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FORENSIC SCIENCE AND HUMAN RIGHTS: THE CHALLENGES *

INNER TEMPLE

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I. Introduction

30 years ago Sir Robert Megarry VC in *Malone v Metropolitan Police Commissioner*[1] said that if something "can be carried out without committing any breach of the law it requires no authority by statute or common law; it can lawfully be done simply because there is nothing to make it unlawful". In that case he was talking about telephone tapping. Had the issue arisen more recently he might have been talking about CCTV or retention of biodata.

Sir Robert said what he did because, following the nineteenth century constitutional lawyer AV Dicey, he considered this to be "a country where everything is permitted except what is expressly forbidden". Their approaches ignore the special position of

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* Valedictory address as President of the British Academy of Forensic Science, given on 16 June 2009 at the Inner Temple, and to be published in the October 2009 edition of the Academy's Journal, *Medicine, Science and the Law*.

1 [1979] Ch 344

government officials. They do not recognise that the power of government officials to act depends on statutory authority and that the institutional position and *de facto* power of government officials may justify their being subjected to greater restrictions than ordinary citizens. Modern examples of such *de facto* power include the ability of the state to erect a network of CCTV cameras in a city centre or on a motorway, to track the movements of an individual using signals from his mobile telephone, and other manifestations of what the Information Commissioner and the House of Lords' Constitution Committee have called a "surveillance society".[2]

Things have changed in the 30 years since the decision in *Malone's* case. Common law rights such as the right of access to an unbiased and independent court or tribunal, the right to property, and the right not to be detained capriciously have been recognised as fundamental.[3] Our rights under the European Convention on Human Rights (the "ECHR") have been brought into our domestic law by the Human Rights Act 1998. The result is that those embarking on a legal career today would find Sir Robert's approach to the position of a public authority extraordinary. But the mindset underlying his approach has not vanished altogether. It bears a similarity to some of the approaches to the possibilities open to the state today as a result of technological and scientific developments.

My topic this evening concerns the intersection of forensic science and human rights. It is a big topic and I shall only deal with a small part of it. Forensic science may impact on a number of the rights under the ECHR, but the human right I am concerned with today is the right to respect for private life in Article 8. Privacy, and thus the right to respect for private life, can be more vulnerable in the modern world as a result of technical and scientific developments. Developments such as a system

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2 *Surveillance: Citizens and the State* 2nd Report, 2008/09, HL 18-1, 21 January 2009.

3 Beatson, Grosz, Hickman, Singh with Palmer *Human Rights: Judicial Protection in the UK* (2008) 1-07 – 1-34

of CCTV cameras and a DNA National database have the capacity to narrow the area of an individual's autonomy and privacy. This area may also be narrowed as a result of an increase in the role of the state. In his book, *Genetic Privacy*, Graeme Laurie said that one of the greatest threats to individual privacy in the last century has been the development of a public interest in the welfare of individuals. The state has taken responsibility for basic services, such as housing, subsistence, education, and health care. Notwithstanding the attempts since 1979 to "shrink the size of the state", the state's legal responsibilities and the very significant financial burdens upon it have led to the development of a position in which the state considers it has an obligation to guide individuals to prudent behaviour that is considered to be of benefit to the community, for example in relating to smoking, consumption of alcohol and the wearing of seatbelts in cars. It is this position that Laurie sees as threatening individual privacy and autonomy.

Within forensic science, the development that has led to most discussion in recent years has centred around DNA. This is understandable. The UK has been the scientific pioneer in this area. The position in England, Wales, and Northern Ireland (but not, as we shall see, in Scotland) has, broadly speaking, been that all bioinformation taken from those arrested is retained indefinitely whether or not the person providing the sample was subsequently convicted or even charged. At present volunteers who have given bioinformation, for example in mass screens, have no right to have it removed from the database. Chief Constables, however, have discretion to destroy the samples and profiles of both those arrested and volunteers in "exceptional circumstances".

Our National DNA Database is the largest database in Europe. In March 2007 approximately 4 million people were on it.[4] The figure included over a million children. [5]By March 2009 the figure had risen to some 5.1 million people,[6] over 7% of our population. The comparable figures for France and Germany are respectively approximately 856,000 people, 1.44% of the French population, and some 611,000 people, 0.74% of the German population.[7]

There are notable examples of the use of DNA both in detecting crime and in exonerating individuals. So, for example, a number of "cold" cases of murder and rape have been cleared up, sometimes years later, when an individual is arrested on another matter and a sample taken from him which implicates him in the unsolved crime.[8] Again, as shown by the cases of Stefan Kisko and Sean Hodgson, DNA can exonorate.[9] The European Court of Human Rights (the "ECtHR") has recognised the "rapid and marked progress [of member states] in using DNA information in the determination of guilt or innocence".[10]

The potential uses of DNA material of course go far beyond the prevention and detection of criminal activity with which many members of the British Academy of Forensic Science (hereafter "BAFS") are concerned. Issues of genetic privacy arise in the context of health care, insurance, and personal identity.[11] There is a natural and understandable desire to make full use of technological and scientific developments

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4 Report of the Nuffield Council on Bioethics on the *Forensic Use of Bioinformation: Ethical Issues* (hereafter "Nuffield Council Report"), para 1.22. Those convicted before 2001 and who have not been arrested since then are not on the database.

5 *The Guardian* 27 February 2009 (An answer to a PQ indicated that 1.09 million profiles of people aged under 18 are held, of which some 337,000 are of people aged under 16).

6 See *The Independent* and *The Daily Telegraph* 31 March 2009

7 Data from the the DNA working group of the European Network of Forensic Science Institutes(ENFSI). : see http://www.enfsi.eu/page.php?uid=98

8 Steven Sellars, a rape 12 years earlier (Daily Express 11 December 2008); Mark Dixie, a murder 9 months before DNA taken in respect of an assault (Times 7 May 2009)

9 19 March 2009; The Times, pp 18, 19; The Guardian p 7. In those cases this did not happen until 16 and 27 years respectively after the convictions.

10 *S & Marper v UK* Applications nos. 30562/04 and 30566/04, 4 December 2008, at [105]

11 See eg. Laurie *Genetic Privacy* (2002) CUP and Rothstein ed, *Genetic Secrets* (1997) Yale UP

in combating disease and crime, and improving our quality of life. But, equally understandably, there are also sensitivities about the retention and use of such material by public authorities and companies whether or not the material is retained in order to assist in the prevention and detection of crime.

It is clearly justifiable to retain and use DNA material for the overall good of society, whether by enhanced screening for disease or by creating a method of deterring and detecting crime. But should the increased power of technology and science be balanced by a greater sensitivity to the need to protect legitimate areas of "privacy" and "autonomy"? No one argues against a balanced approach. It is recognised to be necessary in order to maintain public confidence in systems, to ensure fairness and appropriate autonomy to individuals, and to provide a method of identifying and correcting error. But there is controversy as to what constitutes a balanced approach.

Those who take an approach similar to that taken in the context of telephone tapping by Sir Robert Megarry argue that the justification of enhancing the ability to detect crime, and thus to deter it, far outweighs any concerns of those innocent people whose fingerprints, samples and profiles are retained provided the material retained is not misused. The innocent, it is sometimes said, have nothing to fear from a large centralised DNA database. This is a powerful argument. But there is also considerable force in the approach of others who consider that interferences with privacy and autonomy by the state need to be justified. They argue that specific safeguards need to be in place. These concern both the quality of the technical processes used in taking and retaining the material, and the assurance that the material is taken, retained and used appropriately and only for specified and legitimate purposes. There should be an independent method for correcting mistakes in which the public can have confidence.

II. The decisions in *S and Marper*

The ethical, legal and practical issues which arise in considering when to retain DNA samples and profiles, whose samples and profiles should be retained, and for how long, have given rise to particularly sharp debates in this country since the decisions of the Court of Appeal in 2002, and the House of Lords in 2004 in *R (S& Marper) v Chief Constable of South Yorkshire*[12] about the law governing the obtaining and retention of fingerprints and DNA samples taken from individuals who have not been convicted of an offence.

In *S & Marper* fingerprints and DNA samples had been taken from S, an 11 year old, charged with attempted robbery and Michael Marper, an adult who faced a charge of harassing his partner. S was later tried and acquitted of the attempted robbery. The charge against Marper was not pressed because he and his partner were reconciled before the case came to trial. The police refused to destroy the samples taken. Applications to judicially review the decisions of the police were unsuccessful in the English courts. Four members of the House of Lords considered that retention of fingerprints and DNA samples either did not have an impact on private life so as to bring Article 8 into play or, if it did, was only a "modest infringement". But the House was unanimous in concluding that the benefits of a large database in detecting serious crime and the limited purpose of the retention of the material was a proportionate interference. The courts also rejected the argument that the difference between the treatment of unconvicted persons who had not been arrested and were not on the database and those who had been arrested and thus were on it did not fall within the prohibited grounds of discrimination in Article 14 of the ECHR.

12 [2004] UKHL 39; [2002] EWCA Civ. 1275.

The claimants took their cases to the European Court of Human Rights in Strasbourg. In the four years between the decision of the House of Lords and the decision of the Grand Chamber of the ECtHR there were a number of important UK contributions to the debate.[13] All suggested that significant parts of our practice were not justifiable. The concerns identified were subsequently shared by the Strasbourg Court. On 4 December 2008 the Court held that the indefinite retention of the fingerprints and DNA samples and profiles of unconvicted persons on the National DNA Database without their consent, as is the position in England, Wales and Northern Ireland, is a violation of the right to private life guaranteed by Article 8.[14] We now need to assess the extent of the infringement and what changes in our law and practice will be needed to ensure it is compatible with Article 8 while permitting (and indeed encouraging) the benefits of DNA profiling to be appropriately available for the detection and deterrence of crime. To do this it is necessary to analyse the reasoning of the Strasbourg court and to consider precisely what it said.

Sir Bob Hepple observed in the revised version of his BAFS/Inner Temple lecture last year[15] that the House of Lords and the Strasbourg Court had fundamentally different starting points. That of the House of Lords was the desirability of law enforcement agencies taking full advantage of the available techniques of modern technology and forensic science.[16] That of the Strasbourg Court was that since "the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private or family life" domestic law must afford "appropriate safeguards" particularly where the data is undergoing automatic processing for police purposes.[17]

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13 See below.

14 Applications nos. 30562/04 and 30566/04, 4 December 2008.

15 (2009) 49 *Medicine, Science and the Law* 77 (the lecture was given before the judgment but the published version was revised in the light of the judgment).

16 [2004] UKHL 39 at [1], [78], [88].

17 Applications nos. 30562/04 and 30566/04, 4 December 2008, at [103]

Given the Strasbourg Court's starting point, it is perhaps not surprising that, the core of its decision is the view that the power in England, Wales and Northern Ireland to retain the DNA material of those who have not been convicted was "blanket and indiscriminate"[18] and it is, for this reason, disproportionate. The court also had doubts as to whether the arrangements for taking and storing personal information in section 64 of Police and Criminal Evidence Act 1984[19] were in accordance with law. This was because[20] they "were in general terms" and "may give rise to extensive interpretation". The Court did not find it necessary to decide whether section 64 satisfied the Convention's requirements of clarity and precision; that is the "quality of law" requirements in Article 8(2). But its doubts fed into its view about the proportionality of the rules because it stated that the questions concerning clarity and precision were in this case "closely related to the broader issue of whether the interference was necessary in a democratic society".

The factors the court referred to in the context of its assessment of proportionality[21] included the nature and gravity of the offence of which the individual was originally suspected, the age of the suspected offender, the time for which samples are to be retained (there was no time limit in England, Wales and Northern Ireland), the opportunities to have data removed, and whether there is provision for an independent review of the justification for retention according to defined criteria (whether by a court or otherwise).

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18 Ibid at [119], [125]

19 Ibid at [99]. Section 64 provides that retained material may not be used except for purposes relevant to the prevention or detection of crime, investigation of an offence, or the conduct of a prosecution. The court's doubts concerned the absence of detailed rules about duration, storage, usage, access by third parties, and rules for integrity, confidentiality and destruction.

20 Ibid at [99]

21 Ibid at [119], [122], [124]

The court also referred to practice in other Council of Europe states.[22] In the great majority of states, samples and profiles have to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge. The court discussed[23] the limited exceptions to this principle. For example, in Norway and Spain material may be retained where a person is acquitted for lack of criminal responsibility (for example on the ground of insanity). In Germany, Luxembourg, and the Netherlands material may be retained where suspicions remain about a person or where separate investigations are needed in a different case. In Austria material may be retained where there is a risk a suspect will commit a serious offence. In Poland material may be retained where the individual whose material was taken is suspected of certain serious crimes.

The UK Government argued that a comparative analysis of the law and practice in other States was of limited importance. It considered this was so because the United Kingdom is in the vanguard of the development of the use of DNA samples in the detection of crime. It argued that, as other States have not yet achieved the same maturity in terms of the size and resources of DNA databases, their systems were less advanced. [24] The court rejected this argument. It declined to disregard the fact that, despite the advantages of a large DNA database, other Contracting States have chosen to set limits on the retention and use of such data with a view to achieving a proper balance with the competing interests of preserving respect for private life. Indeed, it considered that a State claiming a pioneer role in the development of a new technology bears a special responsibility for striking the right balance in this regard. [25]

22 Ibid at [108]
23 Ibid at [47]
24 Ibid at [111]
25 Ibid at [112]

In the Court's judgment, the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests." [26] It stated that "the strong consensus existing among the Contracting States in this respect is of considerable importance and narrows the margin of appreciation left to the [UK] in the assessment of the permissible limits of the interference with private life in this sphere."

The Court was particularly concerned that people who had not been convicted of any offence and are entitled to the presumption of innocence would be stigmatised by being treated in the same way as convicted persons.[27] The Court stated that it must be borne in mind that "the right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding an [accused person's] innocence may be voiced after his acquittal".[28] It recognised that "the retention of the applicants' private data cannot be equated with the voicing of suspicions". But it stated that the perception of unconvicted persons whose biodata are on the database that they "are not being treated as innocent is heightened by the fact that their data are retained indefinitely in the same way as the data of convicted persons, while the data of those who have never been suspected of an offence are required to be destroyed".

III. UK contributions after the decision of the House of Lords and before that of the ECtHR

[26] Ibid.
[27] Ibid at [122]
[28] *Asan Rushiti v. Austria*, (2000) 33 EHRR 56.

Sometimes, when the European Court of Human Rights in Strasbourg or the European Court of Justice in Luxembourg makes a decision different to the decision of a UK court it is portrayed as the displacement of a UK solution by the imposition of a "European" solution. Lest the Strasbourg Court's decision in *S & Marper* be presented in this way, it is important to recall the important UK contributions to the debate between the decision of the House of Lords and that of the Strasbourg Court which had suggested that significant parts of our practice are not justifiable. Moreover, as we shall see, the solution that was found disproportionate was not a UK-wide solution: Scotland had taken a different approach. Before considering the implications of the decision of the Strasbourg court and the approach that should be used in developing a new regime in the light of it, I summarise those contributions.

The first development came in November 2004. Lord Justice Sedley suggested that one way of dealing with the "stigmatisation" issue is to have everyone on the database.[29] This has been done in the Icelandic Health Sector Database, albeit (a) with a very much smaller population, (b) not for the purposes of detection of crime, and (c) subject to an opt-out scheme.[30] Lord Justice Sedley's suggestion, however, was not popular. It brought government, the police and civil liberties groups together – for the first and possibly the last time on this issue. It is not being pursued. The House of Lords' Constitution Committee observed that a universal National DNA Database would be more logical than the current arrangements, but said that "it would be undesirable both in principle on the grounds of civil liberties, and in practice on the grounds of cost".[31] The government's response to the Committee and its Consultation Paper, "*Keeping the Right People on the DNA Database: Science and Public Protection*" published in May 2009, state that it never advocated a

29 "Rarely Pure and Never Simple: The Law and the Truth", Lecture at the University of Leicester, 23 November 2004.

30 See Laurie, *Genetic Identity* pp 292-297

31 *Surveillance: Citizens and the State* 2nd Report, 2008/09, HL 18-1, 21 January 2009, para 465.

universal database and that "there are significant proportionality as well as practical and operational issues associated with such a database".[32]

The second, and possibly the most influential, of the UK contributions was the September 2007 report of a working group of the Nuffield Council on Bioethics on the *Forensic Use of Bioinformation: Ethical Issues*. Fifteen months before the Strasbourg Court's decision, the Nuffield Council stated that the indefinite retention of DNA material from all those arrested for a recordable offence[33] whether or not they are subsequently charged or convicted is not proportionate. It also stated that Home Office proposals to take fingerprint and biological samples from any person arrested regardless of whether the arrest is for a recordable offence are not proportionate.

The Nuffield Council's report considered the legal regimes of other European countries. It also considered the more restricted powers in Scotland, where the samples and profiles of those not convicted must be destroyed save for those of people suspected of certain violent or sexual offences. In those cases the samples of unconvicted people can be retained for three years and there is a possibility of retention for a further two years if the police show reasonable grounds for doing so to a court. The Nuffield Council's report concluded that the law of England and Wales should be brought into line with Scots law. The report also expressed concern about the disproportionate over-representation of black ethnic minorities on the database which, even though it may occur because of policing practice in making arrests, increases the risk of stigmatising those known to be on the database. Similarly it was

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32 Cm 7616; CP Para. 3.4.

33 A "recordable" offence is one carrying the possibility of a custodial sentence or otherwise specified by statutory instrument. See SI 2005 No 3106 and Box 1.2 of the Nuffield Council's Report.

concerned about the policy of permanently retaining the bioinformation of minors. [34] The report and its reasoning was relied on by the Strasbourg Court.

In October 2007 Liberty published its report, *Overlooked: Surveillance and Personal Privacy in Modern Britain*. The report called for an overhaul of privacy protection and questioned the ever-increasing size of the National DNA Database in the absence of statistical evidence that its expansion has improved crime-solving rates.

In April 2008 the first Annual Report of the Ethics Group on the National DNA Database, a public body set up in 2007 to advise the government, was published. The Group recommended changes in relation to samples and data derived from those who voluntarily donate their DNA to help the police with enquiries. The recommendation was that such samples and data should presumptively only be used for the case under investigation, that the material should not be loaded into the National DNA Database, and that the samples and all material from the samples should be destroyed when the case has ended. The government accepted these recommendations in its May 2009 Consultation Paper. The Ethics Group also stated that there is an "urgent need for better information for the police, volunteers, and custodial subjects on the use and limitations of forensic DNA analysis"[35] but its recommendation about the use of material obtained from those arrested for recordable offences is limited. It is only that "confidentiality and individual privacy are preserved as far as possible and within clear controls". The Group considered the discretion of individual Chief Constables as to the "exceptional circumstances" under which samples and profiles may be deleted is "potentially inconsistent and

[34] Paras. 4.63 – 4.72.
[35] Para. 5.20

discriminatory and contrary to an individual's privacy rights" [36] and that the requirements of the HRA "appear not to be met by current custom and practice".

Finally, in July 2008 the Citizens' Inquiry into the Forensic Use of DNA and the National DNA Database which had been set up by the Human Genetics Council reported. The Citizens' Inquiry recommended that the DNA samples and profiles of individuals found to be innocent or against whom proceedings had not been instituted should be removed from the database.

BAFS has participated in the debate. Its Executive Council has responded to various consultations by government and other bodies such as that by the Nuffield Council's Working Party. Last year representatives of the Nuffield Council and BAFS met to discuss the Nuffield Council's report. Shortly before the judgment of the Strasbourg Court, Professor Sir Bob Hepple spoke to members of BAFS and the Inner Temple on the issues. Most recently, in March this year, after the Strasbourg Court's judgment BAFS convened a strategic seminar on Chatham house rules to discuss the implications of and possible responses by the UK government to it. About 35 representatives of all relevant interest groups attended. There were judges, lawyers, scientists, police officers, and representatives of governmental and other public bodies including civil liberties groups present. A summary of the views expressed at that meeting (without attribution or identification of individuals) will shortly be posted on BAFS's website.

IV. The process of policy formation in the light of the decision of the Strasbourg Court

[36] Para. 5.30

How should this country respond to the implications of the decision of the Strasbourg Court? The aim should be to render our law clearly compatible with the Convention while permitting and encouraging the benefits of DNA profiling to be appropriately available for the detection and deterrence of crime.

There is little a serving judge can appropriately say about the substantive issues canvassed in the debates because they concern the formation of policy on matters which might in the future come before the courts. But it is possible to consider the process by which policy on this important matter is being formed. The remainder of this talk seeks to do that.

The question of what power the state should have to take and retain our biodata is in a real sense a constitutional question because it is about the allocation of power between the citizen and the state. One of the questions is whether the way we are proceeding pays sufficient regard to the constitutional dimension. There are two aspects to this. The first concerns the way we are moving to develop policy. Compare, for example, the Royal Commission that was appointed to consider the reform of the House of Lords. [37] Compare also the government's suggestion in March this year that the proposals in its Green Paper for a Bill of Rights and Duties[38] should be discussed at citizens' meetings, and note that it has recently been suggested in the aftermath of the business of MPs' expenses that it might not be appropriate to make changes to the system for elections to the Westminster Parliament without the approval of the public in a referendum.

The second aspect concerns the legislative technique envisaged for a new regime. The Consultation Paper states that the criteria for the deletion of profiles on the database

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37 Cm 4534, (2000) para. 5.1.

38 *Rights and Responsibilities: Developing our Constitutional Framework* , Cm 7577 (March 2009).

will be set out in regulations rather than primary legislation. [39] This may mean that there is only limited Parliamentary control over them. Even if the regulations are made subject to an affirmative resolution of both Houses of Parliament, they will be subject to less scrutiny than a Bill, which can be amended and subjected to clause-by-clause scrutiny.[40]

I deal only with the process of forming policy about the retention of the biodata of unconvicted persons but the process issues considered are relevant in other contexts. Other types of forensic material, such as cellsite analysis, image recognition, and firearms residue, also raise important legal, practical and ethical questions on which, while the technologies are important components in the detection and deterrence of crime, our law and practice may be open to question. In the case of facial mapping, for instance, there is as yet no statistical evidence of the significance of the features which are the subject of evidence by facial mapping experts and there are differences between the approaches of different courts as to the appropriateness of an expert expressing opinions as to probabilities based on facial mapping evidence.[41] In all these areas it is important that the process by which policy is formed on such issues is technically rigorous, inclusive, and is such as to command public confidence.

V. The government's response to the decision of the Strasbourg Court

Less than two weeks after the decision, on 16 December 2008, in a speech to a Trade Association, the then Home Secretary announced that the profiles of children under 10 would be taken off the database. She also signalled that a more flexible approach would be taken in the case of samples and profiles taken from older children. As to

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39 Para. 6.22.

40 See the criticisms of the House of Commons Select Committee on Procedure, *Delegated Legislation* (1999-2000), HC 48 at [11] and [53], and the Royal Commission on the Reform of the House of Lords, *A House for the Future*, Cm 4534, (2000) at 74.

41 Cf *Gardner* [2004] EWCA Crim. 1639 and *Grey* [2003] EWCA Crim 1001 (adopted by the New South Wales Court of Appeal in *Tang* (2006) 65 NSWLR 681 at [155] by Spiegelman CJ).

the overall approach, she pointed to the benefits of new ways of capturing, analysing and using data, such as images from CCTV and DNA material. She said these new techniques strengthened what she described as the frontline against crime by *inter alia* "the regular use of DNA today to extend and backdate the ability to investigate crime", and that the DNA Database is crucial to public protection. She said the government must, however, proceed with "caution", that there must be "robust safeguards in place", and the "absolute necessity" of getting the balance on privacy right.

In May 2009 the Home Office published its Consultation Paper, "*Keeping the Right People on the DNA Database: Science and Public Protection*". Paragraph 3.2 of this states: "the Home Secretary's Introduction and the Executive Summary make clear that public protection lies at the heart of the proposed retention framework. This consultation paper is about how to preserve public protection as much as possible while complying with the court decision in S and Marper".

Before turning to the detail, I make three introductory points. The first is that the Consultation Paper's starting point appears to be closer to that of the House of Lords than that of the Strasbourg Court. It is also stated[42] that because "the judgment clearly allows a retention policy provided it is not 'blanket and indiscriminate', there is no need to "rehearse the arguments in the case". It appears that a decision was taken not to address the reasons for the Court's conclusion in the Consultation Paper. This means that this has yet to be done. The Home Secretary's December 2008 speech referred to the "absolute necessity" of getting the balance on privacy right. For that to be done, it would appear axiomatic that attention should be given to the values represented by the Court's starting point before our policy and proposals for a

[42] Para. 2.3, and see p 61 (Annex D: Impact Assessment).

new regime is formulated. That would require an assessment of the legitimate needs of privacy and autonomy in this context, and the boundaries of those concepts.

Secondly, the Consultation Paper focuses "on the details of retention" and does not deal with the threshold for taking DNA material. It recognises "the important distinctions made in the judgment between cellular samples, which contain an individual's actual DNA, the DNA profiles on the database which simply describe for identification purposes certain non-coding parts of the individual's DNA, and finally fingerprints". [43] The paper considers that the existing threshold in PACE for taking DNA and fingerprints on arrest for a recordable offence is appropriate and "was not called into question by the ECtHR". [44] No change, save for a change of name, is proposed to the exceptional case procedure[45] which was criticised by the first Annual Report of the Ethics Group on the National DNA Database.[46]

It would, however, be desirable at some stage in the formulation of policy for the concerns expressed by the Court in paragraph 99 of its decision as to whether the arrangements were "in accordance with law" because they were in general terms and possibly insufficiently clear and precise, to be addressed. I have referred to the fact that the Consultation Paper states that the criteria for destruction of profiles on exceptional grounds will be set out in regulations rather than primary legislation.[47] The reason given for this is that it "is not possible to define comprehensive criteria in legislation for what will in practice [be] based on the individual circumstances".[48] This may suggest that there was something in the Strasbourg Court's concerns.

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43 Para. 2.3.
44 Para. 2.4.
45 Para. 6.22
46 See above.
47 Para. 6.22.
48 The examples given are cases where no sample should have been taken; unlawful arrest, the taking of the sample was unlawful, and there was in fact no offence.

Thirdly, the paper relies almost entirely on a piece of research undertaken since the decision of the Strasbourg Court by Professor Ken Pease of the Jill Dando Institute. The research focuses exclusively on the risk posed by unconvicted people who have been arrested as compared with the risk posed by unconvicted people who have not been arrested. The policy choices are said to rest upon an empirical basis. The issues involved raise difficult scientific and technical questions, and the policy choices in this area also have constitutional and civil liberties implications. The need is for an objective, impartial and balanced assessment in which the public can have confidence. Bearing these factors in mind, I suggest that the issue is one on which, for most of the twentieth century, advice would have been sought from a Royal Commission made up of the leading experts in all the relevant disciplines or a body such as the Law Commission.

So much for the introductory points. While the most important factor in assessing the Consultation Paper concerns the research as to the risk posed by unconvicted people, I start with its treatment of the questions mentioned by the Strasbourg Court.

The first question was the nature and the gravity of the offence for which the individual whose DNA is taken was arrested, and the age of the person from whom a sample is taken. The Consultation Paper considers that in the case of violent, sexual or terrorist offences profiles should be retained for 12 years from the arrest (in the case of terrorism the period is 12 years from the time an individual is no longer subject to a control order. In the case of arrests for other recordable offences, the period is 6 years. Given the reliance on the risks posed by those arrested, it is worth noting that the Consultation Paper states that “the evidence for re-offending in more serious and violent cases is unclear, but we believe a longer retention period is a

commonsense approach given the more serious consequences of re-offending and therefore the damage that a missed detection would imply". [49]

In relation to the nature and the gravity of the offence, it is said that research shows that "criminal careers" are heterogeneous so that there is no close connection between the reason a person is arrested and the nature of his subsequent criminality. For that reason it is suggested that arrest because of suspicion that the person has committed a minor offence does not justify a decision not to retain a profile obtained. [50] There may, however, be some tension between the evidence about the heterogeneity of "criminal careers" and the suggestion that analysis of 365 offences leading to a sample being taken which subsequently led to detection of a serious crime shows that offences of dishonesty and drugs offences score highly in terms of subsequent criminality. There may also be some tension between the stated aim of providing an evidence based justification for policy and the reliance on a "commonsense" rather than evidential approach to justify a longer period of retention where the earlier arrest was because of suspicion that the individual committed a violent, sexual or terrorist offence.

The Strasbourg Court also referred to the need to take into account the age of the person from whom a sample is taken. The Consultation Paper proposes the deletion of the profiles of children under 10, and the deletion of the profiles of those convicted only once of a minor offence and those arrested but not convicted of a minor offence, after 6 years or on their 18th birthday. Again, this policy does not appear to be closely tied to the evidence generated by the research. The research itself does not appear to give data related to age. The policy for children is said[51] to be the result of the position stated by the then Home Secretary in her December speech. She recognised

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49 Para. 6.13

50 Annex C pp 33-35

51 Para. 6.17

that the typical residual criminal career length for those who get involved in crime in their teenage years is 16 years but also that for many young people involvement in crime is often an isolated incident and can be relatively minor.

What about the practices in other Council of Europe States, and in particular Scotland, on which the Court relied heavily. I have only found three references in the Consultation Paper to the position in other states.[52] They are of an *en passant* nature. There is no analysis of the position in other countries, including those, such as Poland, where the regime in relation to the unconvicted has some similarity to ours. The reason given for this is that "there is no existing evidence underlying retention regimes in other jurisdictions" and the UK is "at the cutting edge of forensic development". [53] This might be thought to substantially resurrect an argument rejected by the Strasbourg Court. Also, it should be recalled that the evidence the UK put before the Strasbourg court did not include figures for crimes solved by DNA retained from samples taken from unconvicted people or of the risk posed by such people. It is arguable that the weight of this reason for setting aside the regimes in other regimes depends on the strength of the evidence relied on in the Consultation Paper.

I have referred to the way the Strasbourg court dealt with the impact of retention of the biodata of the unconvicted on the presumption of innocence; the "stigmatisation" point. There is no direct response to this in the Consultation Paper. It states[54] that, on the basis of the research it has considered, it would "have to believe that the risk of offending following an arrest which did not lead to conviction is similar to the risk of re-offending following conviction". It states that, although this is "obviously a

52 Paras. 2.6, 6.1, 6.5.
53 Para. 2.5.
54 Para. 6.10.

controversial assertion", it "does appear to be borne out" [55] by the study set out in Annex C to the Consultation Paper. Having said this, the Consultation Paper's treatment of the presumption of innocence is confined to one sentence:

> "Nothing here detracts from the presumption of innocence of any individual who is not convicted, but we believe that the sort of analysis carried out is legitimate in assessing underlying risks". [56]

But can the issues of stigmatisation be put aside in this way? The House of Lords Constitution Committee noted that, although a Home Office minister stated he did "not think there is any stigma attached at all with being on the database", he was opposed to a universal database on the grounds of "practical civil liberties" as well as "potentially legal concerns". [57] Concern has been expressed about the disproportionate use of stop and search powers on members of black ethnic minorities and what the Nuffield Council described as their disproportionate overrepresentation on the database. There have also been press reports giving examples of stigmatisation in practice.[58] For example, on 5 June 2009 the Daily Telegraph published an item in which it was suggested that the police were "targeting" youths who had not previously been arrested to get hold of their DNA and place it on the national database. The father of DNA profiling, Sir Alec Jeffries, is reported to have described the Consultation Paper's proposals as involving "a presumption not of innocence but of future guilt ... which I find very disturbing indeed".[59]

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55 Para. 6.11.
56 Para. 6.11.
57 2nd Report, 2008/09, HL 18-1, 21 January 2009, para 189.
58 *Daily Mail* 15 October 2008, pp. 54-5. See also *The Guardian* 27 February and 19 March 2009.
59 *The Guardian* 8 May 2009

I now return to the Consultation Paper's assessment of the risk of subsequent offending posed by a person who is arrested but not convicted. Its proposed policy is founded on the assertion that the risk of a person offending after such an arrest is similar to the risk of re-offending after a conviction. [60] Taking that similarity, it is suggested that 52% of "re-offending" happens within 6 years, and it is on this basis that 6 years is said to be a "proportionate retention period". [61] The Consultation Paper recognises the assertion is "controversial". In the light of this would not the case for what is proposed in this sensitive area be strengthened by an alternative analysis which addresses the specific concerns of the Strasbourg Court and the reports by the various UK bodies?

The recommendations in the Consultation Paper are based on what is described as "a provisional model". [62] It is stated that, whereas some work suggests a person previously arrested will have no higher a risk of re-arrest [63] than a member of the public who has not previously been arrested after "more than 5 years", other work "points to between 13-18 years". The provisional model upon which the framework is based suggests a figure of between 4 and 15 years. How are these models and the assumptions upon which they are based to be reconciled with what is said about the heterogeneity of criminal careers? What of the willingness to retreat to "common sense" when the evidence is unclear but at the same time dismissing the relevance of the regimes of other Council of Europe countries, including Scotland because they are not considered to be "evidence based"?

The assumptions in the research upon which the Consultation Paper proceeds must be closely scrutinised by those familiar with statistical analysis and modelling

60 Paras., 2.8, 6.5-6.14. And see the study set out in CP, Annex C.
61 Para., 2.8.
62 Para 2.7.
63 Note, however, there is some slippage in the discussion between the risk of "offending" and the risk of being "re-arrested": para 2.7.

approaches. The data shown has been edited and time constraints meant that there was no time to take into account other research work being undertaken. Mr John Elliott, the Home Office's Chief Economist, assessed the regulatory impact statement made on the basis of the research as providing a reasonable assessment of the likely costs and benefits and the likely risks.[64] However, he drew attention to a number of points. First, the analysis and the decision to adopt a 6 year period "is based on only limited evidence". Secondly, "the need to complete this work to a very short timetable means that the modelling has not captured all costs and benefits as completely as I ideally would like to have seen". The consequence is that "there may be a need to revisit this assessment. Although the problems have been identified for a number of years, at least since the report of the Nuffield Council, it appears that the research was only commissioned after the decision of the Strasbourg Court. It is not apparent from the Consultation Paper whether that research has been subjected to the normal scientific peer review that is a prerequisite of academic respectability. The qualifications in both the Consultation Paper and Annex C containing the report of the researchers, and the speed at which the research was conducted suggest that it may not have been.

Will policy formed on the basis of this research lead to the confidence of the public in the policy choices made and thus in the National DNA Database which the government seeks? It is suggested that there is a risk that it will not unless the questions about the legitimate claims and boundaries of privacy and autonomy raised by the Strasbourg Court, but not dealt with in the Consultation Paper, are addressed. An article in the *Evening Standard* states that the Consultation Paper:-

> "is a pragmatic response, based on patterns of re-offending and on the fact that some people whom police arrest, even if not convicted, turn out to be

64 P. 95.

> implicated in other offences. While this compromise is justified, we should be wary of further attempts by government to hold genetic data of innocent people against their will. Justice demands that we distinguish between the guilty and the innocent." [65]

The other responses have been more critical. I have referred to Sir Alec Jeffries. He is also reported to have described the Consultation Paper's proposals as "minimal and disappointing". He said the Consultation Paper "seems to be about as minimal a response to the ECHR judgment as one could conceive".[66] The headline of the article about the Consultation Paper in the *Times* on 7 May said that the government's "DNA storage plan 'defies EU court Ruling'" and the *Guardian's* leader on the same day is headed; "Contempt of court", and states; "The details of the plan are so anaemic as to constitute a show of contempt for the spirit of the ruling".

VI. From Consultation Paper to White Paper and a new legal regime

All this suggests that there is still much work to be done as we move from this Consultation Paper first to the promised White Paper and then to a new regime for the retention of biodata for use in the important task of preventing and detecting crime. Public confidence in what is ultimately proposed will depend on the strength of the analysis in the White Paper. It is also likely to be affected by attitudes to other manifestations of what has been referred to as a surveillance society. Those defending the present regime have relied on the argument that the UK is "at the cutting edge of forensic development". But this argument, as the ECtHR pointed out, cuts both ways. The leader in a field bears a special responsibility in striking a balance and in explaining why what it proposes achieves it. The various UK reports that preceded the Court's decision suggested we had not done so. Despite those reports the UK

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65 7 March 2009
66 *The Guardian* 8 May 2009

government robustly defended our policy before the Strasbourg Court. [67] The Consultation Paper, our first considered official reaction to the judgment, has not taken on board or addressed and rebutted the Court's criticisms of our systems. We need to do so if we are to address the challenge of producing a legal and regulatory regime which encourages the benefits of DNA profiling to be appropriately available for the detection and deterrence of crime while being clearly compatible with the European Convention on Human Rights.

[67] Para., 4.15.