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Keeping Information on Police Databases

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Keith Soothill and Brian Francis write on confronting a dilemma

The consultation period for the Home Office's controversial proposals for keeping innocent people on the DNA database has recently ended (see, Keeping the Right People on the DNA Database: Science and Public Protection). It is difficult to hazard a guess as to the Government's likely reaction to the large number of responses that have been made. Certainly there is no doubt that the Government is in a serious dilemma which stemmed from the judgment of the European Court of Human Rights (ECtHR) delivered on December 4, 2008 (S and Marper v. The United Kingdom (App Nos.30562/04 and 30566/04)). The unanimous decision by 17 Judges produced the uncomfortable verdict that the blanket policy in England and Wales of retaining indefinitely the fingerprints and DNA of all people who had been arrested but not convicted was in breach of art.8 of the European Convention of Human Rights. While the court did concede that the retention of the fingerprint and DNA data "pursues the legitimate purpose of the detection, and therefore, prevention of crime", the question still remains whether the Home Office proposals have seriously addressed the ECtHR's concerns. Beatson J, in a very pertinent valedictory address as President of the British Academy of Forensic Science, given on June 16, 2009 at the Inner Temple, suggests that there is much more research to do. Our own concerns have focused more specifically on the scientific claims supposedly underpinning the proposals.

Retention of Convicted Criminals on Databases

We saw the issue as primarily concerned with how long innocent people should be adjudged as "honorary" criminals, that is, being dealt with as more akin to criminals than upright citizens. Hence, we did not comment on the proposed indefinite retention of the DNA profiles and fingerprints of adult convicted criminals. However, we have been fascinated that the debate has not overlapped with the topical issue of the value of retention of old conviction records for individuals who have been conviction free for a considerable period. In November 2007, the Information Commissioner's Office (ICO) ordered police forces to delete old criminal convictions from the Police National Computer (PNC) for four cases now aged over 40 where these convictions were for a single minor offence when the cases were under 20 and where there had been no further convictions since ("Police Told to Delete Old Criminal Conviction Records" — ICO Press Release, November 1, 2007). The concern of the ICO was that old conviction information is held contrary to the principles of the Data Protection Act because the information is no longer relevant and is excessive for policing purposes. This enforcement notice was appealed to the Information Tribunal by the relevant police authorities. This appeal was lost (Information Tribunal Decision on Appeal Numbers EA/2007/0096, 98, 99, 108, 127, July 21, 2008) and the case at the moment is with the Court of Appeal whose decision is due in the autumn.

The problem for the Court of Appeal is in many ways parallel to the DNA database issue for convicted offenders where it is reasonable to ask the question as to what stage is the likelihood of an offender committing a future offence the same as a non-offender. In both scenarios is it reasonable to maintain a person's record on the PNC or on a DNA database when a person's chances of re-offending are the same as a citizen who has not been convicted?

Our own work (Soothill K. and Francis, B. (2009) "When do Ex-Offenders Become Like Non-Offenders?", The Howard Journal of Criminal Justice, Vol.48, Issue 4, 373-387) has shown that it is possible to identify empirically the time when the risk of an offender being convicted again of a crime is for all practical purposes the same as that of a comparable non-offender in terms of age and sex. If convicted offenders are kept on databases beyond the time when their conviction rates are the same as the non-offending population, questions of proportionality must arise. In other words, they are then being treated differently from members of the general population when, in reality, their risk of reconviction is the same. So, if there are guidelines being developed, it would perhaps be helpful to ask in what ways are the concerns being raised by ECtHR about the DNA database and the Information Commissioners about the retention of criminal records the same and in which ways are they different. In short, even for convicted offenders, the question should be raised as to when their records should be deleted from the DNA database.

We need to recognize that some safeguards may be necessary. Perhaps there are some offences which are so obnoxious or potentially harmful that we should never countenance their obliteration. But many of these are already covered by other legislation and practices. So, for example, sex offenders are subject to the sex offenders' registration scheme; those who murder are on licence for life. Perhaps there are other types of offences, even when committed as a

young person, which need to be administratively tagged in some way, but the onus should be on those who wish to do so to show that they are predictive of future criminality or that knowledge of the crime needs to be retained for some reason. However for the rest — that is, records for the vast majority of offending behaviour of youths and young persons who manage a sizeable crime-free period — they can be safely expunged. Of course, that was the rationale of the Rehabilitation of Offenders Act 1975 but, sadly, the spirit of that Act is currently being eroded. We need to remember that the greatest protection of the public is when ex-offenders become like non-offenders and we also need to be more welcoming when that transition happens.

On June 22, Alan Johnson, the Home Secretary, announced a review of the retention of police records. According to The Guardian journalist Alan Travis, he has hinted that he would support the deletion of ancient criminal records of under 18s which are no longer relevant. Any new policy will await the Court of Appeal decision.

Retention on Databases

Keeping those arrested but not found guilty on the DNA database raises the stakes in terms of trying to achieve a framework that achieves a proportionate balance between the rights of the individual and protection of the public. So what is a proportionate retention policy for these innocent people?

The consultation document distinguished between those arrested but not convicted for crimes other than for violent, sexual or terrorism-related offences, on the one hand, and those arrested but not convicted for such crimes, on the other. The Home Office selected retention periods of six years and 12 years respectively for these two groups “based on the likelihood of people who have been arrested and not convicted but who may go on to commit an offence.”

We had certainly expected that the argument for retaining those arrested for more serious offences for a longer period would be on the basis of a greater likelihood of committing a more serious offence, not simply the likelihood of committing any crime. The latter seems a curious logic.

The notion of “arrest” is the criterion used for retaining innocent people on the database. The argument is that arrestees who are not convicted have the same level of subsequent criminality as those where guilt is admitted or proved. The Home Office rests its case for a six-year retention period on the argument that by this point around one-half of the crime that is going to be committed will be committed, claiming that this provides a reasonable basis for a six-year retention period for all those arrested but not convicted of crime. Unfortunately, we believe that the counting procedure on which this proposal is based is wrong.

Their calculation is based on the residual number of offences from "first official process" (p.32). While this “first official process” is not clear (ie, is it an arrest or a conviction?), the author (Ken Pease) is looking at the percentage of crime left after a certain number of years from first official process. But this is not how a retention period could possibly work. In brief, DNA information would not be deleted after a certain number of years from first arrest, but from their last arrest. If an adult has another arrest, then the clock is restarted. DNA information would only be deleted after a certain number of crime-free years and the first arrest is not relevant if there is a subsequent arrest or conviction. By calculating crimes from the last arrest, this shortens the retention period that is necessary to meet the criterion used. The work has not been done to calculate exactly how much the retention period would need to be shortened to meet the criterion that the Home Office has set itself, but the present calculations are misleading.

Grappling With Serious Offences

The Home Office is in even more difficulty with the proposed 12-year retention period for those alleged to have committed more serious offences. The consultation document can say no more than that such people have a heightened chance of committing (or at least of being arrested for) any sort of crime than the general population. Our contention is both that the Home Office could have done more to probe this issue and needs to do more in the future. As a start, for instance, one of us (KS) showed nearly 30 years ago (Soothill, K. Way, C. and Gibbens, T.C.N. (1980) “Rape Acquittals”, Modern Law Review, 43(2), 159-172) that the subsequent criminal profiles of those acquitted of rape are almost identical to the subsequent criminal profile of those convicted of rape — in fact, a greater proportion of the former had subsequent violent convictions. However, there is no recourse to this kind of evidence.

In short, our contention is that one can say much more about the likelihood of future serious crime than they do. So, for example, we have found that five out of every 100 kidnapping offenders will be reconvicted for this offence within 20 years (Liu, J, Francis, B. and Soothill, K. (2008) “Kidnapping Offenders: Their Risk of Escalation to Repeat Offending and Other Serious Crime”, Journal of Forensic Psychiatry and Psychology, 19, 2, pp.164-179). However, the greatest danger comes in the early years after their first kidnapping conviction.

So, to conclude. As Pease points out, “the S & Marper judgment casts the retention issue as one of balance between the principles of individual privacy and public protection” (p.37). We believe that a more appropriate analysis is needed to justify a retention period of six years. Secondly, if one is making a case for longer retention periods for those arrested for serious offences, then the only reason for them to be treated differently is that they have a greater risk of a serious offence. In contrast to the consultation document, we believe that one can measure a heightened risk of a subsequent serious offence, and it should be only on this basis that one moves forward with a longer retention period.

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