



**Keeping the right people on the DNA database: Science
and public protection**

JUSTICE Response to Home Office Consultation

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Introduction

1. Founded in 1957, JUSTICE is a UK-based human rights and law reform organisation. Its mission is to advance access to justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. Government consultation on the law governing DNA retention on the National DNA Database is long overdue. While we recognise the considerable and undoubted forensic value of using DNA material to investigate criminal activity, the genetic information contained in a DNA sample represents the most intimate medical data an individual may possess. It is therefore essential that the law strikes a correct balance between the public interest in detecting and preventing crime, on the one hand, and the public interest in protecting the fundamental right to personal privacy on the other.
3. We have long maintained that the existing law fails to strike such a balance. In our January 2007 evidence to the Nuffield Council on Bioethics consultation on the forensic use of bioinformation, for instance, we said the current law on retention involved a 'serious and disproportionate interference with fundamental rights'. We repeated this view in our response to the Human Genetics Commission consultation on the forensic use of DNA in October 2008. In both responses, we also described the 2004 decision of the House of Lords in *R v Chief Constable of South Yorkshire (ex parte S and Marper)*¹ as 'deeply flawed' and predicted that it would not be upheld by the European Court of Human Rights ('ECtHR'). Our prediction was proved correct in December 2008 when the Grand Chamber of the Court held that the law governing retention violated the applicants' right to respect for private life under Article 8 of the European Convention on Human Rights:²

the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.

4. The judgment of the Grand Chamber in *S and Marper* is a landmark decision concerning the proper balance to be struck in a democratic society between the competing interests of public

¹ [2004] UKHL 39, [2004] 1 WLR 2196.

² *S and Marper v United Kingdom* (app nos. 30562/04 and 30566/04, 4 December 2008), para 125.

protection and personal privacy when it comes to the retention of bioinformation. We are therefore dismayed that the government's proposals set out in the consultation paper do little to address that balance. Instead, they seem to us to betray a fundamental lack of appreciation for the importance of personal privacy concerning genetic data, not to mention the presumption of innocence that is the cornerstone of our criminal justice system.

5. Our key concerns include the following:

- Proposals to retain for up to twelve years the DNA profiles of persons arrested but not convicted are unjustified and unnecessary. If implemented, we predict they would be held to be as disproportionate as the current blanket retention policy.
- It is imperative that the new retention regime be set out in primary legislation, to ensure full parliamentary debate.
- The power of Chief Constables to destroy DNA profiles on exceptional grounds should be subject to a statutory right of appeal to an independent judicial body.

6. We are particularly concerned by the government's reliance on research from the Jill Dando Institute that purports to show that persons arrested but not charged or convicted pose the same risk of criminal offending as those previously convicted of criminal offences. The research has been advanced by the Home Office as empirical support for its proposals in spite of what can only be described as significant and substantial methodological flaws. In our view, the goals of public consultation are not well served by reliance on such poor quality research.

7. The inadequate nature of the government's proposals concerning DNA retention are also reflected in its plan to implement these proposals by way of secondary legislation.³ Whatever the ultimate provisions may be, we believe that it is vitally important that the statutory scheme governing the retention of DNA material be subject to full parliamentary scrutiny. It is therefore constitutionally inappropriate to implement such a scheme by way of secondary legislation in circumstances that allow only the most limited opportunity for proper debate and no opportunity for amendment.⁴

8. Before the European Court of Human Rights in *S and Marper*, the government made much of the fact that the UK 'is in the vanguard of the development of the use of DNA samples in the

³ C.f. clauses 96-98 of the Policing and Crime Bill, seeking to introduce section 64B into the Police and Criminal Evidence Act 1984 empowering the Secretary of State to make further regulations governing retention and use of DNA material.

⁴ See JUSTICE Briefing on the Policing and Crime Bill for Committee Stage in the House of Lords, July 2009, p31.

detection of crime'.⁵ This claim is repeated throughout the consultation paper.⁶ However, as the Court itself noted, 'any State claiming a pioneer role in the development of new technologies bears special responsibility for striking the right balance' in relation to fundamental rights.⁷ And as the President of the British Academy of Forensic Science similarly observed:⁸

The leader in a field bears a special responsibility in striking a balance and in explaining why what it proposes achieves it. The various UK reports that preceded the Court's decision suggested we had not done so.

We regret to say that, if implemented, the proposals in the consultation paper would do little more than replace one 'blanket and indiscriminate' retention policy with one that is only slightly less sweeping but still wholly unnecessary and grossly disproportionate.

The power to take fingerprints and DNA samples

9. The consultation paper does not address the power of police to take fingerprints and DNA samples from suspects, on the basis that the existing rules on taking samples were 'not called into question by the ECtHR'.⁹ We believe the decision to exclude these rules from consultation is a short-sighted one. The issue of retention does not arise unless or until a fingerprint or sample is already held by police, and the taking of samples is obviously the primary means whereby samples are obtained.
10. In JUSTICE's view, the power of police to take fingerprints and DNA samples from suspects without consent should be limited to those whom the police have arrested (i.e. where the police reasonably suspect the person has committed an arrestable offence), *and* where the taking of the bioinformation would assist the investigation of the offence. We therefore strongly recommend that the taking and retention of DNA information be limited to serious criminal offences, which involve injury to another and where DNA information is of evidential value, namely offences against the person, sexual offences and burglary.

⁵ See e.g., *S and Marper*, n2 above, para 111.

⁶ See e.g. the Home Secretary's introduction: 'The UK is proud that it leads the world in the field of forensic science and none more so than in DNA' and '[t]he UK leads the world in the use of DNA to solve crimes, to catch criminals and to clear the innocent' (para 2.1).

⁷ *S and Marper*, n2 above, para 112.

⁸ Mr Justice Beatson, 'Forensic Science and Human Rights: The Challenges' (Inner Temple Hall, 16 June 2009), p25.

⁹ Consultation paper para 2.4: 'We consider that the existing threshold in PACE for taking DNA and fingerprints on arrest from a person detained at a police station for a recordable offence is appropriate'.

11. Police should, of course, remain free to request or invite individuals to provide bioinformation such as fingerprints or DNA samples on a voluntary basis to assist with their inquiries. But the power to take samples without consent should be strictly limited to those whom the police have arrested.

The retention of DNA samples

12. The consultation paper distinguishes between the retention of physical samples of DNA , on the one hand, and the retention of the electronic profile drawn from the physical sample, on the other hand. It is the electronic profile of an individual's DNA that is retained on the National DNA Database ('NDNAD').
13. The government proposes to destroy *all* physical samples of DNA once 'any time up to a maximum of six months; or for when a satisfactory profile is loaded onto the database'.¹⁰ So-called 'legacy' samples (those already stored under the existing rules) will be destroyed within a year of the new scheme coming into force.
14. Although we welcome the proposal to destroy all DNA samples within 6 months as a proportionate measure,¹¹ we caution that the profiling of samples can only be lawful while proceedings are pending against a suspect or where a suspect has already been convicted. There may well be cases in which proceedings against an individual are dropped after a sample has been taken but before a profile has been made. In such cases, the sample should be destroyed immediately without a profile being taken. The destruction of samples following the making of a profile, and in any event within six months of the sample being taken, is otherwise a proportionate time period. In particular, we are pleased that the government has discounted as unnecessary any suggestion that samples might need to be retained for the sake of updating the NDNAD in light of possible future technological advances.¹²

The retention of DNA profiles

15. The government claims that the ECtHR 'accepted there is a justification in retaining profiles in non-conviction cases'.¹³ This is misleading. The Court recognised that the retention of profiles

¹⁰ Ibid, para 5.6.

¹¹ Given that it suffices to retain DNA profiles for forensic purposes, any retention of the physical sample after the profile has been taken strikes us as unnecessary and disproportionate. See e.g. the Council of Europe Committee of Ministers recommendation that biological samples be destroyed 'after rendering of the final decision in the case for which they were used, unless it is necessary for purposes directly linked to those for which they were collected'; Council of Europe Committee of Ministers Recommendation No R (92) 1, para. 8.

¹² Ibid, para 5.3.

¹³ Ibid, para 6.2.

generally (rather than of those convicted of criminal offences) for the 'broader purpose of assisting in the identification of future offenders' pursued the 'legitimate purpose of the detection and ... prevention of crime'.¹⁴ This does not mean that the Court approved the principle of retaining the profiles of individuals not convicted of a criminal offence.

16. The government then cites research intended to 'assess how many years after arrest an individual's risk of being rearrested is the same as the risk of an individual in the general population'.¹⁵ The research is set out at Annex C of the consultation paper and is a paper by Professor Ken Pease of the Jill Dando Institute of Crime Science at University College London. The summary claims that:¹⁶

Analysis of a sample of such cases from the Metropolitan Police force area suggests that the level of subsequent criminality over three years is on a par with the subsequent criminality of those given non-custodial sentences or cautioned.

On the basis of this research, the consultation paper claims that the 'risk of offending following an arrest which did not lead to a conviction is similar to the risk of reoffending following conviction'.¹⁷

17. On closer inspection, however, the research set out in Annex C is a bewildering and incomplete muddle that does little to support the Home Office claims. In particular, there are several significant inconsistencies and glaring omissions in the presentation of the data. Professor Pease's paper refers to 'groups of those arrested in the MPS area from whom DNA samples were taken were identified':¹⁸

These groups comprised those sampled on 1st June 2004, 1st June 2005 and 1st June 2006. The data underwent substantial and lengthy editing to exclude those with earlier arrests or convictions, and to exclude pseudo-arrests or convictions (where events recorded subsequently are in fact linked to the taking of a sample and should not be classed as subsequent).

According to the paper, Table 2 'summarises the proportion of those dealt with re-appearing on the PNC data within three specified periods (depending on the period available from the

¹⁴ *S and Marper v United Kingdom*, n2 above, para 100.

¹⁵ Consultation paper, para 6.6. The research is set out at Annex C: 'DNA Retention after S and Marper': Ken Pease. Jill Dando Institute, April 2009.

¹⁶ *Ibid*, p26.

¹⁷ *Ibid*, para 6.10.

¹⁸ *Ibid*, p30.

sample date)'. From this, the paper asserts, 'the subsequent apparent criminality of the NFA group was somewhat greater than of those given non-custodial sentences', although it adds a caveat 'to stress the attendant uncertainty given the modest sample size and the year to year variation'.¹⁹

18. Unfortunately, Table 2 does not refer to groups from 2004-2006.²⁰ Instead it refers to groups from 1994-1996: 99 cases from 1994, 227 cases from 1995, and 206 cases from 1996 which are followed for 54, 42, and 30 months respectively. Table 2 identifies three categories: NFA ('no further action'), 'caution', and 'non-custodial sentence'.²¹ Although it is nowhere clearly spelt out, it appears that Table 2 gives the re-arrest rates for suspects according to how they were originally dealt with on their first arrest. However, the raw numbers in each category are not given, only the percentages. For example, of a sample of 206 people arrested in 1996, we do not know how many were subsequently charged, or – if charged – subsequently acquitted. Table 2 only states that, of some unknown proportion of those 206 people who were not charged or cautioned, 28% were subsequently arrested again. In two years – 1994 and 1996 – the re-arrest rate of those not charged or cautioned was apparently higher than that of those who were convicted and received a non-custodial sentence following their first arrest. It is on the basis of these incomplete figures that Professor Pease suggests that:²²

the subsequent apparent criminality of the NFA group was somewhat greater than of those given non-custodial sentences, with the writer wishing to stress the attendant uncertainty given the modest sample size and the year to year variation.

And:²³

The conclusion is that the NFA group subsequently shows itself to be roughly as criminal as the groups with which it was compared.

19. Leaving aside the manifest inconsistencies concerning the dates of the samples, the partial data presented for each sample, more general doubts about the reliability of the study based on their small size, and so forth, Professor Pease's paper proceeds on the fallacy that rearrest – the subsequent arrest of someone arrested previously – is somehow evidence of

¹⁹ Ibid.

²⁰ See also para 6.12 of the consultation paper, referring to '[t]he Home Office analysis [which] looked at a cohort of offenders who had been convicted of an offence in 2001'. Table 2 is set out again at p15 of the consultation paper with a similar lack of information.

²¹ Those receiving custodial sentences are excluded 'since their period of incapacitation would reduce the risk period for subsequent criminality' (ibid).

²² Ibid.

²³ Ibid, p31.

'criminality', when it is nothing of the sort. The fact of arrest merely reflects the police's suspicion (reasonable or otherwise) that an individual has committed an offence. In itself, it is no evidence of criminality unless and until the individual is charged and convicted. Just as one arrest cannot be taken as evidence of criminality, neither can two arrests: the second may have been as ill-founded as the first. Indeed, although Professor Pease notes that ethnicity and the seriousness of the respective offences may be relevant factors, he nowhere considers what he earlier and in a different context describes as 'vulnerability to confirmation bias by investigating officers'²⁴ – i.e. the fact that once a person is 'known to the police', they are more likely to be considered as a suspect when investigating future offences.

20. Professor Pease's false equation between rearrest and 'subsequent criminality' gives the lie to the consultation paper's claim that 'nothing here detracts from the legal principle of the presumption of innocence of any individual who is not convicted',²⁵ or the government's argument, rejected by the Strasbourg Court, that the retention of DNA by police for the purpose of investigating crimes does not involve stigma to those whose DNA profile is retained.²⁶ The quality of the consultation paper's research has already been the subject of adverse comment elsewhere.²⁷ Dr Ben Goldacre writing in the Guardian newspaper described it in the following terms:²⁸

[the] study from the Jill Dando Institute, attached to [the Home Office] consultation paper as an appendix, is possibly the most unclear and badly presented piece of research I have ever seen in a professional environment.

The importance of accurate and reliable research as the basis for government consultation on important issues should not be underestimated. As Mr Justice Beatson, the outgoing President of the British Academy of Forensic Science and a High Court judge, said in his valedictory address:²⁹

[The consultation paper] relies almost entirely on a piece of research undertaken since the decision of the Strasbourg Court by Professor Ken Pease of the Jill Dando Institute. The research focuses exclusively on the risk posed by unconvicted people

²⁴ Ibid, p27.

²⁵ Ibid, para 6.11.

²⁶ *S and Marper*, n2 above, at para 121: 'The Government contend that the retention could not be considered as having any direct or significant effect on the applicants unless matches in the database were to implicate them in the commission of offences on a future occasion'.

²⁷ See e.g. 'DNA database plans based on 'flawed science' warn experts', *The Guardian*, 19 July 2009.

²⁸ Ben Goldacre, 'Home Office research so feeble someone ought to be locked up', *The Guardian*, 18 July 2009:

²⁹ Mr Justice Beatson, n8 above, p19. Emphasis added.

who have been arrested as compared with the risk posed by unconvicted people who have not been arrested. The policy choices are said to rest upon an empirical basis. The issues involved raise difficult scientific and technical questions, and the policy choices in this area also have constitutional and civil liberties implications. *The need is for an objective, impartial and balanced assessment in which the public can have confidence.* Bearing these factors in mind, I suggest that the issue is one on which, for most of the twentieth century, advice would have been sought from a Royal Commission made up of the leading experts in all the relevant disciplines or a body such as the Law Commission.

21. In our view, there is no empirical basis for the Home Office's recommended retention periods for persons arrested but not convicted of a criminal offence. As the ECtHR held in *S and Marper*.³⁰

Weighty reasons would have to be put forward by the Government before the Court could regard as justified such a difference in treatment of the applicants' private data compared to that of other unconvicted people.

In our view, the proposed retention period of six years (with provision for a further six years upon rearrest) is wholly and utterly unnecessary, and – accordingly – as likely to be found in breach of article 8 for being as indiscriminate as the current law. In our view, the DNA profile of a person arrested but not convicted of a criminal offence should be deleted automatically either following the decision not to proceed against the person or upon their acquittal. This includes any person cautioned, warned or reprimanded, rather than charged. A person arrested but not convicted is entitled to the presumption of innocence and we do not see any basis for distinguishing between those arrested but not convicted of violent, sexual or terrorist offences and those arrested but not convicted of other offences.

22. The blanket retention of the DNA profiles of all persons convicted of a criminal offence, regardless of seriousness, similarly strikes us as unnecessary and disproportionate. We see no reason, why those convicted of minor offences such as shoplifting or non-physical offences such as fraud should have their DNA retained. We therefore strongly recommend that the retention of DNA profiles by police be limited to those convicted of serious criminal offences which involve harm to another, e.g. offences against the person, sexual offences, burglary, or terrorism.

23. We are particularly disturbed by the government's apparent unwillingness to delete the DNA profiles of people arrested but not convicted that are already stored on the NDNAD (the so-

³⁰ Note 2 above, para 123.

called 'legacy' cases). The government refers to approximately 500,000 legacy profiles without a linked PNC record. However, a profile of an anonymous individual taken from a crime scene does not engage anyone's right to respect for privacy unless and until the profile is matched to a known individual. If a profile is matched to a known individual, then the profile should be retained or destroyed according to whether the person has been convicted of a serious criminal offence involving violence or not. If a profile cannot be matched, then it is anonymous and does not engage article 8 ECHR. Either way, it is a red herring for the government to raise logistical problems in respect of half a million anonymous profiles to refuse to delete the profiles of the approximately 350,000 people whom the police know have not been convicted of a criminal offence.

Exceptional power for earlier destruction of profiles

24. According to the consultation paper, the existing power of Chief Constables to delete the DNA profiles of individuals following an application will be subject to 'defined criteria'. However the consultation paper does not spell out what these criteria will be:³¹

Applications for deletion will still be possible but will need to be made and considered against defined criteria. The criteria for deletion would be set out in Regulations. It is not possible to define comprehensive criteria in legislation for what will be in practice a based on the individual circumstances of each case Draft regulations will set out proposed criteria.

In our view, although we welcome the proposal to set out criteria to allow for independent review of a decision to retain a DNA profile, it is deeply unhelpful for the Home Office to invite consultation on possible criteria governing the exercise of the exceptional power without any indication of its own thinking. As with the other aspects of the new retention rules, we believe the criteria should be set out in primary legislation. We also believe it would be better for such applications to be determined by an independent judicial authority rather than a Chief Constable.

Retention period for children

25. The government proposes to retain DNA profiles of children arrested but not convicted of criminal offences for six years or on their eighteenth birthday, 'whichever is the sooner',³²

³¹ Consultation paper, para 6.22.

³² Ibid, para 6.19.

unless they have been arrested for a violent, sexual or terrorist offence in which case it will be retained for the standard twelve years as per adults.³³

26. It also proposes to delete profiles of those convicted of a single minor offence. The DNA profiles of those convicted of a serious offence or more than one minor offence will be retained indefinitely.³⁴

27. In JUSTICE's view, children arrested but not convicted should have their DNA profile deleted as soon as they have been acquitted, cautioned, or the decision has been taken not to charge them. As with adults, we do not consider that the fact that a child has been arrested for a violent, sexual or terrorist offence should make any difference.

28. We agree with the proposal to delete profiles of children convicted of minor offences on their eighteenth birthday, consistent with our view that DNA profiles should not be retained for minor offences in any event. However, a proportionate alternative retention period would be one year for children, rather than six. We do not agree that a blanket indefinite retention policy should operate for minors convicted of a violent, sexual or terrorist offence or multiple minor offences. Instead, minors convicted of such offences should be able to apply to an independent judicial authority for removal of their DNA profile on their eighteenth birthday.

Taking samples – additional categories

29. We can see a principled case for there to be a power for police to take samples from (i) a suspect where the original sample has proved insufficient for profiling purposes; or (ii) individuals who have previously been convicted of a serious violent, sexual or terrorist offence but from whom no sample was taken.³⁵ However, we think it would be constitutionally inappropriate to establish such powers by way of primary legislation while providing for the general retention regime by way of regulations. In our view, all such matters should be dealt with in proposals for a single Act.

Fingerprints

30. We consider that the fingerprint records of persons arrested but not convicted of a criminal offence should be destroyed either following their acquittal or once a decision has been taken not to charge them.³⁶

³³ Ibid.

³⁴ Ibid, para 6.18.

³⁵ Ibid, para 7.1.

³⁶ Ibid, para 8.1.

Volunteer samples and profiles

31. We welcome the government's proposals to remove all existing volunteer profiles from the NDNAD.³⁷ We also welcome the announcement that elimination samples will not be profiled for the NDNAD.³⁸
32. However, if the police are going to invite volunteers to consent to their DNA profile being retained on the NDNAD, we believe that volunteers should be free to require the deletion of their profile from the database at any time, unless they have been arrested for a criminal offence.

Governance and accountability

33. While we agree with the government's proposal to establish a 'strategic and independent advisory panel to monitor and scrutinise the retention policy and the processes of consideration for destruction of profiles',³⁹ we do not see that this should preclude greater judicial oversight of the NDNAD, particularly in respect of applications for the destruction of profiles. The decisions of Chief Constables are already subject to judicial review and judicial authorisation is already well-established in respect of other police activities, e.g. search warrants. We therefore see no difficulty with the establishment of an independent appeal mechanism within the existing Tribunal system. On the contrary, we would welcome such a development as a positive step towards ensuring that the NDNAD does not retain DNA profiles unnecessarily.

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³⁷ Ibid, para 9.1.

³⁸ Ibid, para 9.3.

³⁹ Ibid, para 10.4.