or may affect multiple suppliers, otherwise the problem can't be rectified.
Reports and improvement plans should be published on the Regulator's website to aid transparency, public scrutiny and provide an incentive to suppliers and others to comply.

9. For each of the sanctions below, please state whether you think they would or would not be effective for organisations that refuse to co-operate:
• Refer organisation to UKAS for review of accreditation status YES
• Give the Regulator the power to recommend an organisation be suspended from the procurement framework YES
• Financial penalty per day of non compliance YES
• Removal or suspension of work written into any public sector contracts YES
• Public report or register YES
• Requirement to disclose that subject to an improvement plan YES
• Requirement for contracts with FSPs to require compliance with any Regulator investigation. YES

Please explain your answers, and specify any alternative sanction powers you think the Regulator should be given.
The sanction powers above are adequate but need to be used in combination as necessary. For example, risk of loss of accreditation or procurement contracts is likely to be a bigger incentive to comply than a daily fine, i.e. fines may not be effective when there are major problems but may be adequate in some circumstances. A public report or register and disclosure of any investigations and reports is <u>essential</u> to allow proper public scrutiny and so the courts are aware of any problems.

10. To what extent do you agree or disagree that the Regulator should have a statutory power to access information supplied to UKAS and subject to its confidentiality requirements? Please explain your answer.
Agree. Access to this information will be essential for some investigations.
Regarding commercial confidentiality, GeneWatch does not object to specific information being kept confidential when necessary but we do object to the final reports of investigations being kept from public view (see response to Q11).
GeneWatch supports the proposed requirement on employers to report incidents and the proposed protection for whistleblowers.

11. To what extent do you agree or disagree that statutory powers to investigate will be beneficial? Please explain your answer.
GeneWatch agrees that statutory powers to investigate will be beneficial as otherwise the Regulator may not gain access to all the information needed to investigate the role of forensic evidence in possible miscarriages of justice and to rectify harm and/or prevent further harm in other cases. This

is essential to protect individuals from miscarriages of justice or lengthy unnecessary investigations and to maintain the integrity of and trust in the criminal justice system.
GeneWatch UK strongly disagrees with the proposal to keep reports confidential as this will limit lessons learned. We are surprised that a specific consultation question has not been included on this issue, given its importance. When reports are published, sections may be redacted to protect commercial confidentiality and individual identities as is already common with most documents released under the Freedom of Information Act. It is not necessary to keep the entire report confidential and doing so would severely limit the lessons that could be learned from such reports throughout the CJS. In general, the Regulator should not be exempt from FoI legislation, which allows only certain redactions for certain purposes. In order to enhance the transparency and usefulness of the Regulator's work, we would expect information to be published in a public register about which investigations are ongoing and completed and this register to include final reports, recommendations and any actions taken (or not taken) in response. The proposed annual report to ministers should also go to parliament and be published on the Regulator's website.
Finally, the expected benefits will only be delivered if the Regulator is (and is seen to be) impartial and fair as well as effective. It will therefore be important to develop and adopt a policy on conflicts-of-interest to prevent any bias (or perceived bias) in the outcomes of investigations (with suitable sanctions for investigators who do not declare interests or when investigations breach the policy). Investigators will need to be (and be seen to be) independent of police and prosecutors as well as free of commercial interests.

12. If you have any other comments on giving the Regulator statutory powers to investigate that you would like us to take into consideration, please outline them below.
See answer to Q11 above.

13. Are there other issues relating to the regulation of standards in forensic science not mentioned in this paper for which new legislation may be required?
GeneWatch would welcome a role for the regulator in assessing and monitoring the scientific quality of new forensic technologies and techniques. In the past these have tended to be introduced amid a blaze of enthusiasm and in some cases become controversial as their limitations become apparent later on, necessitating a review of large numbers of past cases. Examples of such techniques (some introduced and others in the pipeline) include Low Copy Number (LCN) DNA, familial searching of the DNA database, software designed to deduce individual DNA profiles from mixtures, fast on-the-spot DNA profiling techniques (Rapid DNA), non-standard DNA profiling methods for use in specific circumstances (e.g. SNP testing of small samples of human remains following terrorist acts or disasters), predictive profiling of a suspect's appearance from crime scene DNA. Many of these techniques have some value but also serious limitations which need to be considered prior to their introduction to the CJS and kept under review. They often also raise ethical issues which, in the case of DNA, should be referred to the NDNAD Ethics Committee for an opinion.
As argued in response to question 1, GeneWatch UK also believes that assessing the statistical power of DNA profiling systems (i.e. numbers and likelihood of false matches even when there are no laboratory errors) is an important issue that should also fall within the remit of the Regulator. This would give the Regulator a role in ensuring that any new DNA profiling system that is introduced has sufficient statistical power to meet the requirements of the CJS and/or any proposals to share DNA matches across borders (a major concern with the now abandoned implementation of the Prüm Decisions). Rules on use of partial matches are also relevant to a scientific quality issue relevant to the performance of the NDNAD. GeneWatch has in the past experienced extreme difficulty in trying to establish the extent to which matches with partial crime scene DNA profiles are used in court, largely because neither the NDNAD nor most police forces seem to keep records of this information. This would be an example of an area which would merit further investigation to ensure that partial matches do not lead to miscarriages of justice.

14. If you have any alternative cost / benefit estimates to those used in the Impact Assessment published alongside this consultation document, please explain them below.
There is an additional intangible benefit in the UK showing leadership in developing "best practice" for the scientific quality of forensic evidence worldwide. A number of countries are developing new DNA database legislation and considering whether or not to include statutory quality assurance requirements, either in primary or secondary legislation (e.g. India, South Africa, Brazil). Setting a high standard in the UK (the first country to establish a DNA database) would provide a welcome example to be copied elsewhere and contribute to reducing the likelihood of miscarriages of justice (which, in addition to incalculable harm to the individuals involved, can also damage trust in the use of forensic evidence). Further, UK providers who meet high standards may be well placed to win forensic business overseas.

15A. Which of the following best describes you or the organisation or sector that you represent? Please give details in the box below.
• Civil liberties charity / organisation / pressure group

GeneWatch UK is a not-for-profit organisation which aims to ensure that genetic technologies are used in the public interest and that the public are given a say about their development and use. The organisation has given evidence to numerous parliamentary committees during the development of the Protection of Freedoms Act and provided expert evidence to the applicants in the ECtHR case of S. and Marper v the United Kingdom. GeneWatch UK is working with others as part of the Forensic Genetics Policy Initiative (http://dnapolicyinitiative.org/) to secure human rights standards for DNA databases worldwide, including the inclusion of quality assurance standards in statutory legislation.

15B. If you represent a Forensic Service Provider, please state the size of your organisation, by approximate number of employees:

Not applicable.