

STATEWATCH UK/EU

Law enforcement and DNA technology: the irresistible march? UK database to be expanded, EU member states to begin exchanging DNA “profiles”

“It is likely that within a generation, the DNA of most of the UK population will have been archived in a national database.

The current mania for DNA testing goes right to the heart of the privacy issue. Traditionally, invasion of privacy has been regarded as effective social management. Police have always argued that privacy and anonymity are bad news for law enforcement. Authority has always sought to create perfect identification of citizens. And DNA is the perfect identifier.” (Simon Davies, Director, Privacy International)

This year has seen a number of significant developments in the use of DNA (deoxyribonucleic acid) profiling techniques in law enforcement. The government has announced an increase in funding to enable the UK DNA database to be more rapidly expanded - even though it already holds profiles taken from just under a million “criminals” and is rising at the rate of 6,000 per week. The Home Office has confirmed that at least 50,000 people’s DNA profiles are held illegally, but are yet to state what is being done about it. An Appeal Court has recently affirmed that prosecutions arising from illegally retained profiles are unlawful and the Police Federation is backing three detectives effectively demoted to desk-jobs for failing to provide a voluntary sample. Under a draft EU proposal, member states are to begin exchanging DNA profiles as a prelude to creating European database.

UK database to be expanded: a sense of disproportion?

With the DNA of 940,000 people on file the UK has the most “profiled” population in the world. At the end of September, Jack Straw announced an extra £109 million to expand the database (this comes after the extra £34 million announced in September 1999).

Some people who have had their DNA forcibly taken in connection with minor offences are angry at the level of intrusion that the law allows (*Statewatch* has been contacted by a number of such people). As the law stands, any person suspected, charged or convicted of any criminal act, however minor - traffic offences, shoplifting, or public order transgressions such as breach of the peace for example can be “profiled”. The “profile” must be removed if the arrested person is not charged with an offence or if the person is acquitted. John Wadham, Director of *Liberty*, commented:

“We have always accepted that DNA testing is a powerful tool against offences where a suspect might have left a sample such as sexual offences, burglary or violent offences. But the Police and Criminal Evidence Act 1994 allows police officers forcibly to hold a suspect down, forcibly to open their mouth and to take a swab - even where the sample would be of no use to the investigation...”

A Dutch arms trade protester arrested for criminal damage to a London pavement and forcibly “profiled” is a case in point (see *Statewatch* vol 10 no 1).

In September, government advisers from the Commission on Human Genetics also expressed concern over the “level of offence” and said it intended to consult the public over what controls might be necessary.

It is also worth noting that levels of DNA profiling vary greatly among UK police forces. For the last four years, Edinburgh police (Lothian and Borders force, Scotland) have systematically taken DNA from everyone they have arrested or detained. Other forces currently use their “discretion” but the extra funding may see the Edinburgh policy become normal practice.

Profiles held illegally, use unlawful but possible

In the UK, police are only allowed to keep DNA profiles on the national database from people who are convicted of the offence for which the sample was taken. All other samples/profiles must be destroyed. However, in July, a Home Office Inspectorate of Constabulary report, "Under the Microscope", estimated that from 752,718 DNA profiles held at the time of their study those of 50,000 individuals which should of been destroyed have been retained. This figure was based on a non-conviction rate of 20%, but in fact the report refers to non-conviction rates of 33 and 45% - suggesting that 82,500-112,500 DNA profiles should actually have been destroyed.

On May 26, Michael Weir's conviction for murder was quashed at the Court of Appeal. Weir had been convicted on the strength of DNA evidence based on blood found on a glove near the scene of the crime. The police matched the blood to a DNA sample taken from Weir a year previously when he was suspected of drugs offences. He was not charged but his profile was placed in the national register. The court affirmed the clear rules in Section 64 (3B) of Police and Criminal Evidence Act 1984 (PACE; as amended by CJPO Act, 1994) which state that:

information derived from the sample of any person entitled to its destruction... shall not be used - (a) in evidence against the person entitled; or (b) for the purposes of any investigation of an offence. If the sample was used for purposes of an investigation then all evidence resulting from that information must be excluded.

What was most alarming in the Weir case was that the police, after having realised that the match in the national database was held unlawfully, chose to take another sample from the suspect and proceed with the prosecution on the basis of a new sample taken lawfully in connection with their investigation.

However, this may change. Last year a Home Office consultation paper has proposed that Section 64 of PACE should be amended again to allow all samples that should be destroyed under current rules to be kept (see *Statewatch*, vol 10 no 1). It is also possible that retrospective legislation will be sought - allowing all profiles that should have been destroyed to be retained. *Liberty* have announced that they would seek a judicial review of any such move.

Questions over reliability and accuracy

In an article in *Police Review* in July this year consultant Paul Millen, a former vice-president of the *Forensic Science Society* and scientific support manager for Surrey police, raised a number of concerns over the advances of DNA technology and the future use of DNA profiles. The introduction of LCN (Low Copy Number) DNA analysis has enabled forensic scientists to identify DNA from cells far smaller than those in which it could previously have been identified. Millen suggests that this technique is so sensitive that it carries an increasing uncertainty as to whether the identification of a person's DNA actually places them at the scene of a crime:

The dangers of secondary and tertiary transfer remain unpublished and therefore unknown. Secondary transfer is where person A touches person B [who] then deposits person A's DNA at a crime scene. Tertiary transfer is where [A] touches a surface, [B] then touches that surface and transfers [A's] DNA... This may seem improbable but with techniques this sensitive the real risk of contamination is currently unexplored.

He called for the possibility of "contamination" to be properly examined by scientists before LCN DNA is brought before the courts.

The accuracy of DNA profiling techniques also came under the spotlight when the DNA database gave a burglary squad in Bolton the name Brian Easton. He was charged four months later, with the police refusing to accept that the database could have made a mistake (see *Statewatch* vol 10 no 1). In a retest demanded by his solicitor a more sophisticated analysis technique ruled him out. The FSS said that the case demonstrated that the database is as useful for eliminating suspects as for tracking them down.

Civil liberties concerns “misplaced” says PM

Tony Blair has stated that civil liberties concerns over DNA are “misplaced” (and happily volunteered a sample for the watching media). The nothing to fear, nothing to hide argument, the standard justification for invasions of privacy, was used in the media.

A Home Office scheme which introduced voluntary DNA testing for police officers provides more enlightened comment. Launched in February at a cost of £3 million the programme invited all police officers to give a sample in order to rule out contamination of crime scenes from clothing, skin particles and hair. So far, 40,000 have provided a sample. The Home Office says it is confident of meeting the 75,000 target by next April.

In the Gloucestershire police force 700 officers have been tested and 30 have refused. Three of those who refused, all detective sergeants, have been forced to take desk jobs. They refused for “personal reasons” and are now seeking legal advice with the backing of the Gloucestershire Police Federation. Its Chairman said that taking sanctions against officers for not participating in a voluntary scheme was a likely breach of their human rights. Gloucestershire police argue that they are protecting the public by protecting investigations from contamination.

The bigger picture

Beyond law enforcement, DNA technology is synonymous with biotechnology and medicine - the achievements of the human genome project and concerns over cloning and genetic engineering for example. This has seen DNA broadly embraced, at least in the UK, as another ‘silver bullet’ of technology. In civil matters, recent Child Support Agency legislation requires all alleged runaway fathers to submit to a DNA test. Failure to do so is tantamount in law to an admission of guilt. Asylum-seekers are being tested in relation to family reunification based applications. Health and life insurance companies are to begin DNA testing clients in order to assess the cost of their premiums. And organisations such as the *Medical Research Council* in the UK and *The Gene Trust* (run by *DNA Solutions, Inc.*) in the USA are setting up databases for medical purposes.

The European dimension

A 1997 EU Resolution on the exchange of DNA analysis results was the first formal call for a European database. However progress has slowed somewhat due to some EU member states reluctance to accept binding commitments to participate. This is perhaps not surprising, some member states only allow DNA testing in connection with very serious criminal offences and do not yet even have a national database. Nonetheless, the EU has pushed DNA cooperation, both politically and practically.

European forensic scientists first began cooperating on DNA profiling informally in 1988 - with the creation of the European DNA Profiling Group. EDNAP’s role was semi-formalised when it was subsumed into the *European Network of Forensic Science Institutes* (ENFSI). It also meets under the aegis of the EU’s *Police Cooperation Working Party*. In 1998 the European Commission funded ENFSI to work on harmonising profiling techniques in the member states under the EU’s STOP budget (created in 1996 by a Joint Action to fund law enforcement cooperation to combat trafficking in human beings and the sexual exploitation of children). Seven DNA “markers” have been identified and agreement on their use in national criminal justice frameworks will now be formalised. The proposals on exchanging results have not been so easy to agree.

The draft EU Resolution on the standardisation of DNA technology and exchange of results is the third to be proposed. It was originally drafted as an EU Framework Decision which would have made the obligations it placed on member states legally-binding. As a non-binding Resolution, those Member States which wish to begin exchanging profiles can begin doing so ahead of the others.

First drafted under the Finnish presidency in 1999, the original Framework Decision “urged Member States to establish national DNA databases”, again called for the establishment of a European database and would have obliged member states to apply the harmonised DNA “markers” in their criminal justice systems within a year of adopting the decision. These provisions do not appear in the current proposed Resolution, but a number of areas of concern remain.

Data protection and legal safeguards

Astonishingly, the “legal safeguards” were withdrawn from the current Resolution on the table. There is no reference even to the inadequate safeguards in the 1997 DNA Resolution, despite the current proposal allowing member states to begin exchanging profiles. Consequently, there is a real risk that profiles will be copied onto other national databases and subsequently exchanged with other national databases, third states or international organisations in the absence of data protection rules. This means no effective guarantee for the individual to be able to gain access to their file or legally challenge the use of the profile; no enforceable rules concerning the expiry, correction or deletion of files; no rules on jurisdiction over complaints or damages; and no principles governing independent data protection supervisory bodies.

It was noted earlier that the UK holds thousands of individuals DNA profiles illegally. Also missing from the current proposal are provisions to ensure access to the use of DNA evidence if relevant to the defence in a criminal trial, or to a challenge to an earlier conviction (as in Weir). Again, in respect to the UK, there is the possibility that illegally held samples could be exchanged in the absence of legal safeguards or supervision.

No limitation of offences or on use of DNA evidence

Both the 1997 Resolution and the current proposal refer only to the use of DNA evidence in “the investigation of crime”, with no reference to a limitation of circumstances for which people can have their DNA taken (as there is in most EU member states).

This certainly suits the UK - one of the countries openly pushing hard for a European database. According to a Home Office Explanatory Memorandum on the proposed Resolution:

The UK's Forensic Science Service leads the field in DNA analysis, and we wish to encourage other Member States, and eventually, those beyond the European Economic Area, to follow our lead.

Where EU harmonisation concerns peoples rights, it is usually the lowest common denominator (the lowest judicial standards among the member states) that is agreed. However, it seems that when it comes to law enforcement powers, it is the highest common denominator that is required.

Guardian, 1.8.00, 2.9.00, 27.10.00; Times, 16.6.00, 1.9.00; Independent, 28.9.00; Police Review 25.2.00, 14.7.00; “Under the microscope”, report for Her Majesty's Inspector of Constabulary, July 2000; “Private Matters”, Simon Davies, Index on Censorship no. 3, 2000; “Draft framework decision on the exchange of DNA analysis results”, 11634/99, Limité, Enfopol 65, 7.10.99; “Draft framework decision on the standardisation of DNA technology and the exchange of DNA analysis results”, 11634/1/99, Limité, Enfopol 65 rev 1, 9.12.99; “Draft Council resolution on the standardisation of DNA technology and the exchange of DNA analysis results”, 8937/00, Limité, Enfopol 36, 29.5.00; Home Office Explanatory Memorandum on Enfopol 36, 21.7.00.

Statewatch Bulletin, Vol 10 no 5, September - October 2000

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