



**Liberty's response to the Home
Office's Consultation: Keeping the
Right People on the DNA Database:
Science and Public Protection**

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Introduction

1. The UK currently has one of the largest DNA databases in the world containing DNA samples of over seven per cent of the population. The development and expansion of this database has occurred without any clear statutory basis or public consultation. England, Wales and Northern Ireland are the only jurisdictions within the Council of Europe which allow for the indefinite retention of fingerprints and DNA material of any person of any age suspected of any recordable offence.¹ Unsurprisingly, we would say, this system has been held, in *S and Marper v UK*, to be incompatible with the right to privacy under the European Convention on Human Rights (ECHR) (and therefore of the *Human Rights Act 1998*). The government's response to this decision is to introduce provisions² enabling it to make secondary legislation setting out details about the retention, use and destruction of fingerprints and DNA. This consultation sets out more detailed proposals as to how this will operate in practice – something completely missing from the amendments that have already been put before Parliament.

2. The government's response to the *S and Marper v UK* decision has been extremely disappointing. The proposals in this consultation are inadequate, very poorly researched and fail to address the Court's conclusion that the current retention regime is a disproportionate interference with the right to respect for private life.³ At the very least, an issue as important as the retention of intimate DNA profiles on a centralised database, must be properly debated and considered by Parliament and not left to secondary legislation. Further, no consideration has been given to deleting the DNA profiles of adults convicted of minor offences. The approach taken towards children fails to fully appreciate the harmful effect on minors of being on the National DNA Database. Most problematically, the proposal to remove the profiles of those who have not been convicted of any offence, either because they have been acquitted or no charges were laid or were later dropped, is limited to six and twelve years according to the offence for which they were arrested. These figures are based on flimsy research, compare unfavourably with the position in other European

¹ *S and Marper v UK*, Application Nos 30562/04 and 30566/04, Grand Chamber judgment 4 December 2008, paragraph 110, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=marper&sessionid=22986969&skin=hudoc-en>

² See clauses 96-98 of the Policing and Crime Bill currently before the House of Lords.

³ See *S and Marper v UK* at paragraph 125.

countries and fail to have due regard for the presumption of innocence. In this consultation response we intend to explore all of these issues.

Existing law

3. Under the *Police and Criminal Evidence Act 1984* (PACE) the police have the power to take fingerprints and DNA samples (and footwear impressions) from a person following their arrest for a recordable offence.⁴ A recordable offence⁵ is defined as being any offence punishable by imprisonment as well as 68 other named offences which include such minor offences as drunkenness in a public place, begging and riding a bicycle without the owner's consent. PACE currently provides that fingerprints and DNA samples may be retained after they have fulfilled the purpose for which they were taken (including from volunteers in most circumstances), but does not deal with when, if ever, such material may be destroyed.⁶ As such, destruction of samples is currently dealt with by each individual police authority, acting under guidance from the Association of Chief Police Officers (ACPO). ACPO guidance says that fingerprints and DNA samples taken on arrest should only be destroyed in 'exceptional circumstances'. If no exceptional circumstances exist the current policy is that DNA samples and fingerprints will be retained until a person reaches 100 years of age.

S and Marper v UK

4. On 4 December 2008 the European Court of Human Rights (ECtHR) in the case of *S and Marper v the United Kingdom* (in which Liberty intervened), ruled that the UK's policy of indefinite retention was in breach of the ECHR. 'S' was 11 years old when arrested on suspicion of armed robbery. His fingerprints and DNA samples were taken following arrest, but despite being acquitted at trial the police refused to destroy the samples. Mr Marper was arrested in 2001 and charged with harassment of his partner. Two months later he had reconciled with his partner and no charges were pressed and proceedings were discontinued, however the police refused to destroy samples of his DNA and his fingerprints taken following arrest. The ECtHR held that the "*blanket and indiscriminate nature of the powers of retention of the*

⁴ See sections 61 and 63 of PACE.

⁵ See the definition in s 118 of PACE and the *National Police Records (Recordable Offences) Regulations 2000*.

⁶ See section 64(1A) of PACE.

fingerprints, cellular samples and DNA profiles of people suspected but not convicted of offences” breached the applicant’s right to respect for private life under Article 8 of the European Convention on Human Rights.⁷

5. The right to privacy is not an absolute right – it can be limited by a law if it is necessary to do so in a democratic society for a number of wide ranging interests. Previous cases have held that the mere storing of data relating to the private life of a person amounts to interference under Article 8.⁸ Whether or not the storing of such information can be permitted under Article 8 will turn on context including, among other things, factors such as the nature of the information; the purpose of its storage; the access regime etc. In their strongly worded unanimous judgment, the Court in *S and Marper* reiterated that DNA samples “*contain a unique genetic code*” which contains highly personal information.⁹ The Court accepted that the retention of DNA information and fingerprints pursued the legitimate purpose of crime detection and prevention, but went on to say that the indefinite retention of such material is not necessary in a democratic society as it fails to strike a fair balance between competing public and private interests and is a disproportionate interference with the right to privacy.¹⁰ In particular, the Court made the following observations and findings in relation to the UK DNA database:

- Most other states take DNA samples and fingerprints from people suspected of having committed offences of a certain level of gravity, whereas in the UK it is taken on arrest for any recordable offence.¹¹
- In most other European jurisdictions, including Scotland, DNA samples are required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge.¹² In fact, England, Wales and Northern Ireland are alone within the Council of Europe in allowing indefinite retention of such material from persons of any age suspected of any recordable offence.¹³

⁷ *S and Marper v UK*, at paragraph 125.

⁸ See *Leander v Sweden*, 26 March 1987, ECtHR at paragraph 48.

⁹ *S and Marper v UK*, at paragraph 72. The Court also held that fingerprints also contain unique information about a person allowing his or her identification with precision in a wide range of circumstances and as such retaining them may, in itself, give rise to important private-life concerns, see paragraphs 84-85.

¹⁰ See paragraph 125.

¹¹ See paragraph 108.

¹² See paragraph 108.

¹³ See paragraph 110.

- The DNA database has contributed to the detection and prevention of crime but many of the matches on the DNA database could be made simply by taking the DNA on arrest but not by indefinitely retaining it.¹⁴
- The power of retention is blanket and indiscriminate, as the material may be retained irrespective of the nature or gravity of the offence, the age of the suspected offender; the fact that the retention is indefinite; there is no provision for independent review and only limited possibilities for an acquitted person to have their data removed.¹⁵
- Every person has the right to be presumed innocent until proven guilty and acquitted persons must be treated in the same way. The National DNA Database risks stigmatising people, as inclusion on the database leads to the perception that suspicions exist in relation to that person.¹⁶
- The retention of samples and profiles of unconvicted people may be especially harmful in relation to children, and currently, unconvicted children and minority ethnic people are over-represented on the database.

6. It should be noted that this decision does not dispute or aim to undermine the important role that DNA evidence can play in the detection and prevention of crime and it will not prevent the police from doing extremely important investigatory work using DNA. Rightly it does not prevent DNA being taken from suspects arrested in the course of an investigation and it does not prevent that DNA from being retained while the investigation is actively ongoing. The judgment does not seek to prevent DNA taken from those on arrest being cross-referenced against unidentified crime scene DNA. Importantly, it also does not require the DNA profiles of those convicted of violent and sexual offences to be deleted from the National DNA Database. What this judgement *should* do is introduce human rights values of proportionality and necessity to the complex issue of DNA retention.

Liberty's starting position on DNA retention

7. Liberty has consistently lobbied for reform of the DNA retention regime in England and Wales. Liberty's starting point is that DNA evidence can be a highly effective crime detection and prosecution tool. Thus we take no issue with the collection of DNA from suspects for the purposes of a criminal investigation into

¹⁴ See paragraphs 116-117.

¹⁵ See paragraph 119.

¹⁶ See paragraph 122.

recordable offences. Anyone who comes under suspicion in an ongoing criminal investigation is likely to have their DNA taken in any event. Our concerns essentially relate to the retention of DNA: we believe that the human rights principles of necessity and proportionality should place limits on DNA retention. As we said in our 2007 Report, *Overlooked*, before the State retains and uses personal information it should be required to justify its actions:

First, is there a legitimate reason for the intrusion of privacy that the [National DNA Database] constitutes? Secondly, could that legitimate aim be achieved in a way which does not intrude into a person's privacy or could do so less? As citizens we are entitled to ask these questions and trust that responsible, democratic and accountable Governments should not shy away from providing us with the answers. Only then can we make up our own minds about the validity of these arguments. A culture of justification is, we believe, integral to good policy making, Government accountability and an engaged citizenship.¹⁷

8. As with any database, the larger the number of entries, the greater the risks of error and abuse. It is sometimes difficult to weigh the societal impact of retaining millions of intimate genetic profiles of entirely innocent people against the intelligence benefits of an ever-larger National DNA Database. Some argue that there should be no permanent DNA retention whatsoever; others that there should be permanent retention relating to every man woman and child in the country. The first view underplays the importance of solving serious sexual and violent crimes; the second ignores both the risks of human error and costs for human privacy and dignity. While both are undesirable they at least have the attraction of clarity and the avoidance of making arbitrary and potentially discriminatory distinctions between different groups of innocent people.

A rushed consultation

9. There are numerous problems with this consultation, not least the fact that the research which appears to underpin the main proposals is fundamentally flawed. Throughout the consultation paper it is clear that everything, from the research, to the policy development, to the writing of the consultation, has been rushed. Indeed, the decision to insert a regulation-making power into the Policing and Crime Bill rather

¹⁷ Gareth Crossman et al, *Overlooked: Surveillance and Personal Privacy in Modern Britain*, 2007, page 67.

than consult and then introduce primary legislation seems to be as a result of an almost panicked decision to react swiftly to the judgment of the ECtHR. While we commend the government in wishing to respond in a timely manner to an adverse decision this should not come at the expense of a proper consideration of the issues – resulting in flawed policy and the transfer of important decisions to secondary legislation. One might also question why the government has felt the need to respond so quickly to this decision when there are older outstanding ECtHR judgments finding against it that have not yet been dealt with. One example is that of *Hirst v UK (No. 2)*¹⁸ which was decided in October 2005 and to which the government is yet to respond – over three years later a second consultation on the proposed response is currently underway. The Joint Committee of Human Rights in its annual review of the implementation of human rights judgments noted last year that there are many decisions which the government has delayed implementing, with delays of upwards of five years.¹⁹ While we are certainly not advocating that the government delay implementation of ECtHR decisions, we would rather the government fully consider the judgment and formulate principled policy before consulting, particularly on an issue as sensitive as this. It is not unreasonable to suggest that the government should have anticipated an adverse finding against it at Strasbourg (despite domestic case law in its favour, international human rights law on respect for privacy is strong) and have been ready to issue proposals for consultation after the judgment was delivered. In fact, one might have assumed that a certain amount of statistical analysis would have already taken place in preparing arguments before the courts on this issue. The government should have initially consulted early in 2009 and after considering the responses introduced a stand-alone Bill into Parliament to deal with this important issue. This would have ensured proper parliamentary scrutiny. In fact, it is not too late for a stand-alone bill to be introduced in the 2009-10 parliamentary session.

Proposals in the consultation

10. It is clear from the consultation that the government has been dragged, reluctantly, to recognising that the right to private life will not allow for indefinite retention of the DNA of innocent people. It is clear that the government would not

¹⁸ *Hirst v UK (No 2)*, ECtHR, 6 October 2005, Application no. 74025/01.

¹⁹ See JCHR, *Monitoring the Government's Response to Human Rights Judgements: Annual Report 2008*, 31st Report of 2007/2008 session, available at: <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/173/173.pdf>

have reached this conclusion alone – it fought this all the way to the ECtHR. The language of the consultation paper, and the proposals it contains, demonstrate this. The language used is emotive and seeks to play on public fears that deletion of DNA data from the database will affect public protection. In fact, the first substantive part of the consultation starts with a quote from the mother of a murder victim who advocates a universal database and says “*I am sick to death of the people who complain about this idea. They have no idea what families like mine have been through*”.²⁰ This is obviously a legitimate complaint from a grieving mother but it is difficult to see why this statement opens the government’s consultation on developing a proportionate DNA retention regime. The consultation states that the government has “*never advocated a universal DNA database*”, although this is what Tony Blair, then Prime Minister, seemed to be calling for in 2006 when he said the number of DNA profiles on the database should be “*the maximum number you can get*”.²¹ It is also what the current system has been systematically setting out to achieve. It is clear that the government would still prefer to maintain large numbers of people on the database and they are relying on flawed science to pick a lengthy retention period of the DNA of people who have not been convicted of an offence.

11. The proposals in the consultation should instead have started from first principles: considering how to shape a proportionate retention regime having due regard to the rights of unconvicted people and the need to protect the public. This is not the approach taken and the end result is a set of proposals that, in the main, fail to strike the necessary balance and continue to disproportionately infringe the right to private life of unconvicted individuals. If enacted these proposals would almost certainly be challenged yet again before the courts. A scientific evidentiary-based approach, even if credible, cannot be the only answer. If it was, we would see the DNA of all 16-20 year old males automatically entered onto the database and retained until they get older given this group is statistically more likely than the general population to be convicted of offences. This, thankfully, is not an option that any government would be willing to pursue as to do so would clearly be wholly discriminatory and disproportionate. Sadly, the same can also be said for the government’s proposals to retain the DNA of anyone arrested for a recordable offence, but not convicted, for up to 12 years.

²⁰ Quote from Mrs Linda Bowman, London Evening Standard, 1 April 2009, on page 8 of the consultation.

²¹ See <http://www.telegraph.co.uk/news/uknews/1532210/DNA-database-should-include-all.html>

Samples and volunteers

12. It is perhaps easiest to start our response to the consultation by outlining the proposals that we welcome. The proposal that considers the principles of necessity and proportionality appropriately is the plan to delete all the DNA samples held on the database. These are the physical DNA samples taken from a person (i.e. their saliva, blood, hair roots etc), barcoded and stored in a laboratory. Some 4.5 million samples are currently held by the police. The Court in *S and Marper v UK* held that the “retention of cellular samples is particularly intrusive given the wealth of genetic and health information contained therein”.²² We are therefore extremely pleased that the government has proposed destroying all these samples – particularly as they serve little investigative purpose as DNA profiles contain the requisite information for searching for matches on the database.

13. We also welcome the government’s proposal to remove all volunteers’ DNA samples from the database and ensure in future that volunteers’ profiles and samples will not be entered onto the National DNA database. Volunteers are those who have consented to provide their samples either as part of a mass screening process in a geographical area or on an individual basis (i.e. to eliminate their DNA from a crime scene). Volunteers’ profiles will then just be searched against crime scene samples relating to the specific offence under investigation for which the sample was given, and not stored indefinitely on the database. This is important to ensure volunteers continue to supply this important information and ensures that those volunteers who originally consented to their information being retained but then change their mind don’t need to be concerned that their profile will be retained indefinitely. However, the language used in the consultation is notable for what it does not say. It states that existing volunteer *samples* will be removed from the database and, in the future, both samples and profiles will be destroyed when no longer required for investigative purposes. We assume this means that the *profiles* of volunteers already obtained will remain on the database indefinitely. This has no logic other than that the government wishes to retain as many profiles as it possibly can, even though it has recognised there is no need to retain volunteer profiles in the future. There are many volunteers who, while they originally consented to their DNA sample being taken and retained, now wish to have that profile removed. They should have that right. Consent should be able to be revoked and it is clearly unnecessary to retain the

²² *S and Marper v UK* at para 120.

profiles of volunteers – certainly no scientific basis has been put forward in the consultation to try to justify the greater likelihood of volunteers committing crimes. We urge the government to remove the profiles of volunteers as well as their samples and ensure consistency in the future.

Children

14. The ECtHR in *S and Marper* notes that the retention of unconvicted persons' data may be especially harmful in the case of minors, given their special situation and the importance of their development and integration in society. Article 40 of the *United Nations Convention on the Rights of the Child* of 1989, which the UK is a signatory to, provides:

*States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*²³

The UN Committee on the Rights of the Child has noted with concern that “*data regarding children is kept in the National DNA Database irrespective of whether the child is ultimately charged or found guilty*”.²⁴

15. Two weeks after the ECtHR handed down its decision in *S and Marper* the then Home Secretary, Jacqui Smith, announced that the DNA taken from all children under the age of ten would be removed from the National DNA Database. The consultation states that all such profiles have now been removed from the database.²⁵ There was never any doubt that the profiles of children under-10 must be removed from the database given these children are under the age of criminal responsibility. Retaining their DNA was evidently unlawful and utterly indefensible.

²³ See Article 40(1) of the UN CRC, available at:

<http://www2.ohchr.org/english/law/crc.htm#art40>

²⁴ Committee on the Rights of the Child, 49th session, Concluding Observations on UK, 20 October 2008, at para 36. Full Report available at:

<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

²⁵ See page 22 of the Consultation.

Removing the profiles of the under-10s is not something for which the government deserves much praise – it is worrying that it took an ECtHR decision before such action was taken. The proposals in this consultation are not especially enlightened with respect to children. The only concessions are:

- A child convicted once of a minor offence can have their profile deleted on reaching 18 years of age or after six years, whichever is sooner. If convicted of two minor offences or if convicted once of a ‘serious’ offence a child’s DNA remains on the database indefinitely;
- A child not convicted of anything but arrested once for a minor offence can have his or her profile removed on turning 18 or after six years, whichever is sooner. But a child arrested twice or more of a minor offence or arrested once, but not convicted, of a ‘serious’ offence will be treated in the same way as an adult.

16. In effect this gives children convicted once of a minor offence a ‘second chance’. This is to be welcomed although we believe the government must go further with respect to convicted children – there should be a presumption in favour of DNA profile removal once a child reaches 18. This presumption could be rebutted (depending on the seriousness of the offence for which they have been convicted, the number of other offences for which they have been convicted etc), but the onus should be shifted. Children should not be stigmatised as a result of things done before they reach full maturity. Additionally, childhood law-breaking is not necessarily indicative of future behaviour. The research paper by the Jill Dando Institute contained at Annex C to the consultation states that the literature demonstrates “*that early age of onset is a predictor of longer criminal careers*”.²⁶ This is of course stating the obvious – if you start something at an earlier age you will necessarily have much longer in which to do it before dying. Just as someone who started collecting stamps at a young age would have a much longer career as a philatelist than someone who didn’t start collecting until they were in their 40s. This does not advance the argument any further. While we do not doubt that a number of children who have been convicted of a crime go on to commit further crimes after they turn 18 this is not an adequate reason to indefinitely retain the DNA of all children found guilty of any offence. Developmental immaturity is recognised when determining what punishment children should receive and the *Rehabilitation of Offenders*

²⁶ See page 33 of the consultation.

Act 1974 provides that convictions and cautions given to those under 18 become spent in half the time as they do for adults. It seems clear that a differentiated system must apply to the retention of a child's DNA. Merely removing the profile of a child convicted once of a minor offence does not go far enough. This means that a child cautioned once for shoplifting when aged 10 and again when 12 would then remain on the database for the rest of their life. It is difficult to see how this could possibly be considered a proportionate response taking into account the special status of children within the criminal justice process.

17. We have further concerns with proposals in respect of children who have not been found guilty of any offence but have simply been arrested. In such circumstances the only 'concession' for children is that if arrested once for a minor offence their profile can come off at 18 or after six years whichever is sooner. Bear in mind that six years is the same as for adults in such circumstances, so 10 and 11 year olds receive no different treatment at all. Moreover, all children arrested for 'serious' offences or arrested twice or more for minor crimes are then subject to the same disproportionate regime as for adults. Thus, a 12 year old arrested for sexual touching of another 12 year old, which is a criminal offence²⁷ and one which the consultation lists as serious,²⁸ will have his or her DNA retained until the age of 24 – despite never having been convicted of anything (of course, such a child if convicted would have his or her DNA retained indefinitely).

18. The arguments listed above in respect of convicted children apply even more forcibly to innocent children. A disproportionate number of children come into contact with the police. This is partly due to the fact that a number of children, particularly boys, are more likely to be criminally active as teenagers. But it is also to do with the fact that children are more visible to police and are often automatically, it seems, considered suspect. This is likely fuelled by our increasing demonisation of children. The UN Committee on the Rights of the Child said in its Report last year, that it was concerned by the "*general climate of intolerance and negative public attitudes towards children, especially adolescents, which appears to exist in the UK, including in the media and may be often the underlying cause of further infringements of their rights.*"²⁹ Liberty believes that the DNA profiles of all children who have not been convicted of any offence should be immediately removed from the database.

²⁷ See section 13 of the *Sexual Offences Act 2003*.

²⁸ See number 114, page 85 of the consultation.

²⁹ *Ibid* footnote 24 at para 24.

Retention of the DNA of unconvicted adults

19. In *S and Marper v UK* the ECtHR stated that it was struck by “*the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender*”.³⁰ It noted its particular concern as to the risk of stigmatisation as unconvicted people are treated in the same way as convicted people. The Court stated that it must bear in mind the right of every person to be presumed innocent until proven guilty and this includes the general rule that no suspicion regarding an accused’s innocence may be voiced after acquittal. It went on to say that while the retention of DNA is not the same as voicing suspicions “*their perception that they are not being treated as innocent is heightened by the fact that their data are retained indefinitely*”.³¹

20. The government is correct to say that the ECtHR decision did not rule unlawful the retention for a specified period of the DNA of those not convicted of any offence (although it didn’t specifically allow for this – rather, it just ruled on the disproportionate nature of the present indefinite retention regime). Liberty has never argued that those who have not been convicted of an offence should never be kept on the National DNA Database. There should however be a strong presumption in favour of removal at the end of an investigation or once a person has been acquitted. Any retention past this period must be shown to be necessary and proportionate. The proposals in this consultation – retention for six years following arrest for most offences and for 12 years after arrest for ‘serious violent or sexual or terrorist-related offence’ – fail the test of proportionality. They fail to recognise the principle of innocent until proven guilty and to address the Court’s concerns regarding the risk of stigmatisation of innocent people on the database.

‘Research’

21. Liberty was surprised to learn exactly how the figures of six and twelve years were conceived. It is clear that the Home Office has based this policy decision purely on the ‘evidence’ sourced by Ken Pease of the Jill Dando Institute (JDI) which is annexed to the consultation. Yet, as any statistician will attest, the figures presented in the study are too small to draw any meaningful conclusions. Even more

³⁰ See *S and Marper v UK* at para 119.

³¹ See *S and Marper v UK* at para 122.

shockingly, the majority of the research proceeds on the seriously questionable and offensive assumption that the reoffending rates of convicted criminals can be used to predict the risk of an arrested person being rearrested. In summarising his work the consultation states that for his figures to be valid “*we would have to believe that the risk of offending following an arrest which did not lead to a conviction is similar to the risk of reoffending following conviction.*”³² The consultation paper does at least have the grace to concede that this “*is obviously a controversial assertion*”³³ but then states that this is backed up by work carried out by the JDI. Not only is this assumption a slap in the face to the presumption of innocence, we do not believe it is at all accurate to say that this conclusion is ‘borne out’ by the JDI research.

22. Liberty does not normally critique research provided by experts in fields other than our own. However, the JDI research is embarrassingly bad. This would be worrying if it simply formed part of the background for the development of the government’s policy in this important and sensitive area, but it is clear from the consultation document that this is the *only* basis on which the government rests its policy. The ‘Evidence Base’ attached to the government’s Impact Assessment which sets out possible options offers only the options of doing nothing (i.e. not trying to comply with the ECtHR decision); automatically deleting all profiles once an investigation is complete; or deleting after six and twelve years. Clearly the first option is not really an option. The option of automatic deletion is not explored at all and the Assessment states that the six/twelve year option is the preferred one. It explicitly states that these periods were based on research by the JDI. The ‘Evidence Base’ states:

*The 6 year figure has been chosen based on evidence of the likelihood of people who have been arrested, but against whom no further action is taken, going on to commit further offences. The data available for research contained those who had been convicted and also if they had been reconvicted. Reconviction was assumed to be a reasonable approximation for those who had not been convicted based on independent research carried out by the Jill Dando Institute which found that the reoffending rates of those where no further action was taken is not significantly lower than for those who were convicted.*³⁴

³² See para 6.10, page 15 of the consultation.

³³ See para 6.11, page 15 of the consultation.

³⁴ See page 63 of the consultation.

23. So what is this 'evidence' from the JDI? Well, it appears to be based on a total of 532 people arrested on the 1 June over three different years and considering what percentage of those against whom no further action was taken were later arrested. The relevant years are very unclear. The text of the JDI research refers to 2004, 2005 and 2006³⁵ yet the accompanying table refers to samples from 1994 – 1996, and the consultation document itself refers to “*work carried out by JDI on a cohort from the mid 1990s*”.³⁶ Not only does this in itself cast doubts over the accuracy of this research, it is an important issue as the footnote to the JDI research states “[t]he writer was concerned by the smaller number of cases in 2004. His best guess is that the date fell on the day following a Bank Holiday.”³⁷ This suggests it was in 2004 (as there was a bank holiday following 1 June 2004), and also shows another possibility for why the results might be skewed. The paper goes on to say that the “*data underwent substantial and lengthy editing to exclude those with earlier arrests or convictions, and to exclude pseudo-arrests or convictions ... Some exclusions were made on the basis of lack of clarity as to the case outcome*”.³⁸ This is all the information we are given as to how this data was sifted. The Table which is said to indicate the percentage of cases of people arrested again within the risk period is very difficult to understand, particularly when compared with what is said in the text. As far as we can make out, it suggests that of those people arrested in 1996/2006 who had no further action taken against them, 28% went on to reappear on PNC data within 30 months. In 1995/2005 and over a 42 month period it jumped to 50% of such people who reappeared, whereas in 1994/2004 over a longer period (54 months) it went down to 48%. No explanation is given as to why the period for follow up was limited in this way. It is also impossible to know how many people made up these percentages. So for example, the 50% ‘reappearing’ rate could be based on ten people having been arrested and not proceeded with and only five of those being later rearrested. The total number of cases in the Table seems only to refer to all cases, including those who were cautioned or given non-custodial sentences. It is therefore not at all inconceivable that from a total of 99 people on one day it was only a very small number against whom no further action was taken – so a 28%, or 50%, or 48% ‘reappearance’ rate could be based on even smaller numbers.

³⁵ See page 30 of the consultation.

³⁶ See para 6.11, page 15 of the consultation.

³⁷ See footnote 8 at page 31 of the consultation.

³⁸ See page 30 of the consultation.

24. In addition, no explanation is given as to what “*reappearing on the PNC data*” means. Presumably this could just mean the person was rearrested. This does not indicate criminality – despite the many and varied innovations in the criminal justice sphere over the past several years we would still expect a government consultation paper to pay lip service at the very least to the presumption of innocence. We know that ethnic minorities are more likely to be arrested by the police (and have their DNA entered onto the database) yet the conviction rate is not substantially higher. It doesn’t take a lot of imagination to identify a possible racial bias in the arresting pattern. Yet, as the paper itself states, the JDI had no evidence about the ethnicity of the group under consideration.³⁹ Putting aside police actions, it is unacceptable for academic research to conflate arrests and findings or admissions of guilt to try to prove the likelihood of subsequent criminality.

25. Furthermore, the numbers themselves are so small as to be insignificant. The JDI research states that “*the writer wish[es] to stress the attendant uncertainty given the modest sample size and the year to year variation*” and notes his awareness that “*errors of estimation will be magnified by multiplying the figures*”.⁴⁰ There is also no evidence that the research has done a ‘power calculation’ to determine the sample size they would need, as required by any statistical study.

26. The rest of the research paper is not much better. Table 1 is meant to give a summary of the significant DNA terms but the Table itself is incomprehensible, not helped in any way by the fact that although the text states that numbers can be differentiated by solid red or stippled yellow coloured cases the entire Table is blue. The majority of the paper is dedicated to considering the reoffending rate of convicted criminals. The research described above concludes that the group who were arrested but had no further action taken against them showed themselves “*to be roughly as criminal as the groups with which it was compared*”, and that makes it “*defensible to look at the criminal career literature generally*”.⁴¹ The six year figure is based on research done for a student’s doctoral thesis on subsequent criminality of convicted offenders, with deletion after six years leaving “*just over half the cohort’s crime yet to be committed*”.⁴² The research concludes that “*a retention period of some 24 years would be necessary to maximise profile value in detecting future*

³⁹ See page 31 of the consultation. Note that the research paper itself suggests a larger scale exercise along the lines of ethnicity is recommended.

⁴⁰ Page 30 of the consultation.

⁴¹ Page 31 of the consultation.

⁴² Page 32 of the consultation.

crime".⁴³ This is presumably based on the doctoral research which shows that by 24 years a person has a 0% rate of reoffending – obviously this is lower than the general population. Yet a Figure attached to the 'Evidence Base' (where it derives from is not explained) shows that convicted persons have the same risk of reoffending as any 16-20 male after four years (and less likelihood after four years). The 'Evidence Base' states:

*This implies that after 4 years the probability of any person re-offending and being convicted following an earlier conviction is the same as the probability that any 16-20 year old male offends and is convicted whether or not they have been previously convicted. Since 16-20 year old males are the most likely to be convicted this gives an estimate of the minimum advisable retention length of a DNA sample.*⁴⁴

If one were to accept this 'evidential' basis (which we do not) it does raise the question as to why not four years then? Why six? The Chief Economist, John Elliot, recognises in Annex E to the consultation the problem with the six year mark, noting that the six year period "*is based on only limited evidence*".⁴⁵ Where the 12 year period for 'serious violent, sexual and terrorist-related offences' comes from is not explained. The research provided states (on the basis of convictions only) that the likelihood of committing a serious offence in the future is not based on having committed a serious offence in the past. It emphasises the versatility of all but a minority of offenders. The JDI research 'evidence' of this, causes serious alarm - we are told that Dick Turpin was arrested for theft and then his true identity was revealed and he was 'hung for murder'. Putting aside the fact that in Dick's case his DNA would have been taken on arrest for the theft were he to commit it today and any investigation into unsolved murders could then have taken place, and the fact that he was actually hung not for murder but for horse rustling, this is hardly compelling evidence. Yet, even if we are to accept that a high proportion of those convicted of serious offences are involved in trivial offences this still does not explain the six and twelve year distinction. On this assumption those arrested for a minor offence should be treated in the same way as those arrested for a serious offence.

⁴³ Page 37 of the consultation.

⁴⁴ See page 88 of the consultation.

⁴⁵ See page 95 of the consultation.

27. In contrast, the 'Evidence Base' states that research suggests "*individuals who are arrested for violent or sexual offence tend to pose a higher risk to society than those charged on other, less serious offences.*"⁴⁶ No evidence is actually cited and it is worth pointing out the conflation here between arrest and charge. The consultation states that despite the evidence for reoffending in more serious and violent cases being 'unclear', the Home Office believes "*a longer retention period is a commonsense approach given the more serious consequences of reoffending and therefore the damage that a missed detection would imply*" (emphasis added). The only thing that is clear is that the entire consultation conflates arrest with conviction and the numbers, drawn from flawed research, don't even add up to the results of the research. Each figure seems to be plucked out the air, with six years having been rounded up from a four year period (which itself is based on breathtakingly flawed evidence) and the twelve year period seemingly just being double that of six. The result is a policy and consultation document that is embarrassing - produced by the Home Office in what is self-evidently not its finest hour. To be fair to some of the contributors to the document, it is recognised throughout that further work needs to be done. The Chief Economist states that a fuller consideration of retention periods would have been helpful but was precluded by time limitations.⁴⁷ The JDI research notes that it is incomplete – that a larger-scale research programme is necessary.⁴⁸ Yet, somehow all of these qualifications and warnings as to the limitations of the research seem to have fallen by the wayside. The government refers to its 'evidence base' as if it were immutable. In a recent letter to the Chair of the JCHR a government Minister states that the measures in the consultation are premised on "*an evidence-based assessment of risk*" and says that the consultation sets out the 'evidence base' that was not available to Scotland when it developed its policies on retention.⁴⁹ We doubt that the Scottish legislature is likely to be convinced by this so-called evidence base. Any indication that the Scottish legislature would re-think their own framework having read the Home Office's 'Evidence Base' would be bold.

⁴⁶ See page 69 of the consultation.

⁴⁷ See page 95 of the consultation.

⁴⁸ See pages 26, 35 and 37.

⁴⁹ See letter by Alan Campbell MP, Parliamentary Under Secretary of State to Andrew Dismore MP, Chair of the JCHR, dated 9 July 2009, available at: http://www.parliament.uk/documents/upload/Campbell_Marper090709.pdf

Violent and sexual offences

28. We also question why certain offences are deemed to be ‘violent offences’ or ‘sexual offences’ that arrest for should be subject to the longer period of retention. It seems that the list, annexed to the ‘Evidence Base’ is taken directly from Schedule 15 of the *Criminal Justice Act 2003*. This Schedule lists those offences that if committed a Court could consider imposing an indeterminate sentence. This requires the Court to exercise its discretion in cases where a person has been convicted and the Court believes on the basis of all the evidence before it the person would be likely to be a risk in the future. It is clear that the situation to which this list is being proposed to be used here is very different. Here it applies when a person has been arrested for such an offence – the only requirement being that a police officer has reasonable grounds to suspect a person of having committed (or being about to commit) an offence. It is always dangerous to simply copy and paste from one legislative scheme to the next given each exists in its own context.

29. The type of offences that are considered ‘violent’ are of concern. Several of the offences in the list are not what most people would regard as serious violent or sexual offences. So for example, intentionally using insulting words or behaviour, which are racially or religiously aggravated, to cause a person harassment, alarm or distress is considered to be a ‘violent’ offence.⁵⁰ As is careless driving when under the influence of drink or drugs.⁵¹ A number of offences listed as relevant sexual offences have now been repealed, including procuring others to commit homosexual acts.⁵² All of these are apparently considered so violent that on arrest a person must automatically have their DNA retained for 12 years. We believe, at the very least, that this list needs to be reconsidered and the inclusion of each offence on the list (if there is to be such a list) should be individually determined. It is not acceptable to simply use a list used in another piece of legislation that has a completely different purpose. What should and should not be included in such a list should be a matter for proper Parliamentary debate, yet Parliament will not be given the chance to do this under the current proposals given whatever is included in any Regulations made under this proposed power will not be amendable by Parliament.

⁵⁰ See offence 59 on page 83 of the consultation.

⁵¹ See offence 49 on page 83 of the consultation.

⁵² See offence 95 on page 84 of the consultation.

Terrorist offences

30. We are also concerned by the blanket statement that “*profiles obtained and retained in relation to terrorism and national security*”⁵³ should be retained for 12 years even without conviction. The language used here is important – it doesn’t say ‘a person arrested’ in relation to terrorism/ national security. This is because the powers allow the DNA to be taken from a person who has not even been arrested. Under Schedules 7 and 8 of the *Terrorism Act 2000*, a constable, immigration officer or customs officer at a port or border can question anyone entering or leaving to determine whether the person is involved in some ways in acts of terrorism, and this power can be exercised “*whether or not he has grounds for suspecting*” that a person has had such involvement.⁵⁴ In order to exercise this power an officer can detain the person, and if detained in a police station the police can take that person’s DNA.⁵⁵ So in these circumstances, DNA can be taken from a person who is not even *suspected* of having committed any offence and that DNA will be retained for 12 years. We would question the assumption that it is necessary to take, let alone keep, such DNA. What evidence is there that someone the police or an immigration or customs officer questions without any suspicion is more likely to commit an offence in the future than other members of the UK population? This also applies to DNA taken by a law enforcement authority from someone who has not been arrested, and who probably does not know their DNA has been taken, if it is to be retained and used “*in the interests of national security*” or for purposes ‘related’ to the prevention and detection of crime, an investigation or prosecution or to identify a deceased person or to identify the person whose DNA was taken.⁵⁶ Again, there is no suspicion that the person whose DNA it is has committed an offence. This DNA will be retained for 12 years. Again no explanation is given in the consultation document. As ‘terrorism offences’ is left undefined we can only assume that this will include all offences under terrorism legislation. This will therefore include broad speech offences such as glorification of terrorism.⁵⁷ Arrest, but not conviction, for this would hardly seem to require DNA retention for 12 years. It is disappointing that the consultation didn’t set out the list of applicable offences and we would hope to have greater consultation before such a list is included in legislation.

⁵³ See para 6.15, page 16 of the consultation.

⁵⁴ See item 2(4) of Schedule 7 of the *Terrorism Act 2000*.

⁵⁵ See item 10 of Schedule 8 of the *Terrorism Act 2000*.

⁵⁶ See section 18 of the *Counter-Terrorism Act 2008*.

⁵⁷ See sections 1 and 2 of the *Terrorism Act 2006*.

Date when profiles will be deleted

31. Finally on this point, we question why it is that the consultation proposes deleting the profiles of innocent people currently on the database within 6 or 12 years from the date of the commencement of the relevant Regulations. Why could such profiles not be deleted as soon as the 6/12 years (which we of course don't accept) since arrest has passed. This could mean that an innocent person who is already on the database and has been for the past 13 years could have to wait another 12 years before their profile is removed. There seems no logical basis for this position. The consultation also states that around 500,000 profiles are on the database for which there is no linked PNC Record. This means it isn't possible to know whether the profiles relate to a person who has or has not been convicted. No proposal is given as to what will happen to such profiles – the consultation provides that the Home Secretary has asked ACPO to carry out further work on this and provide an impact assessment that can be published with the Summary of Responses.⁵⁸ We would hope that resource concerns are not used as an excuse to maintain indefinitely the profiles of half a million people.

Disproportionate and discriminatory impact on ethnic minorities

32. It is not disputed that a disproportionate number of members of ethnic minorities, particular the black population, have their DNA retained on the National DNA Database. As of November 2008 about 30% of the black population over the age of 10 had their DNA retained – with the proportion even higher in respect of young black men. In 2007 the Attorney-General stated that very soon about three-quarters of the young black male population will be on the Database.⁵⁹ The Home Affairs Select Committee has looked at the over-representation of young black males in the criminal justice system and found:

Black people of all ages are three times more likely to be arrested than white people. Black people constitute 2.7% of the population aged 10-17, but represent 8.5% of all those arrested in England and Wales. Black people are just over six times more likely to be stopped and searched by the police than white people,

⁵⁸ See para 6.31, page 17 of the consultation.

⁵⁹ See Hansard, 10 November 2008 : Col 800W.

*although this may partly reflect the fact that three quarters of stops and searches take place in London.*⁶⁰

The Committee went on to express its concern about the presence of so many young black men on the database noting:

*It appears that we are moving unwittingly towards a situation where the majority of the black population will have their data stored on the DNA database. A larger proportion of innocent young black people will be held on the database than for other ethnicities given the small number of arrests which lead to convictions and the high arrest rate of young black people relative to young people of other ethnicities. The implications of this development must be explored openly by the Government.*⁶¹

33. The ECtHR in *S and Marper v UK* also noted concerns that there was an over-representation of ethnic minorities in the database who have not been convicted of any crime.⁶² This is clearly a serious issue and a matter the government is well aware of. Yet, the consultation makes barely any mention of this. The only reference is in the JDI research where it recognises the lack of data on ethnicity in its sample regarding re-arrests of people who have previously been arrested. It later states that more research needs to be done “*clarifying the patterns of ethnicity surrounding the taking of samples in arrest-[no further action] cases and subsequent criminality*”.⁶³ The Checklist for the Specific Impact Tests states that a race equality assessment has not been carried out.⁶⁴ While the proposals on their face are not discriminatory, given the clear discriminatory impact of the retention of DNA of those arrested but not convicted, the consultation should have carried out a race impact assessment of its proposals. The Home Office is required by law⁶⁵ to have due regard to the need to eliminate race discrimination and the fact that the consultation has completely ignored this issue gives rise to an argument that it may be in breach of its duties. Nothing in the proposal to retain the DNA of those arrested but not convicted for 6/12 years will alleviate the discriminatory overrepresentation of ethnic minorities on the database since retention continues to be triggered by arrest without

⁶⁰ Select Committee on Home Affairs Second Report, 22 May 2007, at para 21 available at: <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmhaff/181/18105.htm>

⁶¹ *Ibid*, para 33.

⁶² *S and Marper v UK* at para 124.

⁶³ Page 35 of the consultation.

⁶⁴ Page 75 of the consultation.

⁶⁵ This is required by section 71 of the *Race Relations Act 1976*.

more. The government's commitment to equality is seriously brought into question by its failure to even address this issue in the consultation.

Retention of DNA of people convicted

34. The consultation states that those who have admitted guilt or have been convicted of any offence will remain on the National DNA Database indefinitely:

*Apart from the proposals above in respect of juveniles in specific circumstances, we do not propose to change the existing indefinite period for retention of profiles for those convicted of a recordable offence. This would also cover people given a caution, warning or reprimand.*⁶⁶

The 'Evidence Base' states that the "DNA of those convicted is not affected by the ruling and will remain on the database indefinitely".⁶⁷

35. It is simplistic and short-sighted to state simply that the DNA of anyone convicted, cautioned, warned or reprimanded should remain on the database indefinitely because that is not an issue the ECtHR dealt with specifically in *S and Marper v UK*. The Court reiterated in that case that the retention of DNA and fingerprints by the State amounts to an interference with the right to privacy under Article 8.⁶⁸ Interferences can be justified if they are in accordance with law, pursue a legitimate aim and are necessary and proportionate. Although the Court did not specifically consider whether the retention of such data from persons who have admitted guilt or had findings of guilt made against them, the principles it stated can be applied more generally.

We believe that for the National DNA Database to be considered proportionate, the DNA of those who have been cautioned, reprimanded, warned or found guilty of minor offences and those offences where DNA is irrelevant should be removed from the database. Warnings and reprimands are given to a child or young person who admits the offence where a constable is satisfied that it is not in the public interest to prosecute.⁶⁹ A person who receives a warning or reprimand is to be referred to a

⁶⁶ See para 6.23, page 17 of the consultation.

⁶⁷ Annex D, para 1.1, page 87.

⁶⁸ See para 67 of *S and Marper v UK*.

⁶⁹ See section 65 of the *Crime and Disorder Act 1998*.

youth offending team for the purposes of rehabilitation. Yet their DNA will remain on the National DNA Database indefinitely. As will those convicted of any recordable offence. A 'recordable offence' includes such trivial offences as begging, public order offences, failing to give advance notice of a procession and drunkenness in a public place etc.⁷⁰ Are these really the types of offences for which a person convicted should remain indefinitely on the National DNA Database? The government should take this opportunity to review the retention of DNA more generally and consider the necessity and proportionality of retaining all those on the database including those convicted of minor offences and offences for which conviction was entirely unrelated to DNA evidence. A more comprehensive approach will reduce the likelihood of further time and resources being wasted on the legal challenges that will otherwise inevitably follow.

36. One other point we would note. We are somewhat concerned by the almost throw-away line in the consultation that there is a need to co-ordinate the government's response on DNA profiles with that of retention of other police records and that central to this "*is the development of criminality information policy and implementation of Sir Ian Magee's recommendations following his independent review*".⁷¹ The recommendations of this review relate to giving more public officials access to information about 'criminality' including exchanging criminality information with other countries.⁷² With the government's history of data losses we urge strong caution in expanding the number of officials or agencies that have access to DNA information given the particularly sensitive and intrusive nature of the information, and the unlawfulness of retaining many of the profiles currently present on the National DNA Database.

Summary of Liberty's position on the retention of DNA

37. As already stated, Liberty does not doubt the importance of DNA in crime detection and investigations. As such, we have never advocated banning the taking of DNA on arrest, and allowing searches of that DNA against the National DNA

⁷⁰ See the *National Police Records (Recordable Offences) Regulations 2000*, SI 2000/1139.

⁷¹ See para 6.24, page 17 of the consultation.

⁷² Or, as it is put on the government's webpage on the Criminality Information Unit: "*The focus is on giving front line professionals access to the information they need to reduce risks to public safety, across organisational and sometimes national, boundaries. This will be achieved through closer collaboration on investment, technology, risk and risk management*", see <http://police.homeoffice.gov.uk/about-us/police-policy-operations/criminality-information-unit/>

Database. However, it is important to put the use of DNA in perspective. While it is an important investigative tool it is just one of many that the police have available to them and in the vast majority of cases DNA will have no relevance. The consultation states that in 2007-2008 there were 37,376 crimes with a DNA match which then led to further investigative follow-up. The 2007-2008 British Crime Survey and police recorded crimes in England and Wales showed there were in total 10.1 million crimes committed in this period.⁷³ This means that DNA was only of use in respect of 0.37% of all crimes. In addition, a DNA match with a crime scene includes many matches with victims, innocent passers-by and false matches and only some matches involve sufficient evidence to result in a charge, let alone a prosecution and conviction. As the ECtHR said in *S and Marper v UK*, the statistics:

*do not reveal the extent to which this 'link' with crime scenes resulted in convictions of the persons concerned or the number of convictions that were contingent on the retention of the samples of unconvicted persons. Nor do they demonstrate that the high number of successful matches with crime-scene stains was only made possible through indefinite retention of DNA records of such persons.*⁷⁴

In stating this we do not mean to say that DNA is not important – obviously the use of DNA evidence in solving just one murder case is enough for the use of DNA in criminal investigations to be considered successful. However, it is important to bear these figures in mind when considering the overall importance of the DNA Database to public protection, and when trying to understand the Home Office's claims regarding the fall in the total number of crime detections if the DNA of innocent people is taken off the database.⁷⁵

38. In formulating a policy on DNA retention Liberty seeks to focus debate around what a necessary and proportionate database might look like and which underlying principles might aid the selection of 'trigger offences' for permanent retention. It

⁷³ *Crime in England and Wales 2007/2008: Findings from the British Crime Survey and police recorded crime*. Edited by: Chris Kershaw, Sian Nicholas and Alison Walker, available at: <http://www.homeoffice.gov.uk/rds/pdfs08/hosb0708.pdf>

⁷⁴ *S and Marper v UK* at para 116.

⁷⁵ It is interesting to note the admission in the 'Evidence Base' that detection and conviction are not the same thing but that "*the measurement of the benefit of the objectives is considered in terms of the volume of detections made possible and not convictions secured*". See page 61 of the consultation.

seems to us that within the overarching principle of 'proportionate retention of DNA'; there might be three further principles that assist:

1. The relevance or probative value of DNA to the type of crime in question.
2. The potential propensity of the trigger offender to future crime of a relevant nature.
3. The gravity of both trigger offence and the type of crime feared in the future.

In applying these principles, the easiest argument for permanent DNA retention may be made in relation to adults convicted of (and arguably cautioned for) offences of a sexual or violent nature.⁷⁶ Further, the relevance, propensity and gravity factors may also suggest consideration of some other potential trigger offences (e.g. domestic burglary). If, on the other hand, one takes the view that anyone convicted of any offence should have his or her DNA retained forever, the principles of relevance, propensity and gravity have been replaced with the logic of seeking the largest possible database that one might get away with – which in fact does seem to remain to be the government's approach. Yet, this is a small step from the disproportionate logic of universality. We do not believe that those convicted of minor offences for which DNA has no relevance should be routinely retained by the State.

39. In respect of adults arrested but not subsequently charged and those acquitted, Liberty believes that the starting point should be that these people should have their DNA removed from the National DNA Database. In respect of most offences the DNA material should be removed immediately following acquittal or at an end of the investigation. In respect of the DNA taken from someone arrested but not convicted of a serious violent or sexual offence – which should be tightly defined to include only that which most people would consider to be serious and in which DNA plays a relevant part – this could be retained on the basis of the Scottish model.⁷⁷ In Scotland, DNA can only be retained when a person has been acquitted or not charged in respect of sexual or violent offences. The period of retention is three years, which can be extended by two more years if a Sheriff orders it. This seems to be a reasonably proportionate way of ensuring both public protection and respect for privacy. The ECtHR noted in *S and Marper v UK* that most other European States

⁷⁶ In some ways the government appear to have taken our suggestions regarding this into account in formulating the 12 year retention proposal. But this unacceptably conflates conviction with arrest.

⁷⁷ See *Criminal Procedure (Scotland) Act 1995*.

remove or destroy DNA samples and profiles either immediately or within a certain limited time after acquittal or discharge. The Court said that the position in Scotland “is of particular significance”⁷⁸ and that:

*[t]his position is notably consistent with Committee of Ministers’ Recommendation R(92)1 [of the Data Protection Convention] which stresses the need for an approach which discriminates between different kinds of cases and for the application of strictly defined storage periods for data, even in more serious cases.*⁷⁹

We therefore believe that a similar scheme should operate in England, Wales and Northern Ireland. Notably, the Scottish model is contained in primary legislation – an approach that should also be adopted in relation to the changes to the law in the rest of the UK. As already referred to above, we believe there should be a separate regime for the retention of DNA from those under the age of 18, particularly given the potentially negative impacts of early stigmatisation.

Fingerprints

40. It is also important to note that *S and Marper v UK* recognised that while fingerprints do not contain as much personal information as does DNA, their retention also engages the right to privacy under Article 8 of the HRA. The Court held that the blanket policy of retention of fingerprints was disproportionate in the same way as the policy of indefinite DNA retention. The consultation proposes dealing with fingerprints in the same way as in relation to DNA (despite the ‘Evidence Base’ recommending retention for 15 years).⁸⁰ We agree that fingerprints should be dealt with in the same way as DNA retention to ensure consistency. Our comments above in respect of DNA should therefore be considered in relation to our approach to fingerprints retention. We note that the consultation also proposes removing a current provision from the *Police and Criminal Evidence Act 1984* which allows a person to make a request to witness the destruction of his or her fingerprints. No explanation is given as to why this is proposed. Amending legislation in this way should be explained and we call on the government to explain the need for this amendment.

⁷⁸ *S and Marper v UK* at para 109.

⁷⁹ *Ibid* at para 110. See also paras 43-44.

⁸⁰ See pages 73-74 of the consultation.

Independent review and governance

41. The consultation provides no detailed proposals on how a person can have their DNA profile removed from the database and there is no provision for independent review of the justification for retention. The consultation acknowledges that members of the public might feel there are cases where their samples should be removed immediately and provides that the current process of making an application to the chief officer in exceptional circumstances would remain in place. Examples given of what might constitute exceptional circumstances are where the original arrest or sampling was found to be unlawful or where it turns out that no offence had actually been committed by anyone (e.g. if someone dies and murder is suspected but then it turns out there was no murder: the death was from natural causes). These are the current examples given in ACPO guidance on the destruction of DNA samples.⁸¹ The ACPO guidance also states that when a person asks to have his or her DNA sample or fingerprints removed from the database it should be refused in the first instance as a matter of course and the applicant will need to write in a second time in order to demonstrate exceptional circumstances.⁸² The only change proposed is that applications will now be considered against defined criteria that will be set out in Regulations.⁸³ There will be no appeal mechanism.

42. While we welcome the setting out of criteria in Regulations rather than ACPO guidance, this does not go far enough. It is clear that what is being proposed is largely the same as what already applies. The grounds on which DNA can be removed in such situations are extremely limited and the decision to delete is discretionary. We question why a person must make out 'exceptional circumstances' before deletion can be considered. This test bears no relationship to the tests of necessity and proportionality found in the HRA or to the Data Protection principles found in the *Data Protection Act 1998*.⁸⁴ This test is extremely high and imposes an excessively high threshold.

⁸¹ *Exceptional Case Procedures for Removal of DNA, Fingerprints and PNC Records*, 16 March 2006, available at: http://www.homeoffice.gov.uk/documents/Bichard_Step_Model_Retention.pdf?view=Binary

⁸² *Ibid* at pages 12 and 14.

⁸³ See paras 6.20-6.22, page 16 of the consultation.

⁸⁴ See *The Chief Constable of Humberside and ors v The Information Commissioner*, Information Tribunal, 21 July 2008. The Tribunal stated in this case, in relation to guidelines for the removal of information on the Police National Computer, "do not refer to data protection or human right obligations and there are no risk assessment criteria. In effect all conviction data is retained for life. No risk assessment is made. The exceptional category can

43. There is also no appeals mechanism proposed– the consultation states that the “*discretion would remain subject to judicial review*”. However, judicial review is the least accessible, most complicated and most expensive form of legal action. It can only consider the lawfulness of the decision to refuse to remove the DNA and cannot consider the merits of the case. It is also so complicated that a person almost inevitably requires legal representation and the costs can be prohibitive. Given the test proposed is so high – that of ‘exceptional circumstances’ – and the ability of the court is so limited, the prospects of success using judicial review are so low it is almost worthless. If this test is to remain there must be an appeals mechanism to ensure some levels of access to justice.

44. The government might well argue that setting up a proper basis for challenging DNA retention and providing an appeals mechanism will lead to undue bureaucracy and resourcing issues. However, if the State intends to retain incredibly personal and sensitive information about a person on a mass database it must ensure there are proper and proportionate safeguards in place. If our proposal of removing the DNA of most people who have not been charged or who have been acquitted were accepted, there would be less need for a mechanism to make individual applications for deletion. An appropriate scheme would, however, need to remain in place for the period for which the profile of innocent people were retained, but the numbers involved would be much lower.

Conclusion

45. As is clear by the criticisms set out above, Liberty does not believe that the government’s response to *S and Marper v UK* has been adequate. To begin with, a matter of such public concern and interest should not be left to secondary legislation in which the only role for Parliament would be, after a 90 minute debate, to accept or reject the government’s Regulations in totality. We endorse the JCHR’s recommendation that the government think again “*to ensure that there is sufficient time for scrutiny of measures which, as the European Court has held, substantially interfere with the right to respect for private life*”.⁸⁵ We will continue to lobby for changes to the Policing and Crime Bill currently before Parliament to try to ensure

hardly be regarded as such.” The Tribunal held that the exceptional circumstances criteria in this context was not compliant with the Data Protection principles.

⁸⁵ Joint Committee on Human Rights, *Legislative Scrutiny: Policing and Crime Bill, 10th Report of Session 2008-2009*, HL Paper 68, HC 395 at [1.118].

that the substantive requirements regarding retention, use and destruction of DNA samples and profiles are set out in primary legislation.⁸⁶

46. We are also extremely disappointed by the approach taken in the Home Office consultation. It is clear that the government wants to take a wholly scientific approach to the retention of DNA looking only at the likelihood of future offending of those on the National DNA Database. This is the wrong approach. Even if the science relied on by the government could be considered authoritative (which it clearly cannot) science alone cannot be the sole basis for determining appropriate retention periods. The proper approach is to start from the presumption that anyone not found guilty of a criminal offence must not have their DNA retained. If there are grounds for retaining the DNA of certain suspects these need to be justified by the government. If the retention is justifiable a decision then must be made as to what is a proportionate retention period. This must consider factors such as the gravity of the offence for which the person was suspected, the likelihood of future offending (using a proper statistical analysis) and the relevance of DNA to any possible future offence. So, for example, even if the evidence were to show that a person suspected of having committed an offence is more likely than most to commit an offence in the future, the next question to ask is whether DNA is likely to be relevant to investigation of that future offence, bearing in mind that only 0.37% of crimes have a DNA match. The proposals in this consultation fail to consider this at all. The proposals of 6/12 years also fail to address adequately the over-representation in the database of ethnic minorities and the risk of stigmatisation.⁸⁷

47. We are also disappointed that the government has failed to use this review as an opportunity to review the retention of DNA profiles of all those convicted, cautioned, reprimanded or warned in respect of any offence. It is clear that the vast majority of offences are relatively minor and ones in which DNA plays no part. It is therefore disproportionate to retain DNA indefinitely and we believe another court challenge on this basis is likely.

⁸⁶ We are also concerned to ensure that any amendments to the Police and Criminal Evidence Act 1994 (PACE) are made in primary legislation and not amended by secondary legislation, see for example section 64(1A) of PACE that will require amendments yet the government have indicated to the JCHR that this will be done by using secondary legislation. See: http://www.parliament.uk/documents/upload/Campbell_Marper090709.pdf

⁸⁷ These are all matters the ECtHR found relevant in making its decision in *S and Marper v UK*, see paragraphs 122 and 124.

48. Public protection is incredibly important. But so is respect for a person's private and family life. In fact we would argue that the value of privacy is as much of a societal interest as public protection. Not only because of the impact on the individual concerned but also because of the impact on society as a whole. In a recent Liberty-You Gov opinion poll, 77% of respondents stated that they felt that the UK had become a surveillance society.⁸⁸ This is a telling reflection of current levels of public trust and confidence in the government's approach to personal privacy. We also reject assertions that public protection and respect for privacy are necessarily in conflict with one another. People feel less protected if their private data is being left on trains, in pubs or lost in the mail. The level of debate generated around DNA retention has demonstrated very real public concern. The government's response has been less than inspiring. We hope that in response to this public consultation the government will recognise the importance of the right to a private life and ensure the National DNA Database is set on a statutory footing in primary legislation and retains only that data that is both necessary and proportionate.

Anita Coles

⁸⁸ See <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2009/30-07-09-another-home-secretary-another-id-card-launch-as-public-support-f.shtml>