"The establishment of a DNA database"

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Introduction

The technology of DNA profiling was developed as a result of an unexpected discovery by Professor Sir Alec Jeffreys and his colleagues, in the 1980's. That DNA profiling has introduced a radical shift in favour of effective crime detection is beyond argument.

It was in April 1995 that the first national criminal DNA database was established in the United Kingdom. New Zealand became the second country in the world to have a national DNA Databank. And in Canada a national DNA Databank commenced operations in June 2000. As the LRC notes in its Report the majority of European countries either have, or are establishing, DNA databases.

It seems to me that the case for such a database is coercive. The only issue that remains to be addressed is what limits, if any, should be imposed on the use of that database and the retention of DNA samples and profiles.

The policy considerations

It is clear from the LRC Report that the two primary concerns – of a legal nature – relating to DNA samples and profiles engage the right to bodily integrity and arguably the right to privacy.

The former, it seems to me is concerned solely and exclusively with the process of the taking of the DNA sample. I do not believe that anyone can seriously challenge the necessity for a proportionate approach to the taking of DNA samples. Provided that the sample is taken in the way least invasive of the right to bodily integrity it is not, in principle, objectionable. In this regard it is to be noted that Section 13(c) of the Criminal Justice Bill, 2004 permits the Minister to make provision for the manner of taking a sample. This section is to enable the prescribing of safeguards. In this context I note, with approval, the recommendation of the LRC (page 2.31) of the safeguards proposed by the Irish Human Rights Commission.

It seems to me that the real area of debate revolves around the issue of privacy. Thus in respect of what classes of persons and at what duration should DNA samples and profiles be destroyed. As the LRC notes (at paragraph 2.54) the indefinite detention of a suspect's profiles on DNA databases is the exception rather than the norm. Most European countries require the removal of DNA profiles upon an acquittal or the dropping of charges. In favour of a limited period for retention – in respect of that class of persons – is the evidence of the Scottish experience. This demonstrates that within a window period of approximately 7-12 months (when DNA profiles of suspects were stored) considerable beneficial use has been made of the database. Thus the Committee observes:

> "In the two and a half years from the beginning of 2002 to mid 2005, approximately 7,400 samples gathered from crime investigations in Scotland have been loaded onto the database and approximately 4,900 have matched the person on the database. This represents a match rate of over 60%."

While this statistic is undoubtedly interesting what it does not address is whether the match rate would have been higher if the period of retention was longer or of indefinite duration. We are, of necessity, left to speculate in relation to the Scottish experience.

But does a privacy law dictate a limited power of retention?

Privacy

In *R(S) –v- Chief Constable* the House of Lords rejected the proposition that the retention of finger prints, DNA samples and DNA profiles under UK legislation engaged the right of privacy under Article 8(1) of the European Convention on Human Rights. I have no doubt that this approach was informed by the utility of DNA evidence in prosecutions.

Lord Steyn (giving the majority judgment) outlined the value of such real evidence when he observed as follows:

IV The value of such real evidence

> (7) The value of retained finger prints and samples taken from suspects who are subsequently acquitted is considerable. This is graphically illustrated by a real case which has been referred to as "T". In 1999 a rape and robbery took place. The

perpetrator was not known to the victim. DNA was recovered from semen on the victim. A search of the National Database showed that the DNA matched that of "I". The sample should have been destroyed. It was not. Following the decision in the House of Lords in (AG's Ref) the prosecution went ahead. "I" pleaded guilty to rape and was sentenced to a term of 7 years (subsequently reviewed and appealed to 6 years) in a young offender's institution. But for the wrongly detained sample the offender might have escaped detention to possibly commit other serious crimes."

Other evidence relied upon by Lord Steyn is equally persuasive. Home Office statistics show that the actual detection rate of domestic burglary is only 14% but when DNA is successfully recovered from a crime scene this rises to 48%. In fairness Baroness Hale did not agree with the conclusion of Lord Steyn and set out a strong case to support the right of privacy being affected by the retention of DNA samples and profiles.

But the House of Lords is not on its own in rejecting the proposition that one's right to a private life (under Article 8(1) of the ECHR) is properly engaged in relation to the retention of DNA samples and profiles. The European Commission of Human Rights in *McVeigh –v- UK* has observed that it is open to question whether the retention of fingerprints, photographs and records amounts to an interference with the right to respect for private life. This reasoning should encompass DNA samples and profiles.

Until the European Court of Human Rights decides this issue the debate will on the relevance of privacy will continue to rage!

But how is there a breach of the right to private and family life?

The DNA sample or profile is <u>not</u> available for general publication. It cannot be inspected by members of the public. It can only be used for limited and prescribed purposes and in respect of most of those purposes inspection of the individual DNA sample is carried out at a rapid pace. One would have thought that the examination of a DNA profile on the database only occurs when there is a match made. It is difficult to see a sustainable proposition being advanced that the mere fact of retention – during which it is subject to the intermittent process of a review – is a breach of one's private life.

The obligation of destruction

The LRC has postulated the view that a suspect's DNA sample and profile must be destroyed.

A) 12 months from when the sample was taken and when proceedings have not been instituted against the suspect or,

B) when proceedings have been instituted and the person has been acquitted or discharged or the proceedings have been discontinued.

The LRC has also recommended that the Courts be given a jurisdiction to permit of the retention of such DNA profile and sample if and where there is good reason for its retention. Such orders can be made on the application of either the DPP or the person from whom the sample was taken.

I agree that the use of the DNA sample must be constrained. It is essential that there is a statutory prohibition (if necessary backed up by a criminal sanction) to prevent improper use being made of the sample. That is best way to achieve the balancing of interests.

I have already adverted to my doubts as to the invasion of any privacy rights. But once the improper use of the DNA sample is precluded (and periodic review of the efficiency of that constraint should be carried out) is there any real justification for limits on the categories and the duration of the preservation of DNA samples and profiles?

That ultimately is a matter for the Houses of the Oireachtas and the Minister.

However, in reaching a conclusion in this regard I believe the experience in the UK is instructive. The UK, through its Criminal Justice and Police Act 2001, removed the obligation to destroy DNA samples and profiles where there was no prosecution or where there was an acquittal. Instead the Chief Constable was given a power – that was discretionary in nature – to preserve the sample and profile. It is interesting to look at the

practical consequences of this change of the law in 2001. As the Law Reform Commission notes (paragraph 2.63) of the cohort of profiles that would have been deleted – under the old law – a significant number of them have subsequently been matched with crime scene profiles. The UK and National DNA Database Annual Report 2003/2004 notes that of the 128,517 profiles that would have been removed from the database before the legislative amendments in 2001 some 5,922 have subsequently been matched with crime scene profiles from over 6,280 offences. These include 53 murders, 33 attempted murders, 94 rapes, 38 sexual offences, 63 aggravated burglaries and 56 offences for the supply of controlled drugs. It seems clear that the retention of suspect's samples on the UK's National Database has improved its effectiveness.

Given the absence of a judicial statement confirming that the retention of the DNA sample and profile is conduct that engages the right to privacy it strikes me that the Houses of the Oireachtas would have a large measure of discretion in reviewing our existing law. I have no doubt they will consider "the triangulation of interests" and thus take account of the interests of the victim, the accused and the public.

Conclusion

I commend the Law Reform Commission on its Report. I want to express my gratitude and that of the Government to it for its industry. I have no doubt that the Houses of the Oireachtas will benefit significantly from the Law Reform Commission's detailed analysis of the relevant legal principles in the Report and the mass of information it contains and that is so important to the Houses making an informed view of our laws.

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