

Session Two (i)

– Reminder: Benefits and Risks in Exchanging Forensic Bioinformation Between CJ Systems

- Benefits

- more effective investigation of crime, support to justice and public protection through detection and possible deterrence.

- Risks

- for individuals, that sensitive information is inappropriately shared with adverse outcomes.
- for institutional actors, that public confidence is jeopardised by failure to share, act, secure, or govern



Session Two (i)

Key issues:

- agility/sensitivity/fragility?
- Vulnerability of policing and other priorities to 'urgent' political matters?
- Very crowded operational and deliberative spaces?



The
Nuffield
Foundation

Session Two (ii)

- **What recent and ongoing reports/ judgements/ other deliberations are relevant to today's discussion?**

- **Recent and Ongoing Deliberations in UK**

- Nuffield Council on Bioethics (2007) The Forensic Use of Bioinformation: Ethical Issues
- UK House of Lords European Union Committee (2007) Prüm: An Effective Weapon Against Terrorism & Crime?
- Thomas & Walport (2008) Data Sharing Review Report to Ministry of Justice
- Magee (2008) Review of Criminality Information.
- Home Office (2009) Keeping the Right People on the DNA Database: Science and Public Protection.
- Forthcoming Human Genetics Commission Report on Forensic Use of Genetic Information?
- Forthcoming White Paper on Forensic Science?
- Others?



Session Two (ii)

- What recent and ongoing reports/ judgements/ other deliberations are relevant to today's discussion?

- **Recent and Ongoing Deliberations in Continental Europe and Beyond?**

- European Court of Human Rights, Grand Chamber (2008) Judgement in case of S & Marper vs. the United Kingdom
- Council of EU Framework Decision on the protection of personal data in the field of police and judicial cooperation in criminal matters (2008)
- Canadian Parliamentary 5 Year Review of DNA Legislation (ongoing)
- Others – European? National?



Session Two (iii)

– What background ambitions and considerations inform current deliberations in Europe?

- Security and Public Protection Priorities
 - Strengthening the EU as an area of freedom, security and justice
 - Formalising the exchange of information between police authorities – an ongoing process since at least 1995 with Schengen.
 - Hague Principle of Availability [**see separate slide**]
 - Prüm characterised as ‘a partial implementation of the principle of availability’
- Human Rights Priorities
 - Dignity, Liberty, Autonomy, Integrity
 - Privacy
 - Equality
 - Data Protection
 - Freedom of Information
 - ‘Right to good administration’?



The Hague Principle of Availability

- Throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State.



The Hague Principle of Availability

– Conditions for exchange include:

- the exchange may only take place in order that legal tasks may be performed;
- the integrity of the data to be exchanged must be guaranteed;
- the need to protect sources of information and to secure the confidentiality of the data at all stages of the exchange, and subsequently;
- common standards for access to the data and common technical standards must be applied;
- supervision of respect for data protection, and appropriate control prior to and after the exchange must be ensured;
- individuals must be protected from abuse of data and have the right to seek correction of incorrect data.



Session Two (iii)

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 - The new ‘Right to good administration’ [see next slide?]



Charter of Fundamental Rights

Article 41

Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
 - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken
 - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy
 - the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

Session Two (iii)

What National and International Instruments are invoked?

– Generic ‘Rights’ Instruments

- European Convention on Human Rights (1950) Council of Europe – 40 Nation States. [Article 8 on right to privacy]
- Charter of Fundamental Rights (2000) EU wide but not yet part of the EU Treaty. [Article 7 on right to privacy & Article 8 on right to protection of personal data and right of access/rectification]



Session Two (iii)

What National and International Instruments are invoked?

– Genetic Information (largely framed as ‘medical and research’)

- UNESCO Universal Declaration on Human Genome and Human Rights (1997) [Article 7 on necessity for confidentiality of human genetic data]
- UNESCO International Declaration on Human Genetic Data (2003) [Article 4 attributes ‘special status’ to genetic data & relevant samples; Article 14 on privacy & confidentiality]
- UNESCO Universal Declaration on Bioethics and Human Rights (2005) [Article 9 on privacy and confidentiality]



Session Two (iii)

– What National and International Instruments are invoked?

– Data protection legislation

- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 (the 'Data Protection Directive') Binds Member States who have an obligation to transpose it into domestic law. Breaches of the Directive can be challenged by the European commission are reviewable by the European Court of Justice.
- Council of EU Framework Decision on the protection of personal data in the field of police and judicial cooperation in criminal matters (2008) First general data protection instrument in third pillar



Session Two (iv)

- What themes recur in these various deliberations?
- Concerns about governance and governability (i)
 - Complexity/heterogeneity – of agencies, legislative frameworks, data types. Some existing agencies and some new ones. Various ‘partnerships’.
 - What terms of reference for what agencies? Where can they be found and interrogated?
 - What mechanisms allocate financial and staffing resources across a wide network of technologies and agencies? Is effectiveness compromised by lack of overall mechanisms?
 - Are there robust and well documented processes for data exchange
 - Are there robust and well documented processes for acting on the basis of matches and idents?



Session Two (v)

- Concerns about governance and governability (ii)

- Are regimes and their operation sufficiently transparent to relevant authorities and interested parties?

- What operational details need to be known to whom?
- What do data controllers need to do? How are ‘subject access requests’ managed in this context?
- What should be done to establish and promulgate a list of bodies with whom forensic bio-information can be shared internationally as well as nationally?



Session Two (v)

- How accountable are operational actors and to whom?

- Since transparency can be problematic in this context, how do we ensure a ‘strong culture of accountability and

scrutiny’ (Thomas & Walport)?

- What reporting lines, what co-ordinating and supervising committees, what inspectorates, what independent oversight mechanisms and bodies?
- What would focused, independent, long-running accountability look like?

- Concerns about proportionality of these measures to control crime



Session Two (vi)

– Three main features of the proportionality principle:

- The first balancing test requires a *balancing* between the *end* that a law or policy aims to achieve against the *means used* to achieve that end, including the impact on affected persons.
- A second *necessity* test posits that if a particular objective can be achieved by more than one means, the least harmful of those means should be adopted, that is, one that causes minimum harm to the individual or community.
- A third *suitability* test is sometimes used: this asks whether the means used are appropriate to the accomplishment of a particular aim.



Session Two (viii)

- Proportionality Issues in International Bioinformation Exchange [assuming that no participant in exchange network is currently acting disproportionately]
 - ‘Balancing Issues’ [public protection vs. impact on individual rights & freedoms]
 - » What public protection benefits can be shown?
 - » What rights issues are engaged?
 - » How are rights impacts minimised?
 - ‘Necessity Issues’ [are there alternatives that produce same benefit with less breaching]
 - » How much of what kinds of data have to be shared with whom over what period of time?
 - ‘Suitability Issues’ [are exchanges of this kind suitable for effective criminal investigation]
 - » Might other methods of exchange work better?



Session Two (ix)

– What next needs to be done to maximise benefits and minimise risks?

- Balance operational independence and flexibility against robust national and international governance?
- Control compliance costs by avoiding unnecessary governance overload?
- Oversight bodies?
- In UK, what about McGee's 'Commission for Public Protection Information'?
- In EU what role for European Data Protection Supervisor?

