

HOUSE OF LORDS
MINUTES OF EVIDENCE
TAKEN BEFORE
THE SELECT COMMITTEE ON THE CONSTITUTION
ON THE SURVEILLANCE SOCIETY

WEDNESDAY 4 JUNE 2008

PROFESSOR DAWN OLIVER and PROFESSOR JORG FEDTKE

Evidence heard in Public

Questions 733 - 769

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WEDNESDAY 4 JUNE 2008

Present

Bledisloe, V
Goodlad, L (Chairman)
Lyell of Markyate, L
Morris of Aberavon, L
Norton of Louth, L
O’Cathain, B
Peston, L
Quin, B
Rodgers of Quarry Bank, L
Rowlands, L
Woolf, L

Witnesses: **Professor Dawn Oliver**, Professor of Constitutional Law, UCL, and **Professor Jörg Fedtke**, Faculty of Laws, UCL, on the Surveillance Inquiry, examined.

Q733 Chairman: Can I welcome you both to the Committee and thank you very much for coming. We are being recorded but not televised so could I ask you, for the record, to identify yourselves. If you would like to make a short opening statement, please do so; if not, we will go straight to discussion.

Professor Oliver: I am Professor Dawn Oliver. I am Emeritus Professor at the University College London and my speciality is constitutional law. I do not have an opening statement.

Professor Fedtke: I am Jörg Fedtke. I am Professor of Law at University College London. My speciality is constitutional law in comparative perspectives.

Q734 Chairman: Perhaps I could start by asking if you think there are any existing constitutional conventions or principles that are threatened by the spread of surveillance and data collection and if you think any limits should be imposed on the state’s powers in those sort of areas?

Professor Oliver: I think it is very difficult to identify existing constitutional conventions or principles. Of course we have the Human Rights Act and we have the Data Protection Act, both of which, I would say, express constitutional principles to do with protection of dignity, autonomy, privacy and so on. It is very difficult to be precise about what limits there should be on the use of data protection in the possession of government. I myself am very concerned about data sharing and the extent to which different government departments or state bodies are entitled to share or transfer information they have in one capacity to another part of government. I also feel there need to be statutory provisions about the extent to which government bodies are entitled to retain and use information that might have been obtained not under statutory powers but just accidentally or because information is around. The basic legal position normally is that the Crown and other non-statutory bodies have the same freedoms as ordinary individuals. That came out of the Malone case which you probably know about. My concern would be that there needs to be statutory provisions indicating what can be done with information that has been acquired in those ways.

Professor Fedtke: Professor Oliver quite rightly emphasised the importance of the Human Rights Act and the right to private and family life. I would perhaps add a comparative slant and say that the right to control your own personal data is, in some countries, regarded as a human right in its own right beyond the general right to privacy. The right to know who knows what about you at a particular point in time is, for instance, identified as a constitutional right by interpretation of the German Constitutional Court in that country. Much of this is actually, as Professor Oliver emphasised, encapsulated in the Data Protection Act and its principles, but that is on a lower level and is an ordinary act rather than a constitutional principle. I would argue that the right to control one's own data in this day and age comes close to a human right. I would also add, as far as constitutional principles are concerned, the right to judicial review. If you look at some statutes dealing with surveillance

or data protection, the question arises what is the role of the courts. Personally I would rank that as a constitutional right, a right to have access to a judicial forum to review whatever measures were taken by the executive and that triggers one or two questions. If you look at UK legislation, is the individual who is affected by surveillance informed after the end of a particular measure which in turn allows him possibly to access the courts to raise a case? In many of the statutes in this country that right is not given but in other countries that right is prescribed on each and every occasion. The right of individuals to actually be informed of particular measures is very important. The involvement of the courts in the authorisation of surveillance, in my view, comes close to a constitutional right and has to do with the division of powers between the legislature and the judiciary. I think that other countries may have gone down different avenues, for whatever reasons, in that they require judges to authorise particular instances of surveillance and I would add that to the more general right of privacy and family life which we find in the Human Rights Act. In terms of limitations, and I will try to cut myself short here, again I would stress the importance of very detailed authorisations in statutes. Is there a proper authorisation that sets out in great detail what public authorities may do when it comes to surveillance and data protection? Are there internal safeguards against abuse? I think that is an important element as well. Are there Chinese walls between different government authorities when it comes to the sharing of data? All of these questions relate to the limits of what the state may do in this area. Finally, is there an absolute core of privacy which is absolutely protected from any intrusion or any surveillance? Other systems do recognise that there may be such a core, although again I would stress here that it is very difficult probably to define what that core, in essence, is. These are the limits to what the state should be doing in this area.

Q735 Lord Lyell of Markyate: That is an extremely interesting list. The distinction between overt and covert seems to me to be very important. There are complaints, for

example, that local authorities are using covert powers where really the justification should be overt. A very simple example is dog fouling. I think it is a good thing to stop dog fouling but they should know if there are cameras being used and there should be signs saying so, which would probably be rather effective anyway. That is not constitutionally protected, is it, and would require statute?

Professor Fedtke: It would require statute. I agree entirely with your observation that the principle of trying to obtain data with the person who is actually affected, perhaps the dog owner or the parents of children who send their children possibly to school in the wrong catchment area, the principle that public authorities should first and foremost act openly and first and foremost address or approach the person they are dealing with or the person who is in the focus of their activities, is a thing which should be put down in the statutes. If you look at the German Data Protection Act that is one of the first things you find. Public authorities should target the individual who is involved in the proceedings and do so openly and try to obtain as much information as possible on that basis and only then can other measures perhaps be contemplated if the public authorities need further information.

Q736 Lord Peston: My question somewhat anticipates what I meant to ask you but this is an ideal place to put it. You referred to a protected area at the end of your first statement. Certainly when we were students we were taught about John Stuart Mill on this, and if I may quote his exact words: *“There is a circle around every individual human being which no government, be it that of one of a few or of the many, ought to be permitted to overstep.”* He says the point to be determined is where the limits should be placed but he had no doubt whatsoever that there should be such a limit. We did have here a judge last week who was meant to be supervising exactly this kind of surveillance and when I put that question to him he pretty well said, which worried me enormously, that the philosophy of John Stuart Mill is

now dead. Some of us do not think it is dead; quite the contrary it is what we believe in more than almost anything. I would like to know your view on the matter.

Professor Fedtke: I indicated that I do believe there could be such a core which should be absolutely protected. We may come back to that later on when it comes to specific statutes and the way the state goes about regulating surveillance and data protection. That is just a footnote at this point and I might be able to elaborate later on. I very much believe in detailed specific statutes rather than general provisions which cover ever so many public authorities but that is a different question. In Germany the highest level of possible intrusion, surveillance, wire tapping and so on, actually excludes judges from authorising measures and gives this authority to parliament. In that statute, which in Germany is the highest level of possible intrusion and which contains the highest level of safeguards as a counterbalance, you will find provision which says under no circumstances may the core of private life, if surveillance focuses solely on that, be infringed. Not even on that very high level is there absolute access. There is a core which is difficult to define and that is the main problem here.

Q737 Baroness Quin: I am interested in what you were saying about the position in Germany. Have there been changes in Germany as a result of the worry about terrorism which has somehow gone against the general trend in that country?

Professor Fedtke: Perhaps one introductory remark. I am German so my legal education and my PhD thesis were in that jurisdiction which is why I am particularly interested here in that country. There is a second reason why Germany might be a good system to look at. Germany enacted worldwide the first Data Protection Act in 1970 even before the United States. It is a system which has grappled, for a fair amount of time and to the present day, with these constitutional court decisions in that particular area. It is a long story. To come back to your question concerning changes in the approach and the impact of terrorism, Germany is interesting because in the late 1970s it experienced a serious threat of terrorism.

You may recall the hijacking of a Lufthansa aircraft to Mogadishu and the killing of the pilot and then the intervention of German security forces. In that context you have appearing a number of quite severe statutes which enabled the state to react to such pressures. Yet, at the same time, I do sense that there has been a balance. To the present day measures which have increased the ability of public authorities and security services to monitor particular activities have been counter-balanced with procedural safeguards, in particular the involvement of the courts with information even on that high level of individuals affected by surveillance once the measure has been completed, which again triggers the ability to access the courts and to apply for judicial review. I think that Germany has a very, very early system when it comes to data protection. It has experienced quite a severe terrorist threat. It has not immediately succumbed to changing the legislation and allowing security forces inappropriately high access or rights or powers because there was a fair amount of counter-balance. We might want to look at those elements later on in the discussion. It is a continuous battle and even to the present day the Ministry of the Interior is trying, at every corner, to increase the powers especially of security forces. Basically it is a struggle between those in favour of liberty, of freedom of data protection, and those who argue very strongly in favour of the state, public interest and security and safety.

Q738 Lord Morris of Aberavon: On the principle of overt as opposed to covert, particularly on the instance given as an example by Lord Lyell, are there not limitations on that which undermine the efficiency and the need to observe? A policeman does not give away the point that he is observing a drug pusher from across the road. The defence may demand it and the judge then has to reach a decision. If he is adverse to the Crown then the Crown frequently withdraw the case. We enjoy the sign that there are cameras for road speeding but we do not have cameras for going into a bus lane. Are there not limitations on that or does it not depend on the personality of the observer? Are the police in a special

position as opposed to the Council looking at dog fouling or children going to school in the wrong areas?

Professor Fedtke: I agree data protection, if taken seriously, is one of the greatest challenges of public administration simply because it is very difficult to develop a workable balance between the data protection, on the one hand, and a very onerous system of checks and balances, of internal Chinese walls and limitations. It is very difficult to balance these two. I would agree that it is a question of the case at hand. The policeman watching someone from across the street would be able to do so in Germany without much limitation despite the existence of a fairly elaborate data protection regime. If the policeman was to use some form of device which enables him to listen in across the street then the whole scenario changes and you would have a special statute which would authorise that or set limits on it. The distinction between overt and covert surveillance is a difficult one to draw on itself, which again begs the question how do public authorities deal with that. It is an investment of time and energy to have people who actually take that decision and say this is on this side of the line and that crosses the border.

Q739 Lord Rowlands: Do I infer correctly from what you have been telling us that you do not find it attractive the way we have gone down the route of these commissioners, the information commissioner and the surveillance commissioner, and that is a less effective route than the one followed in Germany? Are you making a direct comparison between the two and are you critical of the commissioner route as it were?

Professor Fedtke: The commissioner route is the right one; there is no doubt about that. Germany has a data protection commissioner on a federal level and on the state level. There is a team of 17 commissioners who have been very influential in securing data protection on a very day-to-day basis. If you look at the development of data protection, in particular in Germany, combined with surveillance, you will see that the impetus for legislative

performance frequently comes from commissioners who have been working in this area and who compile and watch developments very closely. I am all for commissioners but the question is what are the powers of these commissioners. Are they used to authorise certain measures or are they only used to supervise certain areas *ex post facto* when things have already happened? What is their ability to investigate particular instances of surveillance or the use of data? I am all for commissioners but the question is what powers are attached to them.

Q740 Lord Rowlands: The German commissioners, are they privacy commissioners? We went to Canada and heard that they divide privacy from freedom of information whereas our Information Commissioner does both. The argument we had in Canada was there was a potential conflict of interest between the two. In the German model are there privacy commissioners or freedom of information commissioners?

Professor Fedtke: Here I would say that the English system is very much advanced compared to the German when it comes to freedom of information. In that area the Germans are struggling to catch up with the United Kingdom. Access to information is something which this country has championed and where the Germans have done very badly. I think the two in Germany are seen as separate entities although there is a big mix. If you look at the Data Protection Act in Germany as well as in this country, there are rights to access data so obviously the two are very closely intertwined.

Q741 Lord Rowlands: You would prefer a model where they are separate.

Professor Fedtke: Both are very closely related. I would not really have a strong opinion either way as there are advantages and disadvantages in both. The development has been quite different and I could not even say why. It is remarkable that this country has developed access to information very well and Germany has neglected it. Germany has gone quite far

ahead in terms of data protection whereas this country might have some catching up to do there.

Q742 Baroness O’Cathain: We move now from the constitutional conventions or principles to constitutional relationships. Professor Oliver, what do you feel about the relationships between citizens and the state and how they have been affected by the increased use of surveillance? How are they likely to be affected with the inextricable march of better technologies to do just that? Do you believe that they are a threat to the constitutionally established understandings of citizenship in the UK?

Professor Oliver: A difficulty is we do not have a very articulated understanding of citizenship. For me a major problem is the risk that individuals will feel that they cannot trust the state with the information that it has about them and that might make them feel insecure and unwilling to co-operate with the state, unwilling to provide information, for example about their tax and so on, because they are concerned it might be either lost or get into hands they do not want the information to get into. For me the main thing is this question of security, trust and co-operation. Our system depends very largely on law abiding citizens being willing to co-operate with the state and do their tax returns and generally do what is required of them. I find it difficult to be more precise than that about the effect of this information.

Q743 Baroness O’Cathain: I suppose your comments are a direct result of all the CDs and data that has gone missing. Would there be a reason to have regulation to make sure that any data should be encrypted straight away once it is used just in case it falls into the wrong hands?

Professor Oliver: It sounds a good idea. I do not really understand what can be done to data to protect it but I cannot see an objection to it myself.

Q744 Baroness O’Cathain: It does seem strange that more data can go all around the country and fall into all sorts of wrong hands without being encrypted. The last thing we want is more and more laws but do you think it is something to consider?

Professor Oliver: It might well be and I am sorry I cannot say anything very strong about it. One of the problems is we think about these matters on the assumption that our public servants are honest and incorrupt, which fortunately they are, but of course as it becomes known that public servants might have access to information that would be valuable to criminals they are likely to be targeted. We have to get our heads around a scenario that you might not be able to trust, as we do, public servants. I am not quite sure how to deal with it.

Q745 Lord Peston: We have surveillance and it arises essentially from the question of security, both individual security and national security. I do not think any of us doubt that is something we have to take very seriously. The real point, it seems to me, is the limits point which has been raised by both of you. You could put it another way around: if you give any authority any power, and it is not to do with corruption, they will test that power to the limit. Certainly we have had some rather horrific evidence. The most amusing of all was a professor who came to us and sat in the Square and his stuff was searched under the anti-terrorism law. He was just sitting there because he was early before coming to give evidence. I find it hard to believe that parliament enacted that legislation so professors, of all people, should be searched. It is a not a question of professors but can we draw the line somewhere, and in particular whether the human rights thing protects us in practice in the relevant way?

Professor Fedtke: In the light of the German experience, human rights have provided a very good shield, a very good protection. As you rightly say, the difficulty is to strike a balance between the national interest and security and safety for the people and the interest of the individual to be protected from excessive surveillance or an excessive use of data. I think that the Human Rights Act and the European Convention on Human Rights have had a positive

impact in this country as well. Legislation has been put into effect in order to regulate surveillance and data protection under the influence of the European Convention on Human Rights or other measures: international laws such as the Data Protection Directive of the European Union. I do think that human rights provide a strong bulwark but then you have to zoom in and look at the details. I am afraid a general right to privacy is difficult to put into practice and it needs teeth. There I would strongly endorse specifically legislation which deals with particular areas, particular activities of public authorities, and balances very carefully what these public authorities need in terms of information and what they can pass on for the exercise of their particular duties and the right of the individual to be protected from excessive surveillance and data mining.

Q746 Lord Peston: In terms of viewing it in terms of legislation, and I well understand the spirit in which you are making those remarks, there is often difficulty writing into legislation the way you want it used. To take an obvious philosophical point which refers to the balancing question, you could say we are passing this legislation but we want it used in the last resort and only when you have to. Compare that with we are passing it and use it in the first resort. Many of us in this area take the last resort view. The great row going on about the 42 days now is the danger that it will become the normal thing rather than the thing only *in extremis*. Are you optimistic that if we go down the line of balancing that parliaments of different sorts can persuade the people who are doing the actions that many of these powers, because security is so important, should only be used as a last resort? To give you another example which absolutely horrifies me, I gather the City of London uses what powers it has to clock every car going through the City of London. The idea that the City of London should have the power to clock every car going in and out, which I gather they do on security grounds, to go back to my John Stuart Mill point as an old-fashioned liberal, I just find it not a world I would like to live in. That they should be able to use those powers in the last resort is

another matter. What is your response to that? How can we as parliamentarians get the last resort idea into our legislation?

Professor Oliver: That is difficult. The fact of the matter is it is not just the City of London because there is the congestion charge. Interestingly I do not think when the congestion charge was being introduced anybody was worrying about the fact that it would mean your car number was taken. To home in on the point, it is very difficult for parliament to spell things out. Of course, holding bodies accountable, getting them to report on how they have used their powers and then investigating it, is one matter. Another possibility, for example for the police force, might be for them to articulate their policy. The professor who was searched outside parliament, maybe there is a police policy that anyone with a rucksack or a briefcase within X yards of parliament should have that brief case searched. I can understand that but it would help if some of those rules were published so that people knew that you should not sit in Parliament Square with a briefcase if you do not want it searched. Also people can then say that is excessive or you should do more. The policy behind the exercise of some of these powers, in some circumstances, could be more open.

Professor Fedtke: It is a question perhaps of definition. If you want to protect national security, how do you define that? It is very difficult for parliament in any system to come to grips with that problem. I find that the use of very general terms, and national security could be one example, is problematic. How do you solve that? You could introduce in legislation a list of criminal offences which endanger national security so you are giving flesh to the term as a legislator. You are telling the public authorities national interest is important, that is a value and will justify quite severe measures but we define that term as follows. Then you can have, in some systems, quite elaborate catalogues of criminal offences which give flesh to what is intended. That is what you are supposed to do. On the plus side, the principle of proportionality has entered into legislation in this country and that requires public authorities,

not in each and every case but in most cases, to check whether there are milder means. Milder means that is an indicator, that is the flashlight, it is the last resort, look around to what you can do before you actually use this tool. That is a very valuable method of approaching that particular problem. I keep on repeating myself on this one point, that the task for parliament becomes easier if you regulate specific areas: local authorities with their powers and their surveillance methods which need certain requirements, conditions need to be met; then health authorities; then an authority dealing with identity cards; the police and security authorities. That is a lot of work but if parliament shapes the conditions for each and every case then I think you come closer to achieving your aim.

Q747 Viscount Bledisloe: The last answer goes some way to answering my question. I was concerned about proportionality, not only to question whether it is a last resort but whether the crime you are seeking to discover about merits the level of scrutiny. I am thinking in particular of the powers given under the Prevention of Terrorism Act being used to discover whether the right child is going to the right school or the right dog is doing its business in the right place or all these minor things. Do you think this should be regulated by much more detailed statutes directed to particular authorities or an alternative method that you have a specific proportionality commissioner? We have heard from the information commissioner, and so on, but they tend to take into account whether the question of proportionality was considered but not whether the decision was right. Do we not need someone, maybe parliament, maybe not, to say this sort of power should not be used for this sort of much lesser conduct?

Professor Oliver: That is a very interesting point and I have not come across the idea of a proportionality commissioner before.

Q748 Viscount Bledisloe: It came to me about ten minutes ago.

Professor Fedtke: The principle of proportionality in Germany is a constitutional principle and ranks side by side with human rights. It is one of the top elements which public authorities need to take into account in exercising their powers, whether surveillance, whether it is dealing with personal data, or whether it is any other function they might perform. I would hope, in a human rights culture, that step by step every public official dealing with these types of scenarios will have that idea in mind: my actions need to be proportionate to the aims. If you link particular activities, measures or powers to the controlling device of judges, as is very usual in other systems, you will have someone like a proportionality commissioner in the guise of the judge who will look at the measure, the information the public authority has, the aim it is trying to achieve, the personal circumstances of the individual affected and will balance these elements and either authorise it or withhold authorisation. In a way, that is perhaps good.

Q749 Viscount Bledisloe: My concern is if you leave it to the individual in question, if you are the school attendance officer and it may be the last resort for finding out about the school attendance, and you resort to these measures you are not going to be the person to say that school attendance is not sufficiently important to use this sort of activity; you need an outsider.

Professor Oliver: One body that might be able to deal with these questions would be the ombudsman, either the parliamentary ombudsman or the local government ombudsman. If someone is complaining they are using surveillance to see if they are sending their child to the wrong school then they can complain.

Q750 Viscount Bledisloe: By definition they probably will not know it is happening. It needs some affirmative person saying you cannot do this and not someone dealing with the occasional person who finds out and complains, is that not right?

Professor Oliver: You are right. It would not cover everything.

Professor Fedtke: Internal safeguards might be of help. I mentioned the top level in terms of intrusion in Germany. Those measures which affect the existence of the nation or a particular province, very substantial threats to the structure of the state such as terrorism, could fall into that if it is directed at eliminating or substantially hampering the existence of the state. Measures are authorised under that Act. Parliament exercises directly the power to authorise them to go ahead or not, but then internally the authority which actually takes action has to ensure that there is someone who supervises each and every piece of the unfolding story, of surveillance for example, who has the training to be a judge in Germany, which means a lawyer with specific legal qualifications. That is an internal mechanism. I think much of the discussion neglects the fact that public authorities themselves should be the first instance of protection. They should have internal mechanisms which safeguard in themselves the protection of the limits or adherence to the limits. That is an interesting example where you would not have the policeman who would then go off with authority but you would have someone supervising him because it is a measure which has a high intensity. You need someone with a legal qualification not just to review it and sign it off but to go along on each and every step and to say if this is OK.

Q751 Lord Lyell of Markyate: You say someone with a legal qualification but we have this system of magistrates, 28,000 ordinary people reasonably trained, and in a way we look to them to do what is proportionate when it comes to penalty. You remember the dust bin case up in Cumbria. I thought the magistrates were entirely right to confirm that the penalty should be there but I rather questioned whether it was proportionate to have doubled it. Comment in the press and that sort of thing would, if we leave quite a lot to the courts and the magistrates, cause that to settle down.

Professor Fedtke: The magistrates would be in a good position to add a further element of control in this area. I agree entirely with that.

Q752 Lord Rowlands: I am puzzled and I come back to the point. You said the judges would be the judge of proportionality but what do the German commissioners do? Why are they not the judges of proportionality?

Professor Fedtke: Data officers and data protection commissioners can be approached by citizens who feel that their rights have been infringed and they then have investigative powers.

Q753 Lord Rowlands: Why go to a judge if that is the role of the commissioner?

Professor Fedtke: The point is that the commissioner does not authorise surveillance activity. He is not the person who would strike the balance, look at the case or give the go ahead to the public authority but it would be the judge who would have to sign off the measure on the basis of the information provided to him by the public authority.

Q754 Lord Woolf: I was interested in your combination of proportionality and specific legislation dealing with details of what you can and cannot do. If you are going to apply a proportionality test, then is not the idea of having specific legislation which says what you can and cannot do curtailed by the specific legislation so, in fact, what you are saying has an internal inconsistency?

Professor Fedtke: With due respect, I would probably say the opposite may be true. Having a set of laws which starts off on a general basis allowing the policeman to observe things on the street without rushing off to the judge and ending with a law which actually circumvents the judge and says parliament itself will authorise this, is problematic. To have a set of statutes which determine or are designed to cater to different levels of intrusion is in itself an

element of proportionality. You deal with the lesser intrusions in a specific statute, allowing perhaps more public authorities to draw on that authorisation, and the stronger the infringement, the stronger the limitation of a human right, the more specific is your legislation which tries to strike the balance between the right, which is more effective than in the first scenario, and the interest of the state in acquiring information which has to be weightier.

Q755 Lord Woolf: I will press you a little further on this. It is very interesting and I think it is partly a cultural distinction between the German approach and our approach which explains why in Germany you have many more judges than we have in this country. It is important because certainly as a former judge, and still a judge in some ways, I found that one of the great weaknesses of the Data Protection Act is there was such a mass of detail in the legislation that nobody, not even the judges unless they were very specialist - the professors were very specialist but most judges were not specialists - cannot comprehend the legislation. If you are not careful, if you go into too specific detail, you are going to have the dust bin example. Especially if you are applying principles of proportionality, it is very difficult to anticipate all the circumstances. Would you at least agree with me to this extent that probably a very good way of going forward is to start off with general principles, then have a commissioner or some other person who supervises and oversees it in practice, and only when have you a very substantial experience do you go into legislation if you are entitled to do that? I know from actual data that we were falling very far behind and so we had to make a leap forward. There are dangers in that and for a general policy you want to be very cautious in rushing into legislation.

Professor Fedtke: I agree with most of what you have said, the first point being interesting: the number of judges. A system which has so many judges can deploy them to give authorisations. If you are limited in the number of judges then that becomes a resource problem. I agree entirely. In terms of general principles, a data protection commissioner to

supervise developments and to flag when things go wrong is entirely accepted and then to move into more detailed legislation when you identify particular areas which merit more detail. Again there is the question where do you draw the line between the general statutes and where do you cross the border to the need for a specific one. The Data Protection Act is very complex; I agree entirely. Reading and working with it is horrendous. Perhaps the answer to that is it tries to cover so many instances it gets very abstract. If you have a specific statute, if you look at the code of criminal procedure in Germany, if you look at the specific laws on the state level, meaning the regional level, which deal with surveillance and data protection or the use of data by police authorities, you will read them and you will understand them immediately because the measures are described in pure normal language.

Q756 Lord Woolf: Is there not a danger of a conflict between the different legislation? There are all sorts of areas of demarcation so which legislation do you use? I was going to suggest to you that in the area we are talking about there is lot to be said for an holistic approach. I would not necessarily share the Canadian idea. There are two different principles here and it is always going to be a balancing act between two principles.

Professor Fedtke: Again I agree. Let us go back to the Data Protection Act which exists in Germany and which exists in this country. The Data Protection Act in Germany is the foundation for all public authorities. All public authorities are inevitably bound by the Data Protection Act; there are no exemptions. The system then goes on to say if you have specific legislation that may, if it is so prescribed, qualify the general application of the Data Protection Act. The higher you work yourself up in the hierarchy of laws you will find more specific information about what particular authorities can do, but the Data Protection Act, as such, is very broad and covers everything. In the United Kingdom you have a number of exemptions which are quite substantial. They are difficult to define and I think they make the

whole matter much more complex than perhaps with a different approach relying more on specific legislation.

Q757 Lord Morris of Aberavon: What body do you believe would be best placed to protect the constitutional rights of citizens against over-zealous surveillance and data collection? You have the options of parliament, the courts, some other body, but is not the basic problem what information or knowledge they have in order to act as some kind of policeman? Within memory we have had allegations against MI5, evidence given about being economic with the truth, fears, warranted or unwarranted, by people from the prime minister down about surveillance. How can you get parliament or a judge to be informed so he can take the protective view of the citizen?

Professor Oliver: There could be a new official called perhaps not the proportionality commissioner but a protection from surveillance commissioner who would be concerned partly with general policy issues, in other words to take a broad overview of what is happening. If people are particularly worried about dog fouling they could look into that and then report to parliament, and obviously to the public, providing some actual factual information to inform people's comments about it. That approach might help. That person might be an officer of parliament or an independent body commission with that remit. They would overlap quite a lot with the Equality Commission but we can live with overlaps. That might be an institutional arrangement which would provide parliament and other bodies with the background information they need to engage with the problem.

Q758 Lord Morris of Aberavon: How can he be assured that he has the necessary information? You may appoint the body but how does he know what is happening?

Professor Oliver: He might be given powers of access, the right to demand information from the bodies he is investigating.

Q759 Lord Lyell of Markyate: Two of the ways that we deal with it at the moment are you cannot necessarily stop it beforehand, and obviously a commissioner cannot be looking at everything all the time, but when it comes to be used you make the evidence inadmissible and when they try to use it when they should have never been doing it some penalty could fall into place. Are not those two pretty practical protections?

Professor Oliver: Used appropriately, yes. I myself would be a little concerned about a serious terrorism trial collapsing because information that was extremely relevant had not been properly obtained. There is a big debate there I know. A subtle approach to these problems from various angles would be very helpful. For example, as you are suggesting, to discipline police officers or whoever who have overstepped the marks, making it quite clear where the bounds of their authority are, would be one helpful approach. Elaborating codes or standards for certain organisations as well would be another way because at least then the officials know what they can and cannot do or whether they are somewhere on the edge and that gives a peg on which to hang criticism of them.

Lord Lyell of Markyate: Your first point, which I agree with, is that a trial should not necessarily completely collapse. The courts have indicated sometimes that improperly obtained evidence can be admitted but at least the fact that it was improperly obtained comes into the public domain and might be dealt with through one of the other routes.

Q760 Lord Norton of Louth: What role do you think parliament should play in this? Is their more of a role that it should take on? There have been criticisms that perhaps it is too willing to go along with government demanding more surveillance powers and so on. I think you are implying in Germany that the legislature is more active in this sphere. Is there a role that parliament should be playing that it is not playing?

Professor Fedtke: The role of parliament is predominantly to legislate and the detail of legislation, which we have talked about this morning on various occasions, is a task for

parliament to apply its mind to and to try, in my personal opinion, to draft the statutes which authorise surveillance and the use of data in very specific terms. That, in itself, is a formidable task for parliament and is very difficult to do. There are data protection commissioners who report to parliament. These reports should be taken seriously and should be as elaborate as possible because that is one source of knowledge for parliament to actually see what is going on. It is an independent commissioner after all with powers to ask for information, to ask how things have happened, where things have gone wrong, to request access to data to actually establish what happened and these reports should offer quite a lot of information for parliament to work with. Parliament in Germany, as I mentioned earlier, goes beyond its usual remit on one occasion when there is a threat to the nation as a whole, national security threats of the highest order. That is where parliament, in the form of a special commission, itself authorises surveillance and only parliamentarians can say to go ahead or not to go ahead. That led to a constitutional court case some years back because individuals felt this denies them access to the courts. That is a problem in terms of the balance of power between the institutions. The court came down five to three in favour of this existing model with substantial criticism, of course, because access to courts and the role of the judges is extremely important and should not be curtailed lightly. Data protection is a joint effort and it is not just parliament but the courts themselves which should play a strong role. I think the judge, if there is enough manpower for that, is a good person to actually authorise specifically important or infringing measures. There are the independent bodies and the commissioners. Again I would like to stress the importance of internal measures within public authorities. That is very important and more can be done there I think.

Q761 Lord Norton of Louth: It is almost a passive role for parliament in terms of being the recipient. Is there more it should be doing?

Professor Oliver: I do think it is important to distinguish, at the moment at least, between the House of Commons and the House of Lords because your chamber is much more independent and there is not a government majority, and for all the reasons that we know one can rely on the House of Lords to make it much more difficult for the government to legislate in ways that give too much power in relation to surveillance and so on. Whether that would remain the case as and when the House of Lords becomes largely elected is a matter we cannot go into. When it comes to parliamentary procedures, I myself am very interested in the idea that committees scrutinising Bills and Draft Bills could develop standards against which Bills, or provisions in Bills, that are to do with surveillance would be tested. My own sense is that those standards could partly be developed by committees themselves so after a period when several Bills have been looked at you will find a committee is repeatedly getting concerned about whatever it is and you could say that is the standard. My own sense is that does not prevent parliament voting for this thing that seems to be contrary to standards but at least it is not going to be done by mistake. It should feed back into the governmental process where Bills are being drafted because then we will be able to say we are going to get in trouble with the House of Commons, or whoever, if we do it. We want to do it but let us brace ourselves. I think that would be entirely desirable.

Q762 Lord Norton of Louth: From your previous work I believe you ascribe quite a role to this particular Committee.

Professor Oliver: Absolutely, yes.

Q763 Lord Rowlands: Your reply promoted the question I was about to ask. We have seen a lot of evidence about privacy impact assessments within government departments. Would it be a good idea that any department bringing a Bill before the House would have to undertake

a privacy impact assessment and publish it and reveal the degree to which it has assessed what impact this Bill will have on privacy matters?

Professor Oliver: That sounds like an excellent idea.

Q764 Lord Rowlands: We can build powers into the legislative process. Do you think that individual privacy is sufficiently protected by the common law in the United Kingdom?

Professor Oliver: No, I do not. It has made enormous strides, partly under the influence of the Human Rights Act, in relation to privacy and the press. I think individuals do now have a great deal more protection against the press than they did some years ago but it does not say much about relations between the individual and the state or other relationships which are not to do with the press. There is a lot to be said for common law development: it is incremental, it is trial and error and it avoids the political disputes you get. If the government were to introduce a Bill about privacy you would get Fleet Street up in arms and then it is difficult but if the courts do it they get there. I think there is a limit to what the common law can do.

Q765 Lord Lyell of Markyate: This question follows immediately on from that. To what extent are issues about privacy likely to be resolved by the courts in the future? We have the recent Murray case, the J K Rowling case. We had the earlier case of Mr Justice Jack where the Court of Appeal thought he had gone a bit too far in limiting the powers of the press. Some of us in this Committee are worried that judges will be limiting freedom of speech, which is another very important aspect even though it is sometimes unpleasant. To what extent do you think the courts are going to get this right and provide the right balance under the Human Rights Act?

Professor Oliver: One can only guess. I do have quite a lot of faith in the ability of the courts to find balances. There are conflicts between the freedom of the press and privacy and where you draw the line is not easy but it would not be any easier if the idea was that there

should be an Act setting it out. One can imagine the Act would go on and on about things. The Human Rights Act already has this peculiar provision about the importance of freedom of the press in it and I think a statute about it would have many, many more of those. I just happen to like judges and I like the common law method and I have a bit of faith in it but I do not believe it can solve all the problems.

Q766 Lord Morris of Aberavon: I am concerned about the Data Protection Act and how far it is an adequate organ for the privacy of citizens' personal data to be protected. The exceptions and exemptions created under the Act, are they too broad and should they be narrowed? Is not the Act itself contradicted by the Freedom of Information Act?

Professor Fedtke: A Data Protection Act is an enormous advantage in whatever form because it does provide a very thorough broad basis on which public authorities and citizens can draw in the absence of specific legislation. Specific legislation is more helpful, as I said again and again, to actually identify specific dangers and balance them to the aims of public authorities. As far as the exemptions are concerned, it is true that the Act does specify a long list of exemptions and that begs the question what happens if these exemptions are invoked, what regime will take hold in the absence of the application of the Data Protection Act. The answer again is design specific legislation for those particular areas, whether it is media which have exemptions under the Data Protection Act, whether it is security agencies which have exemptions under the Data Protection Act or whether it is the police which have exemptions under the Data Protection Act. I would try to design special statutes which address those specific areas. In that case, I do not really see a problem with the fact that the Data Protection Act is not applicable across the board because that will not be the case in a system like Germany because special legislation will kick in. How do you define particular aspects? How do you define national security, for instance, which is one of the grounds for an exemption? It is very difficult to phrase that in detailed terms. The Data Protection Act, as

it is, is a very substantial piece of legislation already. If you try to introduce additional interpretations to make that more specific and to make the exemptions more workable, that could double the size of the Act at the end of the day. That is one of the main problems, the definition of these exemptions, to try to find language which specifically says under what conditions there will be an exemption. That is the main problem and that is where the data protection is quite broad at times and leaves a lot of flexibility and room for interpretation.

Q767 Baroness Quin: Professor Oliver, at the beginning you talked about your concerns about sharing of personal data between departments of government but I wanted to ask about the sharing of personal data between the public and the private sectors and how concerned you are about that. Does that undermine any constitutional safeguards or principles and is the private sector in some way less constrained than the public sector?

Professor Oliver: There is a concern. There was an example in the news a few days ago where the social security department was talking about sharing its information with the power supply companies about which people were on benefits so it could check that people were on the right tariff so poor people got the low tariff. I was rather horrified at the idea, without thinking about the implications of disclosing information to private bodies particularly about somebody's poverty or their income level or whatever it was, that should be suggested without evidently the minister in question thinking it was a peculiar thing to do. I am a bit concerned about the sharing of information with private bodies and that is just an example. The government possesses pretty personal information which we hope they will not abuse, but private power companies or Tesco might well. It worries me, and it worries me partly that there does not seem to be a culture in government that sets alarm bells ringing and asks is this something we should do. Maybe there should be a code somewhere or statutory provisions to limit that.

Q768 Viscount Bledisloe: I have a related question about retention of data. We were told that if the police ask somebody who is on the scene of a crime but is not a suspect for his DNA or his blood because they want to eliminate him, unless he actually says at the time “I want that torn up after you have finished this investigation” it will be kept forever, or virtually forever, and can be used for other purposes. Do you think that is the right way around or do you think he should be asked at the end of the inquiry shall we destroy it or can we keep it?

Professor Oliver: My own sense is there should be a presumption that it should be destroyed unless the person in question specifically agrees otherwise.

Professor Fedtke: I would go one step further and say not just a presumption that it is destroyed but a clear timetable when data has to be destroyed, again specific data and specific instances. DNA is extremely important, sensitive information. I think there should be a clear rule saying after one month, after three months, after the close of the investigation. There should be a clear time line rather than just a presumption a public authority will do it. There should be statutory provision which says so.

Q769 Viscount Bledisloe: It may well be that the inquiry is rolling on forever. I would have thought they could keep it as long as the inquiry was alive rather than for a set period of time. Would that not be better?

Professor Fedtke: Absolutely. It depends on the context. Data is extremely contextual and its importance in the way you deal with it is relevant. Of course if you have a criminal investigation which drags on for a long period of time you would not want data to be destroyed within a month or three months. Of course you wait for the formal close of that investigation and then say from that point in time we will ensure that data is destroyed. Another brief idea here when it comes to the erasure of data, I would look closely at internal safeguards. Public authorities should be under a duty to document that data was destroyed or erased from data bases on a particular day, at a particular time, by a particular officer so there

is a paper trail of what public authorities do with the data they have retained and are supposed to destroy. You could add that that particular function, destruction or erasure of information, is to be placed under the scrutiny of one particular high-ranking official possibly with a special legal qualification. You can introduce different levels of control within the public authority to ensure that destruction of data is done.

Chairman: Can I thank you both for being with us and for the evidence you have given which is greatly appreciated.