Scottish Law Commission

DISCUSSION PAPER No 80

Evidence

Blood Group Tests, DNA Tests and Related Matters

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The Commission would be grateful if comments on this Discussion Paper were submitted by 28 February 1989. All correspondence should be addressed to:-

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NOTES

1. The period for submitting comments is shorter than normal because the Commission has been asked to deal with this subject as a matter of urgency.

2. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

3. Further copies of this Discussion Paper can be obtained, free of charge, from the above address.

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PART I - INTRODUCTION

The factual background

1.1 **Blood group tests.** It has been known for a long time that a person's blood has characteristics which distinguish it from the blood of many other people. The best known example is that blood may be of group O, A, B or AB, but many other blood grouping systems are now recognised. The genes responsible for the distinguishing characteristics of a person's blood are inherited from his or her parents in accordance with the known scientific laws of inheritance.

1.2 Blood group evidence may be used in various ways. In a criminal case, for example, tests may show that blood found at the scene of the crime could not have come from a particular suspect. Or tests may show that blood on the accused's clothing could have come from the victim of an assault but could not have come from the accused himself.

1.3 In civil cases the main value of blood group evidence is in paternity disputes. Where the blood of the mother, the child and the alleged father can be tested it may be possible to show that the child's blood has a characteristic which must have been inherited from his or her actual father but which could not have come from the man alleged to be the father. Because the genes responsible for some blood characteristics are inherited only from fathers (paternal genes) it is sometimes possible to exclude a particular man from paternity even if the mother's blood is not available for testing. Where the alleged father is not excluded from paternity, blood group evidence can give a positive indication

of the likelihood that he is the father. This will depend on the frequency of the genes in question in the pool of potential fathers. Questions as to whether a particular woman is the mother of a child arise less frequently, but may arise in, for example, immigration or succession cases. The scientific considerations are the same as in the case of paternity disputes. Blood group tests are now so sophisticated that it is claimed that they can exclude from parentage practically every wrongly named parent, and that almost every claimed parent who is not excluded by the tests, where the full range of tests is used, is the true parent of the child in question.[1]

1.4 The weight to be attached to blood group evidence in any case will depend on the state of scientific knowledge at the time and on such factors as the risk of samples having been given by the wrong person, the risk of contamination or confusion of samples, the qualifications of the testers, and the way in which the tests were carried out. In some criminal cases the material available for testing (eg blood stains on clothing) may be less than ideal. Where, however, blood group tests have been properly carried out on adequate, and adequately identified, samples expert evidence of the results has, for many years now, been accepted by the courts as being of great value.[2]

1.5 **DNA tests.** DNA profiling (sometimes called "DNA fingerprinting" or "genetic fingerprinting") is a technique developed in Britain which enables blood and certain other body tissues or

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[1] See the Home Office, DNA Profiling in Immigration Casework: Report of a pilot trial by the Home Office and Foreign and Commonwealth Office (1988) para 10.

[2] See eg S v S [1972] AC 24 per Lord Reid at p41; Docherty v McGlynn 1983 SLT 645 and 1985 SLT 237.

fluids to be identified in a very precise way. DNA (deoxyribonucleic acid) is genetic material found in all human nucleated cells. The new technique involves extracting the DNA from samples of blood or other appropriate body fluid or tissue (such as semen or hair roots) and subjecting it to scientific processes which eventually result in a visible pattern of bands, rather like the bar code found on certain mass produced goods. This is the DNA profile. A person's DNA profile is said to be as distinctive as his fingerprints - hence the colloquial term "DNA fingerprinting". The chances of two people (other than identical twins) having the same DNA profile are said to be extremely remote - one in many thousands of millions.

1.6 The bands in a person's DNA profile are inherited from his or her parents. About half the bands will come from the mother and about half from the father.[1] By comparing the DNA profiles of mother, child and alleged father an expert will be able to reach a conclusion as to whether the alleged man is or is not the child's father. The main difference from conventional blood group testing is that in many cases[2] a positive conclusion of paternity can be reached rather than a conclusion that the alleged father is not excluded and is one of so many men who could be the father.

1.7 A further technique, known as the "single locus probe" has

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[1] In some cases (perhaps about 1 in 10) a band is found in a child which is derived from neither the father nor the mother. In a few cases (less than 1 in 100) two such unascribable bands are found. See the Home Office Report, cited above, para 2.

[2] In some cases the paternal bands could have come from the alleged father or a close relative of his (eg his brother). See the Home Office Report, cited above, Annex A.

been developed for testing DNA.[1] This can be used on very small samples of material. In some cases it can provide information about parentage which cannot be provided by the normal DNA profiling tests.[2]

1.8 The ability of DNA testing to provide positive identification of a person from a sample of blood, semen[3] or other suitable body tissue or fluid means that it is of great potential value in criminal cases.[4] Its ability to provide evidence excluding or confirming parentage means that it is also of great potential value in civil cases where paternity or maternity is in doubt.[5] As in the case of blood group evidence, the weight to be given to evidence of DNA profiles in any case will depend on the state of scientific knowledge at the time and on such factors as the reliability and quality of the samples, and the way in which the tests were carried out. Such evidence has already been successfully used in a number of prosecutions in England and Wales.[6] In Scotland there has been one case in which the accused pled guilty to a charge of rape after a DNA test on stains from the victim's clothing had

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[1] Unlike the normal probes used in DNA profiling which show up simultaneously many locations in the DNA molecule the single locus probe examines only one location and reveals a pattern of two bands, one inherited from the mother and the other from the father.

[2] See the Home Office Report, cited above, paras 20-21.

[3] The DNA is actually in the sperm heads. So semen from a man who had had a vasectomy would be of no use for this purpose.

[4] See Rankin, "DNA Fingerprinting" 1988 JLSS 124; White, "DNA Profiling and Scots Law" 1988 SCOLAG 134.

[5] See Susskind and Eccles, "DNA Fingerprinting: Implications for Civil Proceedings" 1988 JLSS 324.

[6] See Rankin, "DNA Fingerprinting" 1988 JLSS 124.

identified him as the rapist.[1]

1.9 **Other forensic tests.** There are other forensic tests which may require the taking of samples or impressions from a person's body. For example, it may be important in a criminal case to analyse scrapings from under a suspect's fingernails,[2] or stains rubbed from his fingers,[3] or a dental impression.[4] Somewhat similar issues arise in relation to the taking of fingerprints, or hand or foot impressions.

The legal background

1.10 There is no legal difficulty in using evidence of blood groups or DNA profiles where such evidence is properly available. In practice this means that there is no difficulty where blood samples, or other suitable samples, have been provided voluntarily. The difficulties arise where consent to the taking of a sample is refused. The difficulties are less acute in criminal cases, because a court may grant a warrant for the taking of a sample[5] but even in criminal cases there are some points of doubt and difficulty relating to the taking of samples of blood or other matter from a person's body for the purpose of testing. We discuss these later. The difficulty in civil cases is that the courts, under the present law, will not order anyone to supply a sample of blood for the purposes of enabling evidence of the results of tests on that blood to be obtained.[6]

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1 H M Adv v Gilheaney (The Scotsman, 7 June 1988).
2 See eg McGovern v H M Adv 1950 JC 33.
3 See eg Bell v Hogg 1967 JC 49.
4 See eg Hay v H M Adv 1968 SLT 334.
5 H M Adv v Milford 1973 SLT 12.
6 Whitehall v Whitehall 1958 SC 252.

1.11 We have been aware for some time of the defects of Scots law in this area[1] but, rather than deal with isolated aspects of the problem in the course of other exercises, we thought it best to deal with all relevant aspects of it together.[2] Recent public concern about the non-availability of DNA profile evidence in actions for affiliation and aliment has made a consideration of this subject with a view to legislation a matter of high priority.[3]

Purpose and scope of Discussion Paper

1.12 The purpose of this discussion paper is to seek comments on possible changes in the law relating to the taking of blood or other matter from a person's body for the purpose of blood group tests, DNA profiling or other procedures designed to provide evidence for use in criminal or civil cases. We also consider the related matter of the taking of impressions (such as dental impressions) from a person's body for such purposes. The main

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[1] See the Research Paper on The Law of Evidence prepared for us by Sheriff Macphail (cited as "Macphail" in this paper) paras 13.02-13.06, 25.34 and 25.35 (1979, revised edn published by the Law Society of Scotland 1987.)

[2] See our Report on Illegitimacy (Scot Law Com No 82, 1984) para 6.14. We did, however, recommend in that Report a set of rules to deal with the problem of giving consent to the taking of a blood sample from a child or other person incapable of giving consent. Our recommendations, which were confined to blood samples for the purpose of obtaining evidence relating to the determination of parentage in civil proceedings, were implemented by section 6 of the Law Reform (Parent and Child)(Scotland) Act 1986.

[3] The concern was triggered by the case of Conlon v O'Dowd 1987 SCLR 771; 1988 SCLR 119. See para 3.4 below. This case gave rise to a great deal of comment in the press and to calls for reform of the law.

questions with which we are concerned are as follows. Should it ever be possible, and if so when, to take such samples or impressions without a court order? Should it be possible for a court to order or authorise such samples or impressions to be taken by force if need be? Alternatively or additionally, should it be possible for a court or, in criminal cases, a police officer to order or require a person to provide such samples or impressions? What should be the consequences of refusal to obey such an order or requirement? Should any new provisions be retrospective? As the answers are likely to be different for criminal and civil cases, we deal with these cases separately.

1.13 This paper is confined to issues of law reform. It is not concerned with administrative or financial matters, such as the setting up of a DNA testing centre in Scotland or the provision of legal aid for DNA testing.

PART II - CRIMINAL CASES

Present law

2.1 The present law on the taking of samples or impressions from the body of a suspected or accused person is almost wholly based on common law. In order to show how this has developed, and to reveal the difficulties in the present law, we shall set out the leading cases in chronological order. The starting point is that to go up to someone and extract blood from him or scrape skin from him, or scrape matter from under his fingernails, or take fingerprints or other impressions from his body, by force and without his consent, is an assault and consequently illegal unless authorised by law.[1] It does not necessarily follow that evidence obtained illegally will be inadmissible. The courts have a discretion, which is not exercised lightly, to admit evidence obtained illegally.[2] We are not concerned in this paper with the discretion to admit illegally obtained evidence. We are concerned with the circumstances in which the obtaining of evidence is legal.

2.2 The first case involving normal fingerprinting was the civil case of Adamson v Martin.[3] In that case the Inner House accepted that the police had no authority to take the fingerprints of a youth after he had been released from custody.

2.3 In Adair v McGarry[4] objection was taken to evidence of the accused's fingerprints which matched those found on some stolen bottles. It was argued that the police had taken the fingerprints without his consent, and that the police ought to have obtained a

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[1] Jackson v Stevenson (1897) 2 Adam 255; McGovern v H M Adv 1950 JC 33 at p36.

[2] Lawrie v Muir 1950 JC 19; McGovern v H M Adv 1950 JC 33.

[3] 1916 1 SLT 53.

[4] 1933 JC 72.

warrant before taking such evidence. The High Court (Lord Hunter dissenting) rejected this line of argument. The majority were of the opinion that a warrant was a mere formality and that "the suggested protection by way of warrant is quite illusory".[1] The earlier case of Adamson was distinguished because in Adair the accused had been under arrest at the time while in Adamson the pursuer had been released on bail. The court was also of the view that to deny the police power to take fingerprints would unduly hamper criminal detection. An argument that to force a man to have his fingerprints taken would mean that he was being compelled to supply evidence against himself was rejected since the taking of such evidence was "entirely passive ... he is not compelled to do anything requiring any exercise of his own will or control of his body".[2]

2.4 The case of Adair is one of a line of cases[3] which are taken as authority for the police to search any person whom they have lawfully arrested with or without warrant. The right to take fingerprints is regarded as being part of this right of search.

2.5 The next case which involved the extraction of real evidence from the person of the accused was McGovern v H M Adv.[4] In that case the accused came under suspicion while he was at the police station, although he had been neither arrested nor charged with the offence. The police took scrapings from underneath his fingernails. On appeal, the Crown conceded that such evidence had been improperly obtained since it had been obtained without consent, without a warrant and the accused had not been arrested.

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[1] LJC Alness at p80.

[2] Lord Sands at p89.

[3] Cf. Jackson v Stevenson (1897) 2 Adam 255; Bell v Leadbetter 1934 JC 74.

[4] 1950 JC 33.

2.6 The case of McGovern was distinguished in the case of Bell v Hogg.[1] In Bell v Hogg a police sergeant took blotting paper rubbings of the accuseds' hands while they were in custody under caution, suspected of stealing copper wire. On appeal, the accused argued that these rubbings of their hands had been illegally carried out since they were not under arrest at the time and they had not been informed of their right to refuse to submit to this procedure. The Court of Appeal dismissed the appeal and distinguished McGovern on two grounds. First of all, there was no question of urgency in McGovern whereas in Bell the accused could have washed the copper marks off their hands. Secondly, the police in McGovern had no knowledge as to whether the scrapings would yield any evidence of the suspect's connection with the offence.[2]

2.7 In Hay v H M Adv[3] a warrant was sought, prior to the arrest of the accused, for the taking of a dental impression. The application for the warrant was not intimated to the accused. Evidence of the dental impression was objected to during the course of the trial and the question of its admissibility was heard by the trial judge (Lord Justice-Clerk Grant) with Lord Walker and Lord Milligan. On appeal against conviction, the issue was debated before five judges. All eight judges who heard the case were of the opinion that the evidence had been quite properly obtained.

> "As regards the first and main issue in the appeal - namely the legality of the warrant - it has been observed in more than one of the cases...that two conflicting considerations arise. On the one hand, there is the need from the point of view of public interest for promptitude and facility in the identification of accused persons and

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[1] 1967 JC 49.

[2] LJC Clyde at p56.

[3] 1968 SLT 334.

the discovery on their persons or on their premises of indicia either of guilt or innocence. On the other hand, the liberty of the subject must be protected against any undue or unnecessary invasion of it."

"In the circumstances of the present case the obtaining of the warrant prior to the examination in question in our opinion rendered the examination quite legal, and the evidence which resulted from it was therefore competent."[1]

2.8 There are two reported Scottish cases on the taking of blood samples from an accused. In H M Adv v Milford[2] the procurator fiscal petitioned the sheriff for a warrant to take a blood sample from a man who had been arrested on a charge of rape. The man had been asked to give a blood sample but had refused to do so. Sheriff Macphail granted the warrant because he was of the view that the seriousness of the offence and the importance of the police investigation outweighed the argument that an invasion of bodily integrity was involved. Sheriff Macphail stressed, as did the court in Hay, that a warrant of this nature would only be granted in exceptional cases. Milford differs from Hay in that the petition was intimated to the accused and the accused was in custody although he had not been served with an indictment. In the later case of Wilson v Milne,[3] a similar warrant was granted by the sheriff. The accused presented a bill of suspension. In rejecting the bill, Lord Justice-General Emslie acknowledged that the terms of the warrant ought to be carefully considered prior to it being granted.

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1 1968 SLT 334 at pp336 and 337.

2 1973 SLT 12.

3 1975 SLT (Notes) 26.

4 [1984] SCCR 119.

2.9 A problem of a different kind arose in Smith v Innes.[4] Here a warrant had been granted to the procurator fiscal to take fingerprints from a man in prison. This warrant, which had not been intimated to the accused, was granted by the sheriff even though the accused had already pled not guilty to the offence and had been remanded in custody. Objection was later taken to the evidence obtained by the warrant. Sheriff Cox upheld the arguments of the defence and admitted that he ought not to have granted the warrant. He considered that once the accused had been committed for trial the police had no general powers to take fingerprints. Referring to previous cases, he said:[1]

> "They are not an authority for the proposition advanced here by the appellant that it is in order to charge a person with a crime and once he has pled not guilty and is remanded in custody to await his trial, to require from him, by means of a warrant, a sample of his fingerprints for production at the trial as an essential link in a chain of evidence without which there could be no conviction. To hold otherwise is to breach our established tradition that a man cannot be forced to provide evidence against himself once he has been charged with a criminal offence."
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> "After committal the accused person is subject to the protection of the court and can only be approached with a view to obtaining evidence from him by means of a warrant. HMA v Milford is the only reported case of such a warrant after committal. It is distinguishable from the present case and is noteworthy for the anxious consideration which the sheriff gave to it."

2.10 If one imagines a police investigation from start to finish, it seems, on the basis of the above cases, that the common law powers of the police to take evidence from the body of the accused without his consent are as follows. At the initial stage of investigation before the suspect has been arrested, the police have no general powers to take samples or impressions,[2] unless they

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[1] At p123.

[2] Adamson v Martin 1916 1 SLT 53; McGovern v H M Adv 1950 JC 33.

obtain a warrant[1] or (possibly) the matter is one of urgency.[2] It is not easy to envisage a case where it would be a matter of urgency to take a sample of a suspect's own blood or other body fluid or tissue. Once a person has been arrested, the police may take fingerprints[3] and, probably, scrapings from underneath his fingernails[4] from him without a warrant. With regard to samples of blood and other body fluids or tissues, a warrant would be required,[5] the argument being that the ordinary powers to search and fingerprint an arrested person

> "do not extend to the invasion of or removal of any part of the person's body. The taking of blood samples, dental impressions and all searches which involve invasion of the body or removal of any part of it, such as hair or nail-clippings, should ordinarily be previously authorised by a warrant granted by a sheriff upon the application of the procurator fiscal."[6]

Once the accused has been committed for trial, a warrant would be required for the taking of samples or impressions, and, if Smith v Innes were followed, would not normally be granted.

2.11 **Statutory provisions.** The provisions in the Road Traffic Act 1972 on the furnishing of samples of breath, blood or urine in

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1 Hay v H M Adv 1968 SLT 334.

2 Bell v Hogg 1967 JC 49. This case concerned mere blotting paper rubbings of the suspects' hands. It is by no means clear that it would cover more invasive techniques.

3 Adair v McGarry 1933 JC 72.

4 This seems to have been accepted in McGovern v H M Adv (on the analogy of a simple search of the person) but was not a matter of express decision as the accused had not been arrested.

5 H M Adv v Milford 1973 SLT 12; Wilson v Milne 1975 SLT (Notes) 26.

6 Macphail, para 25.32.

relation to an offence under sections 5 and 6 of the Act (driving when under the influence of drink or drugs) do not authorise the taking of samples by force. In the case of breath tests the Act authorises a constable, in specified circumstances, to require the suspected person to provide two specimens of breath.[1] A person who refuses, without reasonable cause, to do so is guilty of an offence.[2] In addition the Act makes it an offence for a person arrested on suspicion of driving under the influence of drink or drugs to refuse, without reasonable cause, to provide a specimen of blood or urine for laboratory tests when he had been duly required by a constable to do so, in certain prescribed circumstances and with the observance of certain prescribed formalities.[3]

2.12 While the provisions in the Road Traffic Act are of interest it does not follow that they would be suitable for more general use. The samples are required, not for identification purposes, but to prove one of the main ingredients of an offence under sections 5 and 6. In the case of serious crimes where there is a strong public interest in the correct identification of the offender the arguments for a warrant to take a sample (by force if need be) may well be stronger.

2.13 The Criminal Justice (Scotland) Act 1980 gives the police power to detain suspects, without arrest, for up to six hours. Section 2(5) of the Act provides that where a person is detained under these provisions a constable may exercise the same powers of search as are available following an arrest and may

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[1] S8(1) and (2).

[2] S8(7).

[3] S8(1)(b), (3), (4), (5) and (7).

> "take fingerprints, palmprints and such other prints and impressions as the constable may, having regard to the circumstances of the suspected offence, reasonably consider appropriate".[1]

Section 2(6) provides that a constable may use reasonable force in exercising these powers to search and take prints or impressions.

2.14 There are various specific statutory powers of personal search.[2] For example, section 60(1) of the Civic Government (Scotland) Act 1982 provides that, if a constable has reasonable grounds to suspect that a person is in possession of any stolen property, he may without warrant

> "search that person or anything in his possession, and detain him for as long as is necessary for the purpose of that search".[3]

He may use reasonable force for this purpose and may seize and detain anything found in the course of the search which appears to have been stolen or to be evidence of the commission of the crime of theft.[4] Provisions of this type would not authorise the taking of samples of body fluid or tissue, but might well authorise the taking of scrapings from underneath the finger-nails. Such scrapings could be evidence of the commission of theft.

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[1] S2(5)(c). A proviso to this paragraph requires the record of prints or impressions taken under it to be destroyed immediately after a decision not to take proceedings against the person or on the acquittal of the accused.

[2] See eg the Deer (Scotland) Act 1959 s27; the Firearms Act 1968 s47; the Misuse of Drugs Act 1971 s23(2); the Customs and Excise Management Act 1979 s164; the Wildlife and Countryside Act 1981 s19; the Civic Government (Scotland) Act 1982 s60.

[3] S60(1)(a).

[4] S60(1)(d).

Criticisms of the present law

2.15 The law on the taking of samples and prints or impressions from the body of a person without his consent[1] for the purposes of obtaining evidence for use in criminal proceedings is less obviously defective than the corresponding law for civil proceedings. The rules on fingerprinting are well-established and, so far as we are aware, have not been subject to criticism. The rules on breath, blood and urine samples in the Road Traffic Act 1972 carefully balance the public interest against the interests of the accused. For other purposes a warrant for the taking of a sample or impression can be obtained. It may well be that the present law is generally regarded as satisfactory. This is something on which we would welcome views.

2.16 One possible criticism of the present law is that it is not entirely clear when a warrant is required to take a sample of fluid or tissue, or a print or impression, from the body of an arrested person without his consent. Fingerprints apart, there is a lack of clear authority on this point.

2.17 If the law is that, in the absence of consent, a warrant is required for the "taking of blood samples, dental impressions and all searches which involve invasion of the body or removal of any part of it, such as hair or nail clippings"[2] a possible criticism is that this is too cumbersome and top-heavy in the case of "non-

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[1] So far as we are aware there is nothing in the present law to prevent a sample or impression being taken with the consent of the person concerned. It was only because consent was refused in H M Adv v Milford 1973 SLT 12 that a warrant had to be sought.

[2] Macphail, para 25.32.

intimate samples"[1] such as clippings from the hair on the head, or nail clippings, or saliva, or dental impressions.[2] It may be that the authority of a senior police officer should be sufficient for the taking, in accordance with prescribed procedures, of non-intimate samples from an arrested person. Any invasion of bodily integrity in such cases is little more than is involved in taking fingerprints and any protection afforded by the requirement of a warrant may be illusory.

2.18 It may be a criticism of the present law that certain procedural matters relating to applications for warrants to take samples of blood or other body fluids or matter are left unregulated.[3] It has been suggested that

> "the application could in appropriate circumstances be added to the normal application for a warrant to search and arrest, and that no intimation [to the defence] is necessary if the application is made prior to the accused's appearance on petition and committal for further examination. It seems at least very desirable, and in the interests of justice it is probably essential, that intimation should be made thereafter."[4]

The Thomson Committee considered that intimation of the application for a warrant should be made to the accused's solicitor in any case where the warrant is sought after the accused has

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[1] The term used for certain samples in the Police and Criminal Evidence Act 1984, ss62 to 65.

[2] We are informed that saliva (as opposed to a sample obtained by rubbing or scraping the gums) does not contain enough material suitable for DNA testing. However, a sample of saliva might occasionally be useful for other purposes (eg to indicate that the suspect had recently been breathing air filled with dust of a certain type).

[3] Macphail, para 25.34.

[4] Macphail, para 25.34.

been arrested, except where there is a risk that the evidence sought could be destroyed.[1] The Thomson Committee also thought that there should be no appeal from a sheriff's decision to grant or refuse a warrant.[2] Sheriff Macphail suggests, however, that as the matters at stake, in the case of a very serious crime, could be grave both for the accused and the public, an appeal ought to be possible.[3] We would welcome views on these matters.

Options for reform

2.19 In assessing the need for, and options for, reform we think that three important points need to be borne in mind. The first is that an innocent person has nothing to fear from the testing of a sample of blood or other body matter or from the taking of prints or impressions. Indeed the results of such tests may well prove his innocence. Secondly, any invasion of bodily integrity in the taking of samples of the type we are considering is minimal. This is not to say that the taking of samples from a person's body is a matter to be treated lightly. It is most certainly not. But it must be kept in perspective. Thirdly, any interference with the person involved in the taking of a sample or print or impression must be balanced against the public interest in the proper investigation and prosecution of crime and the interests of other citizens who might be falsely suspected or accused. The interests of the victim of the offence must also be taken into account - not only the interest in seeing the offender brought to justice but also the possible interest of the victim in the obtaining of compensation under a compensation order.

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[1] Criminal Appeals in Scotland (Third Report) (Cmnd 7005) para 18.05.

[2] Ibid, para 18.05. This would be without prejudice to the right of an accused to take a bill of suspension.

[3] Macphail, para 25.35.

2.20 We set out below what we see as the main options for reform. We would welcome other suggestions. We do not at this stage go into procedural detail, as that could cloud the main issues. We are assuming, however, that the procedures adopted in the taking of samples or impressions would comply with generally accepted and expected standards of fairness and respect for the dignity of each individual.

2.21 The first option would be to do nothing. The criticisms of the present law may be more theoretical than real. In practice it may work satisfactorily, and without unnecessary expense, delay and waste of police and judicial time. We would welcome views.

2.22 The second option would be to allow "non-intimate" samples (defined below) to be taken from an arrested or lawfully detained person, with the use of reasonable force if need be, on the authority of a senior police officer without the need for a warrant from a sheriff. A senior police officer could be taken to be one of at least the rank of chief inspector.[1] Alternatively, the officer in charge of the police station could be designated as the appropriate person to authorise the taking of samples.[2] Non-intimate samples might be defined, as in the Criminal Justice Act 1988, as

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[1] To require a higher rank of, say, superintendent might be impracticable in a rural setting, although this is the rank specified in the relevant English provisions. See Police and Criminal Evidence Act 1984, s63(3)(b).

[2] Cf. Criminal Procedure (Scotland) Act 1975, ss18, 294 and 295, as amended by sections 7 and 8 of the Bail etc (Scotland) Act 1980 (interim liberation by police).

"(a) a sample of hair other than pubic hair;

(b) a sample taken from a nail or from under a nail;

(c) a sample of saliva;

(d) a swab taken from a person's mouth;

(e) a swab taken from any other part of a person's body except a body orifice other than his mouth;

(f) a footprint or a similar impression of any part of a person's body other than a part of his hand".[1]

Fingerprinting would continue to be governed by the existing law. This option would bring Scotland into line with the other parts of the United Kingdom.[2] It is for consideration whether the power to give authority for the taking of a non-intimate sample should be confined to cases where the arrested or detained person is reasonably suspected of having been involved in a serious offence and, if so, how a serious offence should be defined in Scotland.[3] On one view there is no need for any such limitation to serious offences, given the nature of non-intimate samples. It should, however, be necessary for the officer to have reasonable grounds for suspecting the person's involvement in an offence and for believing that the sample will tend to confirm or disprove his

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[1] Sch 14. This is the definition for Northern Ireland. It differs from the corresponding definition for England and Wales in s65 of the Police and Criminal Evidence Act 1984 by including mouth swabs. In both Acts there are separate provisions on fingerprinting.

[2] See Police and Criminal Evidence Act 1984, s65 (England and Wales); Criminal Justice Act 1988, Sch 14, para 8 (Northern Ireland). These are referred to in the following notes as the "1984 Act" and "1988 Act".

[3] In England and Wales the power is confined to serious arrestable offences: 1984 Act s63(4). In Northern Ireland there is a list of offences to which the power applies: 1988 Act Sch 14, paras 1-5. Any definition of a "serious" offence is likely to present considerable difficulty.

involvement.[1] Again, we would welcome views.

2.23 In relation to blood samples, and other "intimate" samples, the present Scottish practice, initiated in H M Adv v Milford[2] and approved by the High Court in Wilson v Milne,[3] whereby, if consent is refused, a warrant for the taking of a sample can be obtained from a sheriff appears to achieve a satisfactory balance between the interests of the suspect and the interests of the public and the victim. The warrant is a warrant to "take" a sample and this must imply that reasonable force could be used if necessary.[4] In practice, it may be supposed, it would rarely be necessary to use force once the options had been clearly explained to the person concerned. The need for a court warrant rules out routine taking of samples and ensures that samples will only be taken without consent in cases where this is justified in the interests of justice.

2.24 An alternative approach is adopted in England and Wales and Northern Ireland. Instead of providing for a warrant to take a sample without consent the law enables adverse inferences to be drawn from a refusal without good cause to provide an "intimate sample" and provides that such a refusal may provide corroboration of any evidence against the person concerned in relation to which the refusal is material.[5] An intimate sample is defined in the most recent legislation as

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[1] See 1984 Act s65(4); 1988 Act, Sch 14, para 4.

[2] 1973 SLT 12.

[3] 1975 SLT (Notes) 26.

[4] In Milford the warrant authorised a named doctor to proceed to the prison "and to take from said Eric Milford such a sample of his blood as such doctor thinks reasonably necessary for the furtherance of said comparisons of blood groups".

[5] Police and Criminal Evidence Act 1984, s62.

> "a sample of blood, semen or any other tissue fluid, urine or pubic hair, or a swab taken from any of a person's body orifices except his mouth."[1]

Clearly, an option for reform in Scotland would be to rule out warrants for the taking of samples and to go over to a system of adverse inferences. We would, however, be reluctant to take such a step. We have as yet received no suggestions that this should be done and, at first sight, it would seem to be undesirable to substitute mere inference for hard evidence, particularly in the case of serious crimes. To adopt the English approach would run counter to two fundamental principles of our criminal law concerning the requirement of corroboration and the need for positive evidence against the accused in order to convict. In English law there is no general requirement of corroboration and therefore a direct comparison between the two systems cannot readily be made. In favour of the English approach, however, it could be argued that it obviates the use of force for the taking of a blood sample or other intimate sample. This, however, may be an advantage which is more theoretical than real as, in practice, a person presented with a warrant for the taking of a sample is likely to comply. Where an arrested person resists a lawful search or lawful fingerprinting then, regrettably, reasonable force may have to be used. Arguably, the same considerations apply to the lawful taking of a blood sample under a court warrant. Apart from differences in the degree of invasiveness (which will have been taken into account by the court in deciding whether to grant a warrant) the only difference which may be

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[1] Criminal Justice Act 1988, Sch 14, para 6(1). This is the definition for Northern Ireland. In England and Wales a sample taken from a person's mouth is included in the definition: Police and Criminal Evidence Act 1984, s65.

significant is that a doctor will be involved in the taking of a blood sample. We would be interested to know if this presents any difficulty. In the absence of any evidence that there is any difficulty we would see formidable obstacles in changing from the present Scottish system to a system of adverse inferences.

Questions for consideration

2.25 The questions on which we would welcome views are as follows.

Criminal cases

1. **Is the present law on the obtaining of samples or impressions from the body of a person for the purposes of evidence in criminal cases regarded as satisfactory in all respects?**

2.(a) **Should the law allow non-intimate samples to be taken from an arrested or lawfully detained person on the authority of a senior police officer without the need for a warrant from a sheriff? If so, how should a senior police officer be defined?**

(b) **Would the definition of "non-intimate sample" in paragraph 2.23 of this paper be satisfactory for this purpose?**

(c) **What restrictions, if any, should be placed on such a power to authorise the taking of a non-intimate sample?**

3. In relation to blood samples and other "intimate" samples should the present Scottish system whereby warrants must be obtained, and can be obtained, from a court for the taking of such samples be replaced by a system whereby such warrants could not be obtained but adverse inferences could be drawn from a refusal to consent to the taking of such a sample when requested to do so by a police officer?

4.(a) Is there a need to regulate the procedure for the obtaining of warrants for the taking of samples or impressions from a person's body?

(b) If so, are any particular rules suggested?

(c) Should there be a requirement that the application for such a warrant should be intimated to the accused, or made in the presence of the accused?

(d) Should an appeal be competent against the decision of a sheriff refusing or granting a warrant to take a sample or impression from a person's body?

5. Are there any other suggestions for improving the law relating to the obtaining of samples or impressions from a person's body for the purposes of evidence in criminal cases?

PART III - CIVIL CASES

Present law

3.1 The civil courts in Scotland have no power to order anyone to supply a sample of blood so as to enable evidence of tests on that blood to be obtained.[1] In Whitehall v Whitehall[2] the making of such an order was thought to constitute an unwarranted invasion of private rights. Even where samples have been obtained voluntarily, the courts were initially reluctant to accept the evidential value of such tests. In Imre v Mitchell,[3] an action for declarator of bastardy where the blood test evidence supported the pursuer's claim that the child was illegitimate, the Inner House reversed the Lord Ordinary's decision to grant the declarator on the ground that there was insufficient evidence to rebut the presumption of legitimacy. Since then, however, as social attitudes to illegitimacy have changed and blood testing has become more accurate and its use more widespread, the courts have shown themselves increasingly willing to rely on such evidence in reaching their decision.[4]

3.2 The use of blood or DNA testing in civil proceedings depends on the parties concerned giving their consent to samples being taken. Problems have arisen in the past[5] over who could give consent on behalf of a pupil, that is, a boy under 14 or a girl under 12. The matter is now resolved by section 6 of the Law Reform (Parent and Child)(Scotland) Act 1986 which deals with the

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[1] Whitehall v Whitehall 1958 SC 252. The same rule presumably applies in relation to samples of other bodily fluids or tissue.

[2] Supra at p259.

[3] 1958 SC 439.

[4] Docherty v McGlynn 1983 SLT 645 and 1985 SLT 237; Russell v Wood 1987 SCLR 207.

[5] See Docherty v McGlynn, supra.

question of consent, not only on behalf of a pupil, but on behalf of any person incapable of consenting himself. It is in the following terms:

> "6.--(1) This section applies where, for the purpose of obtaining evidence relating to the determination of parentage in civil proceedings, a blood sample is sought by a party to the proceedings or by a curator ad litem.
>
> (2) Where a blood sample is sought from a pupil child, consent to the taking of the sample may be given by his tutor or any person having custody or care and control of him.
>
> (3) Where a blood sample is sought from any person who is incapable of giving consent, the court may consent to the taking of the sample where -
>
> (a) there is no person who is entitled to give such consent, or
>
> (b) there is such a person, but it is not reasonably practicable to obtain his consent in the circumstances, or he is unwilling to accept the responsibility of giving or withholding consent.
>
> (4) The court shall not consent under subsection (3) above to the taking of a blood sample from any person unless the court is satisfied that the taking of the sample would not be detrimental to the person's health."

It may be that the court still retains an overriding power not to admit the evidence of a blood test if, in the case of a child, it is not in the child's interests to do so.[1] It is thought, however, that a court today would be unlikely to refuse such evidence simply on the ground that it might prove the child's illegitimacy.[2]

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[1] Ibid. It is difficult to see, however, what basis there could be for such a selective exclusion of relevant evidence.

[2] See further para 3.5 below.

3.3 Where a person refuses to provide a blood or other sample for testing, the question arises as to whether any adverse inference can be drawn from that refusal. Lord Cameron appeared to accept that possibility in Docherty v McGlynn[1] but cited no authority for the proposition. We are not aware of any case in which such an inference has been drawn.[2]

3.4 Much publicity has been generated recently about DNA profiling by the case of Conlon v O'Dowd.[3] In this action of affiliation and aliment, the sheriff found in favour of the pursuer and the defender was ordered to pay aliment in respect of her twin children. The question of DNA testing arose subsequently on appeal at which stage the sheriff principal refused, on procedural grounds, to allow the introduction of new evidence.[4] The issue of whether or not the court could order blood samples to be taken for testing was not considered in this case although the question did arise in Torrie v Turner[5] where the sheriff principal relied on Whitehall v Whitehall to hold that the court did not have such power.

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[1] 1983 SLT 645 at p650. See also Thomson, Family Law in Scotland (1987) p140; White, "DNA Profiling and Scots Law" 1988 SCOLAG 134 at p136.

[2] According to press reports the sheriff declined to draw any inference in Conlon v O'Dowd, where the pursuer was apparently unwilling to submit to blood tests. See following footnote.

[3] 1987 SCLR 771; 1988 SCLR 119. See, for example, press reports in the Glasgow Herald, 20 June 1988 and 30 June 1988 and in Scotland on Sunday, 14 August 1988.

[4] We understand that the parties subsequently agreed to submit to DNA testing which confirmed the sheriff's finding of paternity. See the Glasgow Herald, 25 October 1988.

[5] 6 September and 11 October 1988 unreported. We understand that leave is being sought to appeal to the Court of Session.

Criticisms of the present law

3.5 There are a number of grounds on which the present law may be criticised. Firstly, the approach adopted by the court in Whitehall v Whitehall[1] is outdated. At the time of that decision, the legal consequences of illegitimacy were numerous and were, generally speaking, to the disadvantage of the child.[2] The social stigma attaching to the status of illegitimacy was more acute than it is today. The Law Reform (Parent and Child)(Scotland) Act 1986 has, by and large, put all children on an equal footing in the eyes of the law, regardless of whether their parents were married to each other at the relevant time. What was previously regarded as an "almost irresistible" presumption of legitimacy[3] may now be overturned on the balance of probabilities.[4] Thus there is no longer any real justification for the courts' being unwilling to find that a child has been born out of wedlock. Indeed, it may be said that the interests of a child in being protected from the stigma of illegitimacy have been replaced by his interests in knowing the truth about his parentage.[5]

3.6 Secondly, although the courts showed an initial mistrust of traditional blood test evidence, recent cases such as Docherty v McGlynn and Russell v Wood have clearly acknowledged the

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1 Supra.

2 See our Report on Illegitimacy (Scot Law Com No 84, 1984) para 1.10.

3 Imre v Mitchell, supra per LP Clyde at p464.

4 1986 Act, s5(1) and (4).

5 Cf. Docherty v McGlynn 1983 SLT 645 per LP Emslie at p648; Whitehall v Whitehall, supra per LJC Thomson at p258. See also Thomson, Family Law in Scotland (1987) pp140-1.

improved accuracy and reliability of such evidence. Given the current "state of the art" as regards both blood and DNA testing, it is, to say the least, unfortunate that the courts are not able to take full advantage of these techniques. Their inability to order blood or other samples to be taking for testing means that the best evidence of parentage will often not be available. Individuals cannot be persuaded to give a sample on the strength of any inference that might be drawn from their refusal. In the absence of scientific evidence, proof of parentage can be a notoriously difficult task leading to lengthy and expensive court proceedings. The outcome of these proceedings may ultimately depend on legal presumptions and the incidence of the burden of proof, rather than on clear evidence. A related problem, which could bring the law into disrepute, is that, although the court may have had to reach its decision without the benefit of blood or DNA test evidence, tests may be carried out voluntarily at a later date which prove that the court's decision was wrong.

3.7 One of the concerns of the court in Whitehall v Whitehall[1] was the negative nature of the evidence which could be obtained from blood tests. The pursuer could lose her case if the evidence excluded the defender from being the father but would not necessarily be any nearer to proving it if the blood test evidence did not exclude him. The defender therefore had much to gain from his blood being tested and little to lose whereas the exact opposite was the case for the pursuer. This argument no longer holds good in the face of scientific developments. Blood testing, if the whole range of tests is used, can provide a very high degree of probability that the person tested is or is not the parent and the DNA profile can provide a positive identification. Accordingly, neither party is more likely than the other to benefit from the results of such tests.

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[1] Supra, per Lord Wheatley in the Outer House at p253.

3.8 In support of the present law, it may be argued that one litigant (or, indeed someone who is not party to the proceedings) ought not to be compelled by the court to provide evidence for the other. The parties should be required to select and present their own evidence without judicial intervention. It would be a limitation on our civil liberties if the court could order one party to supply the other with the evidence on which he hopes to build his case, particularly where the evidence concerned can be obtained only by the invasion of the bodily integrity of the individual.

3.9 While the civil liberties argument raises important and sensitive issues, we do not believe that it justifies leaving the law in its present state. There is, in our view, a balance to be struck between protecting the individual's rights of liberty, privacy and bodily integrity and safeguarding the rights of another to fair and properly conducted court proceedings in which the best and, in many cases, incontrovertible evidence can be presented.[1] There are further public interests to be considered, the interests of justice in discovering the truth and the public interest in doing so in the most economical and efficient way possible. There is no doubt that if the court had power to order blood or other samples to be taken for testing, both these interests would be met. The number of cases of disputed paternity which proceed to a full court hearing would, we suspect, fall dramatically, thus reducing the courts' overall workload. Spurious cases would be prevented and the courts would be able to deal more speedily with those that do proceed. Such a power in the court would have implications for all civil proceedings in which questions of parentage or other blood relationships arise. The most obvious

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[1] The courts have accepted, in other contexts, that the interests of justice can override an individual's personal interest in not having his privacy invaded and can require him to produce certain evidence. See, for example, The British Phonographic Industry Ltd v Cohen, Cohen, Kelly, Cohen and Cohen Ltd 1983 SLT 137.

examples are claims for aliment by a child or his mother against the alleged father, actions in respect of parental rights by a man claiming to be the child's father, disputes over succession to a person's estate and immigration cases. In all such cases, paternity could be established outwith the court process, and the court would be left to deal only with the financial and other implications of that finding. This would produce consequential savings in legal aid and, of course, in the individual's legal expenses where court action was being funded privately.[1]

3.10 Our provisional conclusion, on which we would welcome views, is that there is scope for reform in this area of the law. In the following paragraphs we set out the main options for consideration.

Options for reform

3.11 We have already indicated, in general terms, the issues with which we are concerned in this Discussion Paper. In the context of civil cases, the question of taking samples for testing without a court order does not arise. Individuals may volunteer samples for testing at any time[2] and it is inconceivable that they could be compelled to give samples in any circumstances without court intervention. The main questions to be considered in this Part fall therefore under four headings. Should the court be able to order samples to be taken? Should direct enforcement of the order be possible? If not, what should be the consequences of failure to obey the order? Should any new provisions be retrospective?

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[1] The present cost of DNA testing on a single blood sample is £202 + VAT (information from Cellmark Diagnostics, Abingdon, Oxfordshire). Legal aid is, in fact, already available for DNA testing in appropriate circumstances.

[2] Subject, of course, to any procedural rules on the introduction of new evidence. See Conlon v O'Dowd, supra.

3.12 As regards the first question, we are firmly of the view that the court should have power to order samples of blood or other matter to be taken from a person's body for the purpose of blood group tests, DNA profiling or other procedures designed to provide evidence for use in civil proceedings.[1] The arguments for and against have already been rehearsed in our criticism of the present law. In summary, the public and individual interest in ascertaining the truth efficiently and economically is weighed against the individual's right to bodily integrity. In our view, the fact that DNA profiling gives an almost foolproof means of identification swings the balance in favour of giving the court this power.

3.13 It is interesting to note the English provisions on this issue contained in the Family Law Reform Act 1969.[2] Section 20(1), as substituted by section 23(1) of the Family Law Reform Act 1987, provides:

> "In any civil proceedings in which the parentage of any person falls to be determined, the court may, either of its own motion or on an application by any party to the proceedings, give a direction--
>
> (a) for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and
>
> (b) for the taking, within a period specified in the direction, of bodily samples from all or any of the

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[1] We are not concerned with the taking of impressions from a person's body here. Dental impressions and the like do not have any real role to play in civil proceedings.

[2] The original provisions were based on recommendations of the English Law Commission contained in their Report on Blood Tests and the Proof of Paternity in Civil Proceedings (Law Com No 16, 1968).

following, namely, that person, any party who is alleged to be the father or mother of that person, and any other party to the proceedings-

and the court may at any time revoke or vary a direction previously given by it under this subsection."

"Bodily sample" is defined in section 25 as "a sample of bodily fluid or bodily tissue taken for the purpose of scientific tests" and "scientific tests" as "scientific tests carried out under this Part of this Act and made with the object of ascertaining the inheritable characteristics of bodily fluids or bodily tissue."[1]

3.14 Section 20 of the 1969 Act goes on to make detailed provision about the report to be submitted once the tests have been carried out, its form and the information which it should contain, the possibility of obtaining a supplementary written statement amplifying anything contained in the report and the fact that the report and any later written statement should be received by the court as evidence in the proceedings. It also provides that, unless the court otherwise directs, the person responsible for carrying out the tests may not be called as a witness unless notice is served on the other parties to the proceedings within a prescribed time. Section 22, as amended, then provides for detailed regulations to govern the sampling and testing procedures, in particular, requiring that the samples be taken only by "approved" medical practitioners and that the tests be carried out only by persons and at places appointed by the Secretary of State.[2]

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[1] These definitions were added by section 23(2) of the 1987 Act.

[2] Magistrates Courts (Blood Test) Rules 1971 (SI 1971/1991) and Blood Test (Evidence of Paternity) Regulations (SI 1971/1861), as amended.

3.15 In our view, the English approach to this question is too elaborate. We consider that it is unnecessary and potentially too restrictive to prescribe in such detail the contents of the report and the procedures that must be followed in the sampling and in the testing of the samples. It is in the interests of the party requesting the tests that the samples are taken from the right people by a person qualified to do so; that the tests are properly conducted; and that the tester's report should stand up to scrutiny in court. If these standards are not met, the credibility of the scientific evidence would be destroyed in cross-examination. This should be enough to ensure that the requisite standards of sampling and testing are adhered to and that the subsequent report is accurate without the need for regulations following the English model.

3.16 The English Act also makes it an offence for any person to personate another for the purpose of providing a sample for testing.[1] In Scots law, however, the matter could be dealt with under the head of attempting to pervert the course of justice or under the common law crime of fraud. For this reason, we do not believe that any special statutory offence is necessary although we would, of course, welcome views on this point.

3.17 Although we do not at this stage have a precise form of implementing legislation in mind, we envisage that it would be framed in more general terms than the equivalent provisions of the 1969 Act. We would favour an order being made at the court's discretion, as in the English legislation, either by the court of its own motion or on the application of one of the parties to the proceedings. We would not, however, limit the use of

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[1] Family Law Reform Act 1969, s24.

scientific tests to ascertaining whether a party to the proceedings is or is not the parent of a particular individual. Wider questions of blood relationship may be raised in, for example, a dispute over succession to a person's estate.[1] The court action may be between the deceased's executors and an alleged beneficiary and the question at issue whether the beneficiary's claim to be the deceased's brother was substantiated. Any legislation should, we think, be framed in terms wide enough to accommodate this type of case.

3.18 A related question is whether the court should be empowered to order samples to be taken from persons other than parties to the proceedings. In a straightforward paternity dispute, it would be appropriate for the court to order samples to be taken from the child whose paternity is in issue, the mother as pursuer and the alleged father as defender. But the alleged father's defence may be that, although he had sexual intercourse with the pursuer, there were other men associating with the pursuer at the relevant time, any of whom could be the child's father. He may call such other men as witnesses. Should the court be able to direct samples to be taken from these men as well? In our view, the answer is no.[2] There would be no suitable sanction available if such witnesses refused to comply with the order. A fine or imprisonment for contempt of court would be too draconian a measure. It would not be possible to draw any adverse inference if more than one witness refused. Even if there was only one witness involved, what sort of inference could be drawn if both he and the defender

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[1] We are not, however, contemplating that the deceased's body should be exhumed to allow DNA testing to take place. We understand that blood samples may be taken and stored for later testing, in the event of any dispute arising after the person's death. It is also possible to envisage questions arising while the testator is still alive which can be resolved through DNA testing.

[2] For the pursuer, one solution would be to raise successive actions against different defenders until she traced the father.

declined to give samples for testing (except perhaps that they were acting in collusion)?

3.19 Similar difficulties would arise in the kind of succession dispute mentioned in the previous paragraph if the parents of the deceased refused to give samples. In our view, the problems involved make this solution impracticable. Certainly, blood test and DNA profile evidence from other persons should be admissible if relevant to either the pursuer's or the defender's case but such evidence can only be made available on an entirely voluntary basis. In conclusion on this point, it is interesting to note that the New Zealand legislation allows the court to disregard the evidence of a defence witness who swears that he is or may be the child's father but refuses to undergo a blood test.[1] This is designed to strike out any perjured testimony by the defendant's acquaintances that any number of them could be the father. It may be that this is an issue which would affect the witness's credibility but we do not think that it merits specific statutory provision.

3.20 Although we are in favour of empowering the court to order samples to be taken for testing, we would not go so far as to advocate direct enforcement of such orders in civil cases. The public interest in the detection and prosecution of serious crime may justify such a course in criminal cases, just as it justifies search warrants. In civil cases the question is more one of balancing private interests. We do not think that the general public interest in the efficient conduct of civil litigation would justify the use of force, in this context, to extract evidence from one party for use by the other. The practical and ethical problems involved in extracting a blood sample from a person who was not under arrest would also be acute. Nor would the threat of being

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[1] Domestic Proceedings Act 1968, s50(4).

imprisoned for contempt of court be likely to provide a satisfactory solution.[1] It would not provide the evidence that was being sought and might only add to the emotional trauma being experienced by the child whose paternity is in question.

3.21 Our suggestion would therefore be that a court could direct bodily samples to be taken from a person for testing but that no sample could actually be taken without that person's consent or the consent of someone entitled to act on his behalf. In cases where a person was incapable of giving his own consent, the rules laid down in section 6(2) of the Law Reform (Parent and Child)(Scotland) Act 1986 would apply.[2]

3.22 The question remains: what should be the consequences of refusal to supply a sample for testing? Two possibilities exist. One is that the party refusing should automatically lose the case. The other is that an adverse inference should be drawn against him. In practice, there may often be little difference between the two. Section 23(1) of the English Family Law Reform Act 1969 provides that where a person fails to comply with the court's direction, the court "may draw such inferences, if any, from that fact as appear proper in the circumstances". In McV v B[3] it was held that an adverse inference which was drawn from the refusal of the putative father to take a blood test could corroborate the mother's story. Similar legislative provision is to be found in

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1 This approach did not commend itself to LJC Thomson in Whitehall v Whitehall 1958 SC 252 at p258 nor to the English Law Commission in their Report (Law Com No 16) para 39.

2 See para 3.2 above. We would propose expanding the provision to include not only blood samples but also other fluid or tissue samples.

3 The Times, 28 November 1987.

Ireland[1] and some parts of Australia.[2] Other countries provide for the automatic loss of the case if a party refuses to submit to a blood test.[3] Yet others adopt a mixed approach allowing for both automatic loss of the case and the drawing of adverse inferences. In South Australia, for example, the Community Welfare Act 1972 provides that if the complainant in affiliation proceedings refuses to take a blood test, her case will be dismissed and that if the defendant refuses adverse inferences may be drawn.[4] A similar approach is to be found in New Zealand although the legislation there is in terms of the defendant's refusal corroborating the mother's evidence.[5] In both countries, the provisions apply only to standard paternity cases, not to any other civil cases in which a person's blood relationship to another is at issue.

3.23 If the pursuer (usually the child's mother) were to refuse, on her own behalf or on behalf of the child, to provide a sample for

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[1] Status of Children Act 1987, based on recommendations contained in the Law Reform Commission's Report on Illegitimacy (Report No 4, 1982).

[2] Family Law Act 1985, s99A. See also Queensland: Status of Children Act 1978, s11(1) and New South Wales: Children (Equality of Status) Act 1976, s21. The New South Wales legislation also provides that the inference may corroborate other evidence or be evidence which rebuts the presumption of legitimacy and that the inference cannot be drawn to the detriment of the child whose paternity is in issue.

[3] This is apparently the norm in European Socialist countries although in the German Democratic Republic a blood test can be imposed by subpoena. Chloros (ed), The Reform of Family Law in Europe (1978) p252. See also Rule 35 of the United States Federal Rules of Civil Procedure.

[4] S112(3).

[5] Domestic Proceedings Act 1968, s50(2).

testing, it would seem fair that her action should fail regardless of what other evidence might be available. She has taken the initiative in bringing the proceedings in the first place. She should be prepared to present the best evidence in support of her claim. The only concern about this solution is whether she could ever have any justifiable reason, on religious or medical grounds, for her refusal. We doubt that there could be many good reasons, if any, for refusing to supply any kind of bodily sample. Even if the pursuer objected to providing a blood sample, other samples such as hair roots or skin or mouth scrapings could be used. Moreover, to make allowances for refusal on "reasonable grounds" or "with good excuse" might simply re-open arguments about the propriety of directing litigants to undergo medical procedures. If, however, there was any substance to this concern, an alternative approach would be to allow for adverse inferences to be drawn.[1] In the majority of cases, we imagine that this would produce the same result.

3.24 Although we see automatic loss of the case as an acceptable sanction for the pursuer's refusal to provide a sample for testing, we would not favour such drastic consequences for the defender were he to refuse. If, in a paternity case, there is conclusive evidence that the defender was abroad at the relevant time, he may regard the production of scientific evidence as a waste of time and expense and would therefore have reasonable grounds for refusal. On this basis, our provisional preference is to allow the court to draw any inference from the defender's refusal as is proper in the circumstances. We do not think it would be necessary to state precisely what effect such inferences might have, for example, whether they might corroborate the pursuer's

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[1] See para 3.24.

evidence or rebut the presumption of legitimacy.[1] This can be left to the discretion of the court. Depending on the evidence available, the result may be a finding of paternity against the defender. If he admits having had intercourse with the pursuer at the relevant time but refuses to submit to blood tests and offers no plausible defence, the inference is that he knows the test will prove that he is the father.

3.25 A problem does, however, exist if his defence is that other men had intercourse with the pursuer at that time and accordingly any one of them could be the child's father. The only inference that can be drawn in these circumstances is that he knows the test may prove that he is the father. This is not enough, in our view, to lead to a finding against him without there being other persuasive evidence supporting the pursuer's claim.

3.26 To meet this particular difficulty, it would be possible to provide that, where it was admitted or proved that the defender could be the father but the defender established that someone else was equally likely to be the father but still refused to submit to a blood test, the court should have power to decide against him, despite the fact that no effective adverse inference could be drawn. This would not be a very principled or logical solution. The defender would have a finding of paternity against him simply on

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[1] As in the New Zealand legislation: Domestic Proceedings Act 1968, s50(3). In any event corroboration is no longer required in civil proceedings and in particular, the doctrine of corroboration by false denial, applicable in actions of affiliation, has been abolished: Civil Evidence (Scotland) Act 1988, s1(1) and (2).

evidence that he could have been the father, although not proved to be the father on the balance of probabilities. It might, however, be a reasonable enough solution in practice as the effect would generally be to induce the defender to opt for the chance of exoneration by a test rather than the certainty of a decree against him. He would have only himself to blame if the wrong result were reached.

3.27 The final question to be considered is whether any new provisions on the use of blood group and DNA tests in civil proceedings should be given retrospective effect. The general rule is that new legislation should take effect only after its commencement date and, in this sort of case, would apply only to actions raised after that date. Court proceedings already started would therefore continue to be governed by the pre-existing law. However, given the certainty of result produced by DNA profiling and the obvious time and cost-saving benefits which follow from its use, it may be that there are reasonable grounds for adopting a different approach and applying the new provisions to actions which are already in court, whether at the appeal stage or in course of the initial hearing, or, indeed, to actions in which final decree has already been granted so as to enable variation of that decree.

3.28 We are, however, extremely reluctant to depart from the usual rule giving prospective effect only unless convinced that it is absolutely necessary in the interests of justice. In particular, we have grave reservations about re-opening cases in which final decree has been granted. This approach was not taken when conventional blood test evidence first became available. We do not believe that the development of new scientific techniques can

justify disturbing an individual's legal position which may have been established many years previously.

3.29 It may be, however, that the law already provides the answer for at least some cases in which scientific evidence inconsistent with the court's finding subsequently becomes available. Take the example of affiliation and aliment proceedings raised under the old law in which the defender is held to be the father without the benefit of blood group tests or DNA profiling. Conclusive DNA evidence then becomes available after the passing of implementing legislation showing that the court decision was wrong. The incidental finding of paternity made in these proceedings would have no effect on anyone other than the parties to the action and could therefore be challenged in proceedings with a third party. But could the defender raise an action for declarator of non-parentage, to which the mother would be a party, in order to have the earlier decision overturned or would the question be regarded as res judicata between them? The doctrine of res judicata precludes further action on the same subject matter and on the same ground between the same parties. It is perhaps arguable that affiliation and aliment proceedings and an action for declarator of non-parentage do not raise precisely the same subject matter even although they are both concerned with the general question of paternity. If a declarator of non-parentage could be obtained, it would in effect, trump the affiliation decree, since it gives rise to a presumption of paternity,[1] and would constitute a material change of circumstances entitling the defender to seek a variation of the award of aliment orginally made against him.[2] The difficulty would be where the orginal

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[1] Law Reform (Parent and Child)(Scotland) Act 1986, s5(3).

[2] Family Law (Scotland) Act 1985, s5(1).

proceedings had taken the form of an action for declarator of paternity between the mother and the man claiming or alleged to be the father and one of the parties sought to overturn this decision on the basis of new scientific evidence. It is obvious here that the doctrine of res judicata would apply preventing a further action of declarator between the parties although the question could be re-opened in another context with a third party, perhaps in relation to succession to the alleged father's estate.

3.30 Thus while the existing law might provide adequate remedies in some situations, it is doubtful whether it can deal with all cases in which scientific evidence becomes available after the proceedings are already underway or have in fact been completed. If it is thought desirable to allow the courts to vary their decree on the basis of DNA or blood group evidence made available in terms of the new legislation, or to admit such evidence in the course of proceedings already begun, it may be better to say so expressly. Accordingly, it could be provided that in any action dealing with questions of parentage or blood relationship raised before commencement of the legislation the new provisions should apply. Retrospective effect could be given in varying degrees, applying the provisions (a) to actions raised before commencement but still in course of proof; (b) to actions pending appeal at the time the legislation came into force; or (c) to those in which final decree had been granted, allowing in effect for variation of that decree. We ourselves do not favour this third option although we accept that, in some instances, the result may be to bring the law into disrepute. We should be grateful for views on this particular question as well as on the general issue of whether retrospective effect is desirable here at all.

Questions for consideration

3.31 We invite comment on the questions noted below.

Civil cases

6. Do you agree that the present law on the use of blood group tests and DNA profiling in civil proceedings is in need of reform?

7. Should the courts have power to direct samples of blood or other matter to be taken from a person's body for the purpose of blood group tests, DNA profiling or other procedures to provide evidence for use in civil proceedings?

8. If there were to be such power in the court--

(a) Should it apply to all cases in which a person's blood relationship to another is at issue or only where questions as to parentage arise?

(b) Should the court's power to direct the taking of samples apply only in relation to samples from the parties to the proceedings and, if relevant, the child whose parentage is to be determined in those proceedings or should it apply also in relation to samples from witnesses?

(c) Do you agree that detailed regulation of the sampling and testing procedures and as to the contents of the

test report is unnecessary, given that the person producing the evidence has an interest in ensuring that it is not open to challenge?

(d) Do you agree that a statutory offence of personation for the purpose of providing a sample for testing is unnecessary?

(e) Should the taking of a sample from a person's body be permitted only with the consent of that person or any person entitled to consent on his behalf or should some form of physical compulsion be available?

9. If samples could be taken only with the consent of the person concerned, what should be the consequences of his refusal to consent?

(a) In the case of the pursuer's refusal, should the result be automatic dismissal of the action or should the court be empowered to draw such adverse inferences as seen proper in the circumstances?

(b) In the case of the defender's refusal, should the court simply be empowered to draw such adverse inferences as seem proper in the circumstances, or, in a paternity case where the defender could be the father but establishes that another person is equally likely to be the father, should the court be empowered to find against him, whether or not any adverse inferences can be drawn in the circumstances?

(c) If the court were to have power to direct samples to be taken from witnesses, what should be the consequences of their refusal to consent?

10. Should any new provisions be given retrospective effect? If so, to what extent?

11. Do you have any other comments on the issues raised in this Part of the Discussion Paper?

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