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Liberty's Second Reading Briefing on the DNA provisions in the Crime and Security Bill in the House of Lords

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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 Crime and Security Bill contains a broad range of criminal justice initiatives. Clauses 2-23 amend current law on the taking, retention and use of DNA and fingerprints. The major amendments in respect of DNA respond to the European Court of Human Rights (ECtHR) ruling in the case of *S and Marper v the United Kingdom*[1] (*Marper*) in which Liberty intervened. This is an area in which Liberty has long been campaigning and given the importance and complexity of this topic we have taken the opportunity to provide this separate briefing for parliamentarians. We have produced another briefing on the remaining clauses in the Bill.[2] Below we examine the current law as regards fingerprint and DNA retention and legal developments. We explain below what is contained in these complex clauses and set out Liberty's position.

Current law

2. Currently 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.[3] A recordable offence[4] is defined as being any offence punishable by imprisonment as well as 68 other named offences which include such minor offences as being drunk in a public place (section 91 of the *Criminal Justice Act 1967*) and begging (section 3 of the *Vagrancy Act 1824*). 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 must or may be destroyed.[5] 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). Clauses 2 to 23[6] of this Bill introduce provisions amending PACE (and the Northern Ireland equivalent as well as Scottish

[1] Application Nos 30562/04 and 30566/04, Grand Chamber judgment 4 December 2008, available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=marper&sessionid=22986969&skin=hudoc-en
[2] Available at www.liberty-human-rights.org.uk
[3] See sections 61 and 63 of PACE.
[4] See the definition in s 118 of PACE and the *National Police Records (Recordable Offences) Regulations 2000*.
[5] See section 64(1A) of PACE.
[6] Clauses 8 to 13 replicate clauses 2 to 7, but in relation to Northern Ireland, and clause 15 replicates clause 14 in relation to Northern Ireland.

legislation) in relation to the taking and retention of DNA and fingerprints. The amendments fall into three main categories. The first gives police the power to take fingerprints and DNA once a person is no longer in police detention if not previously taken or the material proved to be insufficient.[7] The second set of amendments allow for the taking of fingerprints and DNA of UK nationals and residents convicted of serious offences outside England, Wales and Northern Ireland.[8] The final set of amendments[9] respond to the 2008 European Court of Human Rights' judgment in *S and Marper v the United Kingdom*[10] which ruled the current system of indefinite retention unlawful. While we have concerns about some aspects of the first two sets of amendments, we do not object as a matter of principle to these proposals – indeed, we believe that it makes much more sense to retain the DNA of those convicted of serious offences, be they those convicted before DNA was routinely taken or those convicted of serious offences outside the UK, than it does to retain the DNA of innocent people. It is the third proposal – the response to *Marper* – where our significant concern lies. We believe that the retention of the DNA of people arrested but not convicted of *any* offence for up to six years, is wholly disproportionate and fails to properly address the concerns set out in *Marper*. In this briefing we will deal first with the amendments in response to *Marper* and conclude by considering the first two sets of amendments relating to the taking of DNA and fingerprints.

European Court of Human Rights' ruling: *S and Marper v UK*

3. On 4 December 2008 the ECtHR ruled in *Marper* that the UK's policy of indefinite retention was in breach of the European Convention on Human Rights (EHCR). '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 his DNA. Mr Marper was arrested in 2001 and charged with harassment of his partner. Two months later he had reconciled with his partner, no charges were pressed and proceedings were discontinued, however the police refused to destroy samples of his DNA and his

[7] See clause 2 (and cl 8 re Northern Ireland). See also clause 6 (and cl 12 re Northern Ireland).
[8] See clause 3 (and cl 9 re Northern Ireland). See also clauses 6 and 7 (and 12 and 13 re Northern Ireland).
[9] See clauses 14-23.
[10] *S and Marper v UK*, Grand Chamber judgment, 4 December 2008, available at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=marper&sessionid=22986969&skin=hudoc-en

fingerprints taken following arrest. The ECtHR held that the "*blanket and indiscriminate nature of the powers of retention of the 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 ECHR.[11]

4. The right to private life as protected by the ECHR is not an absolute right – it can be limited by law if it is necessary to do so in a democratic society for a number of wide ranging purposes. Previous cases have held that the mere storing of data relating to the private life of a person amounts to interference under Article 8.[12] 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.[13] 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.[14] 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.[15]
- 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.[16] In fact, England, Wales and Northern Ireland are alone within the Council of Europe in allowing indefinite

[11] *S and Marper v UK*, at paragraph 125.
[12] See *Leander v Sweden,* 26 March 1987, ECtHR at paragraph 48.
[13] *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.
[14] See paragraph 125.
[15] See paragraph 108.
[16] See paragraph 108.

retention of such material from persons of any age suspected of any recordable offence.[17]

- 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.[18]
- 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 retention is indefinite; there is no provision for independent review and only limited possibilities for an acquitted person to have their data removed.[19]
- 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.[20]
- 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.

Clauses in the Crime and Security Bill that respond to *Marper*

5. Clause 14 of this Bill sets out the Government's main response to *Marper*.[21] Provisions were initially inserted in the Policing and Crime Bill of the last parliamentary session to allow regulations to be made setting out a system regarding the retention, use and destruction of DNA and fingerprints and other information.[22] After widespread opposition to introducing such important amendments via secondary legislation, the Government sensibly dropped the provisions from that Bill late in the last parliamentary session. Liberty welcomes the inclusion of these provisions in primary legislation. We believe that parliamentarians are long overdue the opportunity to fully debate and consider the important issue of DNA retention.

[17] See paragraph 110.
[18] See paragraphs 116-117.
[19] See paragraph 119.
[20] See paragraph 122.
[21] And clause 15 in relation to Northern Ireland.
[22] See clause 95 of the Policing and Crime Bill as amended on Committee in the House of Commons which set out the regulation-making power.

6. These proposals follow a Home Office consultation (concluded in August 2009) that proposed two separate retention periods for innocent people staggered according to the offence for which a person is arrested but not convicted. It was proposed that where somebody was arrested for a serious type of offence, a DNA profile would be retained for 12 years and retained for six years for all other offences.[23] We are relieved the Government has now dropped its misconceived proposals to retain the DNA of innocent people for up to 12 years. Unfortunately however the revision of policy has been only partial and the retention proposals contained in this Bill remain fundamentally flawed. Clause 14 sets out fifteen complicated new provisions dealing with how long fingerprints and DNA samples and profiles can be retained.[24] In summary it provides:

- Fingerprints and DNA profiles may be retained indefinitely except in circumstances set out below.[25] There are no exemptions for adults convicted of any recordable offence.
- DNA samples will be destroyed as soon as a DNA profile has been obtained or, if sooner, within six months after the sample was taken.
- Fingerprints or DNA taken from volunteers (i.e. people who are not arrested and who consent to give their fingerprints/ DNA) must be destroyed as soon as it has fulfilled its purpose (unless the volunteer is convicted, arrested, under investigation etc). A volunteer can give written consent to allow their DNA to remain on the database for longer, and, unlike the current position, that consent can be withdrawn at any time.[26]
- Fingerprints and DNA taken from a person subject to a control order is to be destroyed two years after the person is no longer subject to the order. Currently DNA of those that have been made subject to a control order remains on the database indefinitely.[27]

[23] Keeping the Right People on the DNA Database, Home Office Consultation, May 2009 available at: http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/dna-consultation?view=Binary. See Liberty's response to the consultation available at: http://www.liberty-human-rights.org.uk/issues/3-privacy/dna-database/index.shtml
[24] Note, it also applies to the retention of impressions of footwear (which PACE also currently regulates).
[25] See proposed substituted section 64(2).
[26] See proposed new sections 64ZB and 64ZL.
[27] See proposed new section 64ZC (and for the current situation, see section 64(1AA) of PACE).

- Fingerprints and DNA taken from an adult who has not been convicted[28] (but has been arrested or charged with *any* recordable offence), is to be destroyed six years after the material was taken.[29] But if the person is re-arrested (but not convicted) the clock for retention will start again on re-arrest.
- Under 18 year olds arrested for a recordable offence but not convicted will have their fingerprints and DNA retained for three years, unless the offence is a qualifying offence (sexual or violent offence) and the child is aged 16 or 17, in which case their fingerprints and DNA will be retained for six years.[30]
- Under 18 year olds convicted once of a recordable offence that is not a qualifying offence (i.e. more minor crimes) will have their DNA retained for five years, rather than indefinitely. However, a second minor offence will result in indefinite retention.[31] A child convicted of a qualifying offence (sexual or violent type offences) will have their DNA retained indefinitely in the same way as adults.
- None of these more limited periods of retention apply if the chief officer of police for a particular police area determines it is necessary to retain the DNA profiles or fingerprints "*for the purposes of national security*". A determination to that effect can be made every two years, and there is no limit on the number of these determinations. Effectively then, an unconvicted person's DNA could be retained indefinitely in this way.[32]

7. Clause 16 amends Scottish legislation to enable DNA taken by police in Scotland to be retained, effectively indefinitely, if a chief constable determines it necessary to do so on the grounds of 'national security'. Clause 17 makes amendments to the *Terrorism Act 2000* to deal with fingerprint and DNA samples taken under that Act, which applies both when a person is arrested as a terrorist suspect but also where a person is detained, with no need for suspicion, at the port or border under Schedule 7 and 8 of that Act. These provisions largely mirror the

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[28] This means not having any previous convictions for a recordable offence, unless it is an exempt conviction, which is explained in proposed new section 64ZI(2)(b) as an offence committed when under 18 that is not a qualifying offence.
[29] See proposed new section 64ZD.
[30] See proposed new sections 64ZE, 64ZF and 64ZG.
[31] See proposed new section 64ZH.
[32] See proposed new section 64ZL.

provisions proposed to be inserted in PACE (i.e destruction after six years for non-convicted adults etc), and also maintains the ability for the police to keep indefinitely any DNA on 'national security' grounds. Clause 18 mirrors these amendments in relation to the application of the Terrorism Act 2000 in Scotland.

8. Clause 19 amends the *International Criminal Court Act 2001*, which allows police to take the DNA and fingerprints where the International Criminal Court (ICC) has asked for assistance to identify a person suspected of having committed genocide, war crimes etc. It requires the destruction of the material six months after the material was submitted to the ICC, or if later, as soon as it has fulfilled the purpose for which it was taken.

9. Clause 20 enables fingerprints and DNA to be taken from persons subject to a control order in Scotland, and sets out how that material may be used. Clause 21 sets out a retention and destruction regime in relation to DNA and fingerprints obtained using covert methods carried out by the police, the Secret Intelligence Service (MI6) and the Security Service (MI5) and held on the 'counter-terrorism database'. Material held by these agencies was only put on a statutory footing for the first time in the *Counter-Terrorism Act 2008*. Clause 21 now provides that this material must be destroyed within six years (or three years for under 16s) if it relates to a person with no previous convictions and if it is held in a form that identifies the person whose DNA or fingerprints it is. If there is no personal identifying information held with the fingerprints and DNA there is no limit on how long it may be held. Also, there is again the general opt out clause to make a determination to allow material to be retained for the purposes of national security, which can be renewed every two years.

10. Clause 22 deals with fingerprints and DNA samples and profiles already on the database and provides that where, under the new regime, the material would need to be destroyed, the Secretary of State must make an order by statutory instrument to provide for the destruction of the material. The statutory instrument is not reviewed by Parliament as a matter of course – it will only be reviewed by Parliament if a resolution of each House decides to annul it (and of course it cannot be amended). There is no time limit on when the Secretary of State must make such

an order and the Explanatory Notes themselves states "*that this exercise may take some time to complete*".[33]

11. Finally clause 23 puts the National DNA Database Strategy Board on a statutory footing, and, as a result of amendments introduced at Report Stage in the Commons, it now must issue guidance about the immediate destruction of DNA samples and profiles retained under PACE (but not under the *Terrorism Act 2000* etc). Police forces are then required to act in accordance with that guidance. We welcome this measure as it may help in avoiding the current 'postcode lottery' system whereby success in seeking destruction of DNA depends to a large extent on which police force holds the DNA. However, this of course will still only apply in limited circumstances and is no substitute for amendments relating to the automatic period of retention.

Samples

12. We welcome the provisions that provide for the destruction of all DNA samples as soon as a profile has been obtained from them or, if sooner, within six months after the sample was taken. Samples are the physical DNA samples taken from a person (i.e. their saliva, blood, hair roots etc), barcoded and stored in a laboratory. Over some 4.5 million samples are currently held by the police. The Court in *Marper* held that the "*retention of cellular samples is particularly intrusive given the wealth of genetic and health information contained therein*".[34] We are therefore extremely pleased that under these new provisions these samples will be destroyed– particularly as they serve little investigative purpose as DNA profiles contain the requisite information for searching for matches on the database. We do, however, urge the Government to act quickly in destroying those DNA samples currently being held. We understand that the Government expects it to take up to two years to destroy current samples. While we appreciate that the practicalities of destroying such a large number of samples means that delay will be incurred we would point to the fact that over a year has now lapsed since the *Marper* judgment and that destruction of samples is an uncontroversial step. There seems to be no reason why the destruction project could not already have been implemented and we

[33] See paragraph 75 of the Explanatory Notes to the Crime and Security Bill in the House of Lords.
[34] *S and Marper v UK* at para 120.

urge the Government, working with the forensic science providers, to initiate this process without delay.

Volunteers' profiles

13. We are also pleased that volunteers' DNA profiles and fingerprints will be destroyed as soon as they have fulfilled the purpose for which they were taken or derived. 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). However, under current arrangements, once consent is given it cannot later be revoked. However, the power in clause 22 for the Secretary of State to make an order providing for the destruction of samples and profiles etc only applies where the new provisions would require destruction. Volunteer's DNA and fingerprints must be destroyed if consent is withdrawn, but it is not clear that proposed new section 64ZL enables existing volunteers to withdraw their consent, as the provision is drafted to state that consent "*given under this section*" can be withdrawn at any time. Current volunteers will not have given consent under this new section. There are many volunteers who, while they originally consented to their DNA sample being taken and retained, now wish to have that profile removed. Existing volunteers should not continue to have their DNA retained indefinitely if they decide they now wish to withdraw consent and these provisions should be amended to reflect this. We understand that the policy intention behind clause 22 is that volunteers that are already on the NDNAD and who later withdraw consent should be able to have their profile removed however in our view whether or not they will be able to under this clause as currently drafted is at best ambiguous.

14. The Home Office DNA consultation stated that in future, volunteers' DNA profiles and samples would not be entered onto the National DNA database, so that "*future volunteer profiles will only be searched against crime scene samples relating to the specific offence under investigation*".[35] However, this is not reflected in this Bill as proposed new section 64ZL allows material to be retained (and entered onto the National DNA Database) if a person consents in writing. The explanatory notes contain no explanation of the apparent change in policy following the consultation proposal.

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[35] See paragraph 9.3 and 9.5 of the Consultation.

Retention of DNA/fingerprints for six years for arrested but unconvicted adults

15. The proposals in this Bill to retain for six years the DNA profiles and fingerprints of all those arrested for any recordable offence but not subsequently convicted (either because no charges were laid, charges were dropped or the person was acquitted) are fundamentally flawed. As we set out below this proposal fails to acknowledge the presumption of innocence; takes no account of the stigmatisation of inclusion on the NDNAD; is based on dubious statistics with little reference to principle; will do little to address the discriminatory nature of the database; fails to properly address the issue of blanket retention of innocent's DNA; and is likely to fall foul once again of the Government's obligations under human rights law. In sum, the proposal continues the Government's clumsy, indiscriminate and disproportionate approach to DNA retention. Instead of a considered, principled response to the judgment in *Marper* these proposals appear to be a thinly veiled attempt to continue to retain the DNA of innocent people for as long as the Government believes it can get away with.

Stigmatisation

16. The proposed blanket retention of the profiles of innocent people for six years does nothing 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. It is clear that the Government remains very reluctant to accept that retaining DNA and fingerprints in this way interferes with the right to a private life. Indeed, the Explanatory Notes reference the 2004 House of Lords decision in *S and Marper*, in seeking to argue that the interference with privacy is 'minimal'.[36]

17. The Notes go on to say that the personal impact of retaining DNA in such a way is 'modest' and it "*does not stigmatise [someone] as a past or future suspect in any public sense*."[37] This justification runs counter to several observations of the court in *Marper* including concerns over stigmatisation and the perception that under the current system arrested persons were not being treated as innocent. The common refrain from those who support long periods of DNA retention for innocent people is that if you have nothing to hide you have nothing to fear. On a practical

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[36] See paragraph 283 of the Explanatory Notes, quoting Lady Hale in *R (on the application of S and Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39.
[37] Paragraph 298 of the Explanatory Notes.

level alone, recent data loss scandals appear to have put that slogan to rest. On a more principled level, the importance of human dignity and the right to personal privacy (values that are inherently linked) mean that the State must justify any intrusions into the personal sphere. When it doesn't its actions have a very real impact on those affected. Liberty has advised a number of innocent people who feel understandably aggrieved that despite having committed no crime their DNA, or their children's DNA, is retained on the National DNA Database.[38] The retention for six years of the DNA of innocent people will do nothing to ease their concerns.

'Evidence' base

18. The proposal for a six year period of retention is being justified, it appears, on the basis of a hunch that a person arrested once but not convicted will go on to commit an offence in the future. The Government recognises that a blanket six year retention regime in this way "*runs counter to the steer in Marper that the seriousness of the offence is a material criterion in determining whether retention is proportionate*" but goes on to say that "*this approach is supported by the best available evidence*".

19. It is quite clear that the 'best available evidence' is not much evidence at all. Earlier 'evidence' presented in the Home Office consultation was widely acknowledged as being flawed and incomplete.[39] It was based on an extremely small sample of research carried out by the Jill Dando Institute for Crime Science which its Director later noted was incomplete and based on data they were not given direct access to. In September 2009 Gloria Laycock, Director of the Jill Dando Institute for Crime Science, said: "*That was probably a mistake with hindsight, we should have just said 'you might as well just stick your finger in the air and think of a number*'".[40] Indeed, the Committee of Ministers' stated in relation to this:

[38] In addition to our intervention in the *S and Marper* litigation Liberty provides an advice and information service to the public and we are regularly contacted by people whose DNA samples and profiles have been retained despite never having been charged or convicted of an offence. Annexed to this briefing are a number of example case studies that we have taken up as a result of running a DNA clinic in conjunction with Diane Abbott MP in Hackney in August 2009.

[39] See Liberty's response to the consultation at paragraphs 21-27 available at: http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-response-to-dna-database-consultation.pdf

[40] See comments by Gloria Laycock, Director of Jill Dando Institute for Crime Science as reported by *BBC News*, "DNA storage proposal 'incomplete'", 25 September 2009, available at: http://news.bbc.co.uk/1/hi/uk/8273882.stm

Given the United Kingdom's claimed "pioneer role", reliance only on academic studies, two of which do not relate to the United Kingdom and an approach to those studies which appears to rest on the principle that unconvicted individuals will commit criminal offences, do not appear sufficient to justify retention periods which do not appear to be in conformity with the Court's judgment.[41]

20. In publishing the Government's response to the consultation responses, the Home Office also published a paper intended to present a review of the evidence in relation to DNA retention periods presented in the consultation paper.[42] Authorship of this paper is left unattributed and we understand that it is an internal Home Office document. This Home Office research, which forms the basis for the six year retention period, is based on data obtained from the Police National Computer (PNC) that only goes back to April 2006 (because pre-2006 PNC data was heavily weeded). As it is only three years since this data was obtained it is clear that the six year period during which it is estimated that an arrested person is likely to commit an offence is merely conjecture. The Home Office document calls this an 'extrapolation', noting that to perform the analysis more data is needed so they simply "*smooth the curve through the available data points and extrapolate it forwards*", so as to analyse data for up to eight years following the initial arrest and beyond. It is clear then that the data itself is incomplete and the estimated likelihood of future arrest derived from simply guesswork. In fact, the research says that data constraints mean the "*risk cannot be calculated with any confidence*", notes a number of "*important caveats*" and that "*there are a number of sources of uncertainty in the current analysis, which means that our basic estimate of six years for the maximum retention length is subject to variation*". It also goes on to say that because they did not have access to data that linked arrests (with no further action taken) and any subsequent convictions, "*we can only roughly estimate the relationship between arrest and conviction*". It concludes by noting "*to what extent these errors are acceptable and hence what relationship period is actually chosen, is ultimately a matter of judgement*".

21. Disturbingly also the so-called statistical evidence and extrapolation on which the six year period is based confuses the likelihood of future arrest with likelihood of

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[41] Committee of Ministers, 1065th meeting (DH), 15-16 September 2009, section 4.2.
[42] See 'DNA Retention Policy: Re-arrest Hazard Rate Analysis, available at: http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/dna-retention-evidence-paper?view=Binary

future criminality. The Explanatory Notes state that the six year retention period "*is based on research which suggests that a person who has been arrested is for six years at a higher risk of re-arrest than the chance of arrest in the general population*"[43]. A risk of arrest is not the same as a risk of future offending. Indeed to go down a road which confuses the two is a highly dangerous approach in a free society – not least for the message that it sends. The research considerately acknowledges that "*subsequent arrest is not itself indicative of criminal behaviour*" but states that in the absence of alternative data it is more preferable to the analysis undertaken for the earlier Home Office consultation (which mainly looked at the likelihood of future convictions of those already convicted). However, as already stated, a risk of arrest is not the same as a risk of offending. We know that ethnic minorities are more likely to be arrested by the police (and have their DNA entered onto the database) and it doesn't take a lot of imagination to identify a possible racial bias in the arrest statistics.

22. Despite the Government relying heavily on the statistical risk of an innocent person offending once their DNA is removed from the Database, there is virtually no reliable evidence to support this argument. Yet, the Government constantly conflates arrest with confliction. The Minister, the Rt Hon David Hanson MP, in the Committee Stage debates in the House of Commons stated that the evidence showed "*that ultimately, people who have been arrested have the potential to* ***commit further crime*** *in a six-year period*", failing of course to recognise that such a person has not indeed been found guilty in the first instance.[44] Later he went on to say:

> *The point is that our evidence shows that like it or not, people who have faced initial arrest and been charged, even if they are not convicted, have a propensity to return before the courts and be convicted within six years.*[45]

Parliamentarians should bear in mind the limitations of the 'evidence' available. Sadly, the limitations on its own research seem, for the meantime, to have been forgotten by the Government in the debate.

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[43] Paragraph 234 of Explanatory Notes.
[44] See *Hansard*, Crime and Security Bill, Public Bill Committee debates, 6th sitting, 2 February 2010, column 244, available at: http://www.publications.parliament.uk/pa/cm200910/cmpublic/crimeandsecurity/100202/pm/100202s05.htm
[45] Ibid.

23. The statistical data is so incomplete and misguided as to amount to guesswork and conjecture. If this is indeed the 'best available evidence' it seems clear that the Government is not in a position to take an evidence-based approach to this important and sensitive issue. It certainly doesn't lead to the conclusion that "*the special responsibility which the UK's 'pioneer role' confers on it should not prevent it from setting longer retention periods than is the norm in other countries, as this is supported by the best available evidence*".[46] Further, a scientific evidentiary-based approach, even if credible, cannot be the only answer. If it was, we would see the DNA of all 16-24 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 violent offences.[47] Indeed, those young males living in areas in which crime is more statistically likely might then be entered or retained on the database in droves, over and above those living in less crime-ridden areas.[48] Similarly, such an approach to retention would see young men from ethnic minority backgrounds entered onto the database in greater numbers than their white counterparts given the greater likelihood that they may be imprisoned.[49] Clearly this is not an option any government with a commitment to equal treatment would propose. Such a policy would lead at the very least lead to a public outcry. We do not make this comparison to suggest that the government's current policy is tantamount to such an overtly discriminatory approach but instead to make the point that statistical analysis alone can never be the sole determinant of policy. Over-reliance on statistics with little or no role for principle or ethic can lead to dangerously discriminatory outcomes. At best, and if reliable statistics are available, such evidence should inform the framing of policy. When devising policy as sensitive and significant as State collection and retention of DNA, the human rights values of

[46] Paragraph 234 of the Explanatory Notes.
[47] See *Crime in England and Wales 2008/2009 – Volume 1 – Findings from the British Crime Survey and Police Recorded Crime*', July 2009, page 56 available at: http://www.homeoffice.gov.uk/rds/pdfs09/hosb1109vol1.pdf "*Offenders in violent incidents were most likely to be young (in 55% of violent incidents the offender was believed to be aged between 16 and 24 years) and male (81% of violent incidents involved male offenders)*"
[48] Ibid at page 8: "*Fifty-nine per cent of robberies in England and Wales were recorded by just three forces, the Metropolitan Police, Greater Manchester and the West Midlands, that represent 24 per cent of the population*".
[49] See Ministry of Justice report, '*Statistics on Race and the Criminal Justice System 2007/2008*', April 2009, page xiii, available at: http://www.justice.gov.uk/publications/docs/stats-race-criminal-justice-system-07-08-revised.pdf. "*For British Nationals, the proportion of Black prisoners relative to the population was 6.8 per 1,000 population compared to 1.3 per 1,000 for White persons. Similarly there were more people from Mixed ethnic backgrounds in prison per head of population (3.7 per 1,000) than White people*."

necessity, legitimate purpose and proportionality must form the very first principles from which policy is built. Sadly, on this occasion it is clear that the Government has relied almost wholly on a flawed set of statistics.

Disproportionate and discriminatory impact on ethnic minorities

24. It is not disputed that a disproportionate number of members of ethnic minorities, in particular the black population, have their DNA retained on the NDNAD. As of 16th October 2009 there were 436,897 Black subject profiles on the NDNAD which accounted for 7.39% of the total make-up of the database.[50] This statistic is sobering given that at the last national census in 2001 the Black population was recorded as 1% of the total population. While there is some debate over the exact proportion of the Black population that is now on the database it is now widely accepted that over 30% of the black population over the age of 10 has their DNA retained – with the proportion even higher in respect of young black men. A 2009 Ministry of Justice Report found that:

> *there are nearly eight times more stops and searches of Black people per head of population than of White people… there are four times more arrests of Black people per head of population than of White people… and there are five times more Black people in prison per head of population than White people*[51]

The Home Affairs Select Committee has looked at the over-representation of young black males in the criminal justice system and has noted:

> *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.*[52]

[50] See Lord West of Spithead (Parliamentary Under-Secretary Security and Counter-Terrorism) (HC Deb, 8 December 2009, c105W)
[51] Ministry of Justice, '*Statistics on Race and the Criminal Justice System 2007/2008*', April 2009, page x, available at: http://www.justice.gov.uk/publications/docs/stats-race-criminal-justice-system-07-08-revised.pdf
[52] Ibid, para 33.

25. The ECtHR in *Marper* also noted concerns that there was an over-representation of ethnic minorities on the database who have not been convicted of any crime.[53] This is clearly a serious issue and one of which the Government is well aware. 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, a race impact assessment should have been, but has not as far as we are aware, been carried out.[54] The Home Office is required by law[55] to have due regard to the need to eliminate race discrimination and the fact that the Government has completely ignored this issue gives rise to an argument that it may be in breach of its duties. We call on the Government to explain why it has not carried out this assessment. Nothing in the proposal to retain the DNA of those arrested but not convicted for six years will alleviate the discriminatory overrepresentation of ethnic minorities on the database since retention continues to be triggered by arrest without more. The Government's commitment to equality is seriously brought into question by its failure to address this.

Failure by the Government to engage with the issue of innocents on the NDNAD

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26. At the heart of the Government's response to concerns about the current regime is an unwillingness to engage fully with the particular issue of retaining the DNA of innocents'. More often than not the Government has been satisfied with defending the current position by alluding simply to the importance of the NDNAD in detecting crime and referencing a number of high-profile cases where DNA has played a crucial role in securing convictions for the most wicked of crimes. However to cite the usefulness of the database in response to concerns about the current and proposed retention regime is to build a man of straw as no-one disputes the important role of NDNAD in detecting crime. Of course the database has been extremely useful in detecting, prosecuting and securing criminal convictions over the past 15 years. It would be hugely surprising if it hadn't given the recognised value of DNA evidence. Indeed, as a result of its effectiveness Liberty has always supported the use of DNA as evidence both in convicting the guilty and clearing the innocent. It is important to remember also that DNA can be of most use in the investigation of

[53] *S and Marper v UK* at para 124.
[54] On page 75 of the Consultation the Checklist for the Specific Impact Tests states that a race equality assessment had not been carried out.
[55] Required by section 71 of the *Race Relations Act 1976.*

some of the most serious crimes as it is those crimes (such as violent and sexual offences and domestic burglary) where DNA is most relevant. However, while Liberty would never seek to downplay the importance of DNA evidence in securing convictions we do have concerns that the benefits of DNA evidence have been oversold relative to other more traditional forms of evidence. No one evidential technique will ever suffice as a silver bullet for the prevention and detection of crime. Indeed recent statistics reveal that DNA evidence is used in an average of 0.67% of convictions.[56] While it is an important investigative tool then 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.

27. Further, citing the usefulness of DNA in securing convictions does not bear relation to the debate over blanket extended retention of the DNA of innocents. This is another matter entirely. It is indeed only logical that the more DNA profiles that are stored the greater the potential number of crimes detected. However this is an argument not for the extended retention of innocents' DNA but rather the indefinite universal retention of DNA.

28. The Government's lack of principled engagement has also led to some confusion in the public domain over the effect that removing innocents' DNA (and a presumption against its future retention) would have on crime detection levels and a number of past high profile investigations. One message that is often lost as the debate becomes oversimplified and polarised is that a presumption against retaining the DNA of innocent people will not prevent the power of the police to take DNA on arrest for a recordable offence whether or not DNA has previously been taken. This is an especially powerful tool given that the NDNAD is populated with profiles from past as well as present crime scenes. The result is that when DNA is taken on arrest and uploaded onto the database, matches to crime scenes that may be entirely unrelated to the case for which the profile has been derived may be found. There are those that argue that the power to take on arrest rather than charge or conviction fails to properly safeguard the presumption of innocence. Liberty does not take this approach. We have always recognised the value of DNA as evidence and the way in which its effective use at the investigation and prosecution stages can help to secure both convictions and acquittals. In many of the high profile cases cited by the Government over the years either in support of its current regime or its new

[56] See the oral evidence of the Association of Chief Police Officers to the Home Affairs Select Committee inquiry into the DNA database on 05/01/10.

proposals it is the power to take DNA on arrest that has provided the key to a successful investigation.

29. Another message that is also often lost is that in a case where the retention of an innocent persons DNA has later led to a successful prosecution for another suspected offence, it is rarely the case that the earlier DNA retention is the only method by which investigators could have matched the individual with the crime. Instead, other traditional investigation techniques and types of evidence may well trigger the necessary suspicion that would then lead to a corroborating DNA sample being taken, profiled and matched to the crime scene after arrest.

30. Indeed in all its eagerness to take an 'evidence based' approach to reform of the NDNAD the Government has failed to produce one statistic in particular - the percentage of convictions secured solely as a result of the retention of an innocent persons DNA on the database. This would mean the percentage of convictions that have come about as a result of (a) a DNA profile of an innocent person being retained on the database (b) that profile leading to their conviction (c) in circumstances where no other evidence was or could have been available to investigating officers to cause them to suspect and arrest the offender. While Liberty does not seek to dispute the obvious fact that with greater numbers of profiles retained there is potential for additional crimes to be solved we believe that the statistic for the number of convictions based solely on the basis of the innocent retention of DNA would be negligible. We further believe that the soft touch, wide impact of retaining the DNA of hundreds of thousands of people is not justified by any negligible crime detection gains. We must remember that in a free society there is always more that could be done to prevent crime whether that is by implementing night time curfews or removing of the requirement of suspicion for an arrest without warrant. Extended blanket retention of the DNA of innocent people is just another such flawed policy where the ends do not justify the means.

Use of Emotive Cases

31. The Government has also relied on a number of tragic, high profile and emotive cases to argue for a prolonged period of DNA retention. Earlier this month the Prime Minister, the Rt Hon Gordon Brown MP, in a speech in Reading Town Hall, used one such example of a previously unsolved rape committed in 1991. In this case the offender's DNA was taken on arrest for a minor offence in 2005 and the

match occurred in 2007 after a cold-case review when police uploaded the 1991 crime scene evidence onto the Database. The Prime Minister used this as an example of a sickening crime that would have gone unsolved if we moved to a system more akin to the Scottish system whereby the vast majority of DNA profiles of innocent people are destroyed. He said:

> *The next time you hear somebody question the value of retaining DNA profiles from those who have been arrested but not convicted, remember Jeremiah Sheridan. And most of all remember the innocent woman he attacked.*[57]

However this case did not need to turn on the retention of the DNA of someone previously unconvicted. Indeed the case could actually have been solved at least two years earlier had the police been given sufficient funding to properly undertake cold-case reviews. Jeremiah Sheridan's DNA was taken on arrest and uploaded onto the Database. Nothing in the alternative retention schemes proposed by us and others would have prevented this from happening. Unfortunately, however, the DNA from the 1991 unsolved crime scene had not yet been uploaded. If it had been a match with Jeremiah Sheridan could have been made immediately. Despite the Government announcing in 2000 that it was expanding the National DNA Database, there has not been a real push to upload the DNA of all unsolved crime scenes on the database. Rather than focusing on trying to solve those crimes that occurred before DNA was routinely uploaded on the database, money has been allocated towards expanding the collection of DNA (including the collection of DNA from innocent people). If more priority had been given to solving unsolved crimes, the DNA of Jeremiah Sheridan, taken in 2005, could have been matched in 2005 against the 1991 unsolved crime. Instead it took until 2007 before officers undertook a cold-case review. Further, some reports have suggested that Jeremiah Sheridan had previously been convicted of burglary.[58] In this Bill the Government proposes that DNA should be allowed to be taken from those convicted prior to the creation of the Database and who are no longer in prison. Indeed if this policy had been activated sooner Jeremiah Sheridan's DNA may well have been taken retrospectively as he had been previously convicted of a qualifying offence.

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[57] Gordon Brown's speech on Crime and Anti-Social Behaviour, 1 March 2010, at Reading Town Hall, available at: http://www.number10.gov.uk/Page22631

[58] See 'DNA match led to breakthrough', *The Star*, 5 September 2009 http://www.thestar.co.uk/news/DNA-match-led-to-breakthrough.5620913.jp

32. Of course there will always be some few cases where the blanket, indefinite retention of DNA has helped in criminal investigations. Yet, despite all the millions of offences that have been committed since the DNA Database came into existence the Government has only pointed to less than a handful of such cases. On further investigation it is clear that in many of these cases retention of an unconvicted persons DNA was not the silver bullet. For many of these cases there was other evidence that would likely have led to the offender being arrested and prosecuted. In some cases it was the taking of DNA on arrest that led to a match with a past crime scene – completely unrelated to the issue of retention.

33. While DNA evidence can be crucial in securing successful prosecutions and acquittals we must bear in mind that DNA is of relevance in helping to solve less than 1% of all crimes. Citing examples where not retaining DNA of unconvicted people might have lead to crimes going unsolved is, taken to its logical conclusion, an argument essentially for a universal database. If every person in the country was on the National DNA Database it is very likely that there will be some more successful criminal investigations. However, thankfully, this is not a road down which any political party has seriously suggested we go down.

Lack of compliance with the Court judgment in Marper

34. As the ECtHR stated in *Marper*, in the great majority of other Council of Europe States with functioning DNA databases "*samples and DNA profiles derived from those samples are required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge*"[59] The Committee of Ministers of the Council of Europe met on 15-16 September 2009 to discuss responses to judgments from the ECtHR, including the UK Government's response to *Marper* (looking at the proposals contained in the Home Office consultation).[60] It discussed the initial proposal to keep DNA of those arrested but not convicted of serious offences for 12 years, and all other offences for six years, and stated:

> *The application of two different retention periods based on the nature of the offence for which an individual is arrested, would appear to respond to the*

[59] See paragraph 108 of *Marper*.
[60] See Committee of Ministers, 1065th meeting (DH), 15-16 September 2009, section 4.2, available at:
https://valwcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH%282009%291065&Language=lanEnglish&Ver=section4.2public&Site=DG4

> *Court's criticism of an indiscriminate approach. However, the question remains whether the proposed retention of DNA profiles and fingerprints is proportionate and strikes a fair balance between the competing public and private interests, as required by the European Court's judgment…The European Court stated in particular that the regime in Scotland which provides for retention of DNA for unconvicted adults only in cases of serious offences and then only for 3 years, was in accordance with Committee of Ministers Recommendation Rec(92)1. The Court also stated that "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" (§123). In the light of all the above, it seems that the proposed measures and in particular the proposal to retain profiles for 6 years following arrest for non-serious offences do not conform to the requirement of proportionality. [emphasis added]*

35. It is our belief that the provisions in this Bill fail adequately to comply with the ECtHR's decision in *Marper*. This of course leaves wide open the real possibility, indeed the almost inevitability, of further legal challenges to the compatibility of our DNA retention regime with Article 8 (right to privacy) of the HRA. To ensure compliance proposals for reform must start 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 fail to strike the necessary balance and continue to disproportionately infringe the right to private life of unconvicted individuals.

Liberty's position on DNA retention for unconvicted adults

36. 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. Anyone who comes under suspicion in an ongoing criminal investigation is likely to have their DNA taken in any event. Our concerns instead relate principally to the proposed scheme of blanket retention of DNA for 6 years for all those whose DNA is taken after arrest for a recordable offence, even if no charge (let alone conviction), follows.

37. We believe that the human rights principles of necessity and proportionality should place limits on DNA retention. The significant value of DNA retention as an intelligence and evidence tool must be balanced against the incredibly intimate nature of material that reveals so much more than the identity of the person profiled. Further, as with any database, the larger the number of entries, the greater the risks of error and abuse. Such a development would only work to undermine and discredit the use of DNA as evidence and ultimately be hugely counter-productive for crime detection.

38. 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. Whilst equally unrealistic, both positions have the attraction of clarity and the avoidance of making arbitrary and potentially discriminatory distinctions between different groups of innocent people. In particular, we share concerns (held by some calling for the universal database), about the arbitrary and thus discriminatory nature of the current policy which allows permanent DNA retention in respect of anyone arrested for a recordable offence.

39. Liberty therefore seeks to focus debate around what a necessary and proportionate database might look like. In particular whether or not it is possible to find any principled justification for extended DNA retention of those who have been arrested or charged but not convicted. One popular rationale seems to be that such retention would be more relevant to crime detention than random sampling. However, as we highlight above, there is no evidence to support this assumption. On 9th October 2006, the former Home Office Minister Joan Ryan told the House that *"As far as we are aware, there is no definitive data available on whether persons arrested but not proceeded against are more likely to offend than the population at large."* Despite muddled attempts by the Home Office to produce such data Liberty does not believe that the situation as described by the former Minister has changed. As we have also explained above, statistics as to the number of convictions that have been secured only as a result of the retention of innocent people's profiles are not known. Even if statistics were provided to show that there was a dramatic difference in the future likelihood of conviction between those previously arrested once and the rest of the population, we believe that alone would not suffice to justify retention of all innocent arrestees for 6 years. As we explain above – a criminal justice system

premised on statistic and extrapolation takes us down a dangerous and discriminatory road where the retention of DNA of young men between 18-24 is justified for expediency's sake.

40. Liberty has however never taken an absolutist approach to retention of innocents' DNA. While retention on the database certainly stigmatises it does not attribute guilt. We do not therefore take the view that retention of innocents' DNA can never be justified. We accept for example that the consistently low conviction rates for sexual offences caused by victim vulnerability, complex issues around consent and so on raise real proportionality arguments about possible retention from an earlier point in the process. We also accept for example that there is a difference in the proportionality of retaining the DNA of a person arrested and not charged with a low level offence where DNA is not relevant to the proportionality of retaining the DNA of a person suspected of several violent offences against whom criminal proceedings have been dropped.

41. Tellingly, the Scottish system of DNA retention was cited with approval in *Marper.* We will be suggesting amendments at the Committee Stage of this Bill which would pull England and Wales closer in line with the Scottish model. This would mean that a person who was arrested but not charged or convicted with a lower-level offence would have their DNA profile destroyed as soon as reasonably practicable. If no charges were brought their DNA would be destroyed within 6 months if not sooner and if criminal proceedings were commenced, DNA would be removed as soon as proceedings were concluded otherwise than with a conviction, warning or caution (i.e. on acquittal or when proceedings were dropped). If a person was arrested but not proceeded against for a more serious sexual or violent offence, DNA would be destroyed as soon as reasonably practicable following a decision not to prosecute and in any event within one year of the arrest. If a person was arrested for a more serious sexual or violence offence and proceedings were brought but charges dropped DNA could be retained for three years following the date of acquittal. If the same happened but the person was acquitted rather than having charges dropped, DNA could be retained 3 years from the date that the charges were dropped.

42. The debate on DNA retention takes on further importance as we move towards inter-jurisdictional access to State DNA databases. Serious crime in particular is not tied to national borders, so the principle of allowing countries mutual controlled access to databases has merit. However, most countries limit their DNA

databases to those convicted of serious offences. With over 4.5 million profiles the UK's database is proportionately several times larger than that of any other nation. The implications of allowing access to foreign agencies are, therefore, more significant.

National security exception

43. In respect of all DNA, other than that obtained under the *International Criminal Court Act 2001*, there is a general opt-out from the requirement that DNA and other material be destroyed after six years etc, if a chief officer of police determines it necessary to retain it for the purposes of national security. This effectively means that a person who has not been convicted of anything can have his or her DNA potentially retained indefinitely. While it is unclear from the clauses in the Bill whether a person would know that their DNA was being retained on these grounds we understand that current policy is that a person will not be told that their DNA is being retained. Under the current proposals a person will not be notified when their DNA is destroyed unless they ask to be notified. Proposed new section 64ZM(3) provides that if a person makes a request to be notified when their DNA is destroyed, within three months of the request the police must issue a certificate recording the destruction. This fails to explain what happens if a person asks to be notified and the material is not in fact destroyed. Will they be told of this fact or, if this is unlikely because informing a person they are under suspicion on national security grounds, will a person have to take it that silence means it is being retained on this ground (which in effect is the same as notifying the person). What is there to prevent the police from determining a high proportion of DNA and fingerprints must be retained on undefined notions of national security? This exception applies to the DNA/fingerprints taken from anyone convicted of *any* offence. Under these powers a chief officer of police could determine it necessary on national security grounds to retain the DNA of someone arrested for offences under the *Public Order Act 1996*, such as taking part in a prohibited public procession[61] or for shoplifting, simply by invoking national security grounds. Of course this decision would be subject to judicial review but given the very real difficulties in accessing judicial review, and the fact that invariably courts are reluctant to investigate the statement that something falls within national security grounds, this is not much of a safeguard. There is not

[61] Taking part in a prohibited procession is a recordable offence – see item 34 of the Schedule in the *National Police Records (Recordable Offences) Regulations 2000*, SI 2000/1139.

even, at the very least, anything requiring police to make a publicly available record of the number of times a determination is made that DNA and fingerprints are to be retained on national security grounds.

44. These provisions effectively allow DNA and fingerprints to be retained indefinitely on national security grounds regardless of the offence for which the person was arrested, and of course regardless of the fact that the person has not been convicted. While we can understand that there may be exceptional circumstances where DNA can be retained for a limited period of time where a person has not been convicted, these must be very tightly defined and to meet proportionately requirements they would need to be linked to objectively justifiable criteria – such as whether or not criminal proceedings were begun; and/or the type or number of offences for which an individual was suspected. A general catch-all provision that applies to retain the DNA of anyone arrested of any offence is not a proportionate response and does not stand up to scrutiny. It seems unlikely that this general catch-all exception will comply with Article 8 (right to privacy) and with the principles set out in *Marper*.

Children

45. 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.*[62]

[62] See Article 40(1) of the UN CRC, available at: http://www2.ohchr.org/english/law/crc.htm#art40

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*".[63]

46. We have grave concerns over the proposals in the Bill 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 for a more minor offence their profile can be deleted after three years instead of six. But 16 and 17 year olds arrested for a more serious crime (a qualifying offence) are treated in the same way as adults, with their DNA retained for six years.

47. 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. This is likely fuelled an increasing cultural 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*."[64] The Committee of Ministers recently expressed its concerns, noting the measures proposed in the consultation (which admittedly have changed since inclusion in this Bill, but not in any way we submit that would lead to a different conclusion) did not adequately respond to the *Marper* judgment:

> *Given the close similarities in the provisions for retaining profiles of children and adults, the European Court's specifications on the vulnerability of children as compared with adults and the particular importance on the treatment of minors in the criminal justice system, the proposed measures do not appear to respond to the requirements of the judgment.*

Liberty believes that the DNA profiles of all children who have not been convicted of any offence should be removed from the database as soon as reasonably practicable in all but the most exceptional circumstances. Such exceptional circumstances could

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[63] 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
[64] Ibid footnote 24 at para 24.

be for example where a 16 or 17 year old is arrested for a more serious sexual or violent offence but is ultimately acquitted or has charges dropped. In this situation DNA removal could take place a year after acquittal or the dropping of the charges.

48. Under the Bill's new provisions, under 18 year olds convicted once of a recordable offence that is not a qualifying offence (i.e. more minor crimes) will have their DNA retrained for five years, rather than indefinitely. However, a second minor offence will result in indefinite retention.[65] A child convicted of a qualifying offence (sexual or violent type offences) will have their DNA retained indefinitely in the same way as adults. 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 – that 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 Explanatory Notes state: "*In proposing retention periods for children, the Secretary of State has again acted on the basis of evidence which shows that the earlier a criminal career starts, the longer it is likely to last*".[66] This is of course stating the obvious – if you start something at an earlier age you are necessarily likely to have much longer in which to do it before death. This does not advance the argument any further. Developmental immaturity is recognised when determining what punishment children should receive and the *Rehabilitation of Offenders 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.

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[65] See proposed new section 64ZH

[66] See paragraph 237 of the Explanatory Notes.

Retention of DNA of people convicted

49. There is nothing in the Bill that deals with the retention period for the DNA of those convicted or cautioned for minor offences (other than in relation to under-18s). While *Marper* did not specifically consider the retention of DNA of those convicted of offences, it did point out that the retention of DNA and fingerprints by the State amounts to an interference with the right to privacy under Article 8.[67] 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. Yet, under the current law, none of which will be affected by this Bill, anyone convicted of a recordable offence will have their DNA and fingerprints retained indefinitely. 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.[68] Are these really the types of offences for which a person convicted should remain indefinitely on the National DNA Database? We believe the Government should have taken 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.

No right of appeal about decision to retain fingerprints and DNA

50. Currently ACPO guidance says that fingerprints and DNA samples taken on arrest should only be destroyed in 'exceptional circumstances'. The two examples given of what would 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

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[67] See para 67 of *S and Marper v UK*.
[68] See the *National Police Records (Recordable Offences) Regulations 2000*, SI 2000/1139.

but then it turns out the death was from natural causes).[69] The 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.[70] 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. We know that as a result of this 'Exceptional Case Procedure' in 2007/8 only 162 subject profiles were deleted from the NDNAD and in 2008/9 only 283 profiles were deleted. The proposals in this Bill[71] provide that a chief officer of police for the police area where the DNA and fingerprints were taken must destroy the DNA and fingerprints if it appears the arrest or the taking of the DNA etc was unlawful; the arrest was based on mistaken identity; or other circumstances of the arrest or alleged offence mean it is appropriate to destroy the material. This is subject to first being able to complete a speculative search using the DNA or fingerprints. Note that these provisions do not apply in relation to DNA and fingerprints obtained from someone under a control order or material obtained for the counter-terrorism database.

51. No application process is set out in the Bill – the person whose DNA and fingerprints are held does not need to apply to the police to have his or her material removed. However in reality the police are only likely to consider removal after a person has contacted them and asked for their DNA and fingerprints to be removed. There is no appeals process set out in the Bill to seek review of any decision not to remove a person's DNA and fingerprints. The ECtHR in *Marper* said in relation to the current system that the very limited possibilities to have data removed from the National DNA Database contributed to their finding that the current system was unlawful, including, in particular, the fact that "*there is no provision for independent review of the justification for the retention according to defined criteria*".[72] In response to the Government's consultation on DNA in which no appeals mechanism was set out, the Committee of Ministers of the Council of Europe said:

> *Continuation of the existing system does not appear to respond to the Court's findings on this point. It is noted that a request for destruction will continue to be*

[69] *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
[70] Ibid at pages 12 and 14.
[71] See clause 14 in relation to England and Wales and clause 15 for Northern Ireland, proposed new section 64ZI(5). See also clause 16, proposed new paragraph 14F(5).
[72] See paragraph 119 of *Marper*.

made to the Chief Constable of the police force that initially took the DNA sample and profile. This does not appear to correspond with the need for an independent review. It is noted that such a decision would be subject to judicial review. However, this is the same as the position considered by the Court in the judgment. In addition, the European Court has questioned the effectiveness of judicial review when considering proportionality.[73]

52. Without an appeals process set out in the legislation the only available review is by way of judicial review. However, as suggested by the Committee of Ministers, 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. While we are pleased the Government has not continued the current approach of requiring 'exceptional circumstances' before DNA can be removed, for this to be an effective mechanism a review process is essential. We are also concerned that the provision explicitly states that a speculative search may be carried out on the DNA and fingerprints even if a chief officer of police considers an arrest was unlawful. Allowing a speculative search despite the unlawfulness of an arrest may well encourage arrests simply in order to take a person's DNA and fingerprints. Given recent reports that this may be already happening[74] the Bill should address this issue (by explicitly prohibiting arrest simply to take DNA) and prohibiting speculative searching if the arrest is unlawful.

Clause 2: Proposal to take fingerprints and DNA after arrest, charge or conviction

53. The power to take fingerprints or DNA of those arrested is currently restricted to those detained in police custody. Clause 2 seeks to amend this to allow police to take the fingerprints and DNA of an arrested person who is on bail and is not in police detention. On the face of it, this amendment will enable police to arrest a person, release them on police bail and either take a person's fingerprints/ DNA on the spot (if the technology allows it)[75] or require them to attend at a police station at a

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[73] See Committee of Ministers, 1065th meeting (DH), 15-16 September 2009, section 4.2.
[74] See for example "Arrests are being made 'to expand DNA files'," The Times, 24 November 2009 available at: http://www.timesonline.co.uk/tol/news/uk/crime/article6929017.ece
[75] With regard to fingerprinting, mobile fingerprinting technology allows for fingerprints to be taken by a portable electronic device; see section 61(8A) of PACE which requires that where

later date to give their DNA and fingerprints. Once a person has been charged with an offence PACE already allows DNA to be taken from someone not in police detention if it has not already been taken or if it is insufficient. Clause 2 extends this to the taking of fingerprints in these circumstances and to allow DNA to be taken if the original DNA *sample* has been destroyed and there is a dispute about the accuracy of the DNA profile.

54. PACE currently provides that a person's fingerprints can be taken after conviction (or caution, warning or reprimand) for any offence at any time.[76] In relation to DNA the current law allows DNA to be taken from a person convicted of any offence after 10 April 1995 (but only if taken one month after conviction) and the DNA of prisoners convicted of certain sexual or violent offences[77] before 10 April 1995.[78] Clause 2 amends this to re-enact with slight modification the provisions in relation to fingerprinting, and allows DNA to be taken from anyone convicted, cautioned, warned or reprimanded in relation to certain sexual or violent offences before 10 April 1995 whether or not they are currently in prison.

55. Proposed new Schedule 2A inserted into PACE by clause 6 sets out the procedure when a person is required to attend a police station to be fingerprinted or have their DNA taken. Currently a person can only be required to attend a police station to give their DNA within one month after they are charged with or convicted of an offence.[79] New Schedule 2A will enable the police to require a person to attend the station within six months after the person was arrested, and the initial fingerprints/DNA taken were incomplete etc, or within six months after they were charged. However, there appears to be no limitation on when a person arrested for an offence and released on bail can be required to attend the police station to have their fingerprints/DNA taken, which seems an odd gap. In relation to convictions (or cautions, warnings or reprimands) it allows DNA and fingerprints to be taken two

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a person's fingerprints are taken electronically they must be taken using such devices as the Secretary of State has approved for this purpose. As for DNA, this can be taken by taking a sample of a person's hair or a swab from their mouth – it is possible that this could be done outside of the police station and the sample then taken back to the station for the profile to be created.

[76] See section 61(6) of PACE.

[77] The types of offences for which DNA can be taken are set out in Schedule 1 to the *Criminal Evidence (Amendment) Act 1997* and include certain sexual offences, certain violent offences such as murder, false imprisonment; kidnapping, grievous bodily harm, some uses of firearms, burglary, arson, conspiracy and attempts or incitement to do these offences.

[78] See section 63(3B) and (9A) and section 63A(5) of PACE.

[79] See section 63A(4) to (8) of PACE. Note it does not apply to fingerprints as there is currently no power to take fingerprints when a person is not in detention.

years after conviction etc, or for those already convicted, two years after Schedule 2A comes into force. However, in relation to convictions for qualifying offences (sexual and violent offences) there is no time limit on when the fingerprints/DNA can be taken. If a person fails to attend the police station when required a constable may arrest them without warrant (and then take their fingerprints and DNA).

56. We welcome proposals to enable the taking of DNA from those convicted of serious offences who are currently not on the National DNA Database. It has always seemed illogical that those convicted of serious offences such as murder and rape may not be on the database because they were convicted pre-1995 and were no longer serving a prison sentence – yet those arrested, but not convicted, of any offence remain on the database indefinitely. If "*protecting the public, but in a way that's proportionate to the threat*"[80] is the aim one wonders why it has taken so long for the Government to bring this proposal forward.

57. We are concerned, however, that the proposals to take fingerprints and DNA when a person may not be in police detention may allow for fingerprints and DNA to be taken on the streets. With mobile fingerprinting technology, and given DNA can be taken from a strand of hair or a mouth swab, there is nothing in this legislation stopping the police from taking DNA from a person on the street. We believe this could create real problems in terms of privacy, raises questions over the security of the DNA and opens up the possibility that DNA and fingerprints will be taken far more often as a matter of course from those arrested for minor offences and are not usually required to attend at the police station. Moreover, the provisions setting down a time limit on when DNA and fingerprints can be taken (i.e. six months after arrest or charge etc) only apply when a person is required to attend a police station in order for the material to be taken. If a person is not required to attend the station, but fingerprints and DNA are obtained on the street, there is nothing preventing this from being taken at any time. We understand that it may not currently be the policy intention to take such intimate material on the streets but the fact remains that the power is not currently constrained to reflect this. Further we have all too often seen

[80] See Comment Piece by Alan Johnson MP, Home Secretary, 'My DNA Dilemma', *The Guardian*, 25 November 2009, available at: http://www.guardian.co.uk/commentisfree/libertycentral/2009/nov/25/my-dna-dilemma

sloppily drafted powers introduced with assurances that they would only be exercised in a certain way, only to then be used in the intrusive manner allowed for.[81]

58. We are concerned that if such powers can be exercised on the street it is even more likely that police officers will automatically use their discretion to take DNA and fingerprints as a matter of course, without determining the necessity to take such material. Indeed, the Human Genetics Commission recently recommended that new guidance is already required as to when it is appropriate to take a DNA sample following arrest, noting:

> *It is true that when a person has been arrested a discretion exists as to whether to take a sample, and then whether to submit that sample for profiling and loading to the database; however, we have heard from those working within the police service that this discretion is not exercised, inasmuch as to do so would require a justification to be given the could potentially be seen as discriminating between different people who have been arrested.*[82]

This is to say that DNA is routinely taken as a matter of course with little thought as to whether it is necessary or proportionate. In August last year the Government issued a consultation in relation to a review of PACE powers in which it recommended that PACE be amended to make it clear "*that the taking of fingerprints and DNA to carry out a speculative search and collect biometric data is not sufficient grounds on its own to make an arrest*".[83] The consultation closed in November last year yet the Government have yet to issue its response, and this proposal has not been included in the measures included in this Bill. It is surprising that this proposal seems to have been dropped and yet measures allowing for DNA and fingerprints to be taken anywhere outside of police detention have been introduced, making it easier for such material to be obtained. We believe sensitive personal material such as DNA and fingerprints should only be taken when it is necessary to do so and when a person is at a police station, and we will be calling for these provisions to be amended to reflect this.

[81] Section 44 of the *Terrorism Act 2000*, stop and search powers, being one such example.
[82] See Human Genetics Commission, 'Nothing to hide, nothing to fear? Balancing individual rights and the public interest in the governance and use of the National DNA Database', November 2009, at paragraph 3.27.
[83] 'Government's Response to the Review of the Police and Evidence Act 1984', Policing Powers and Protection Unit, Home Office, August 2008 at paragraph 7.15.

59. We are also concerned that a blanket power to take the DNA and fingerprints of anyone arrested, charged or convicted of *any* offence not only means that those convicted of very minor offences for which DNA is not relevant will be unduly targeted but it also imposes an undue burden on the police. Locating all those arrested, charged or convicted of any crime at any point in time will be a massive logistical exercise for the police and take up an inordinate amount of police resources. The Explanatory Notes recognise that "*some offenders may well be difficult to trace*"[84] and that therefore "*the power is intended to be targeted at those offenders who continue to represent a risk to the public of committing further crime or where there is sufficient evidence to suggest that it will assist in the detection of past crimes*".[85] Yet, the power to take fingerprints and DNA following conviction is to be exercised whenever an officer of at least the rank of inspector is satisfied "*that taking the sample is necessary to assist in the prevention or detection of crime*".[86] This is a very broad test and it is not difficult to envisage a situation where the police are blamed for not having taken the DNA from a person convicted in the past who goes on to commit a crime where the police had not taken his or her DNA. It is clear that once the police have this power they will be expected to exercise it in all cases where it might assist in the prevention and detection of crime. We believe this power is too broad and should be limited to the taking of fingerprints and DNA of those convicted of more serious offences, rather than giving police the power to take the DNA of those convicted of a minor shoplifting offence in 1990 for example. A limitation to this effect will ensure minor offenders are not unduly targeted and will also give more guidance and clarity to the police in giving effect to these provisions.

Clause 3: Proposal to take DNA of those convicted outside England, Wales and Northern Ireland

60. Clause 3 introduces a new power to allow police to take the fingerprints and DNA of UK nationals and residents who have been convicted of certain offences outside of England and Wales that would constitute a qualifying offence if it were committed in England or Wales (clause 9 applies the same procedures to those convicted outside Northern Ireland). Clause 7 defines what a qualifying offence is which includes a number of sexual and violent offences.[87] It is important to note that

[84] Paragraph 224 of the Explanatory Notes.
[85] Paragraph 225 of the Explanatory Notes.
[86] See clause 2(6) of the Bill, proposed new section 63(3BC).
[87] Note this includes the same offences currently listed as those for which DNA can be taken from prisoners convicted pre 10 April 1995 (such as sexual offences and other violent

this applies to offences committed anywhere outside England, Wales and Northern Ireland, which of course includes Scotland. This could mean that a person whose DNA is on the database in Scotland could be required by non-Scottish UK police to provide their DNA to be added to the National DNA Database.[88]

61. We believe it is sensible to ensure that those convicted of serious offences outside the UK who are UK nationals or residents should, on their return to the UK, be entered onto the National DNA Database. Again, it makes little sense for those convicted of any offence in England, Wales and Northern Ireland to be on the database but not those living in the UK who were convicted of murder or rape elsewhere in the world. We do, however, caution against overbroad qualifying offences. Of particular concern is the inclusion in the list of qualifying offences that of 'encouragement of terrorism'. This is a speech offence that can be committed even when a person has no intention to commit it, and is not an appropriate offence to include in qualifying offences (particularly as finding an equivalent offence elsewhere is unlikely).

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offences). It also includes other offences (see proposed new section 65A (l), (m), (o), (p), (q) and (r)) such as taking or possession of indecent photos of children, hijacking offences, causing or allowing the death of a child as well as a number of terrorism offences.

[88] However, we understand that Scottish police already add DNA to the National DNA Database so this is most likely to apply where there is a power in England and Wales to take DNA but not in Scotland – for example, Scottish offenders convicted pre-1995 who are not on the database.

Liberty DNA retention Case Studies[89]

Case Study 1

A woman in her mid-20s, with no previous arrests, convictions or cautions, is trying to get her DNA removed from the National DNA Database. The woman went to Primark to return some goods she had bought the day before. When she went in she was wearing a Primark sweater she had bought the day before (which she was not planning to return). She was arrested on suspicion of having stolen the sweater she was wearing, despite being able to produce the receipt for it. She was arrested, taken to a police station where her DNA, fingerprints and photographs were taken. She was questioned and released after 9 hours. She was subsequently told that no further action would be taken. Her DNA and fingerprints remain on the database, and under the proposals in this Bill would remain there for a further six years.

Case Study 2

A young man in his early 20s who suffers from a serious learning disability and autism has had his DNA indefinitely retained. Due to his disability, he is very interested in women's shoes and occasionally asks women if he can clean their shoes. On one occasion that he did so, the woman consented, but alleged that the young man touched the lower part of her leg. The young man was arrested on suspicion of sexual assault and DNA, prints and photographs were taken. He has no previous arrests, convictions or cautions. He was interviewed in the company of his father and during the interview it was established that his behaviour was entirely non-threatening and arose from the symptoms of his disabilities. His DNA is currently being retained indefinitely and under the proposals in this Bill, would remain on the database for another 6 years.

[89] Liberty is currently assisting all the individuals anonymised in these case studies after they attended a Liberty DNA clinic organised in conjunction with Diane Abbott MP in Hackney in August 2009.

Case Study 4

A young black man was riding his bicycle in a park with his friends. A robbery took place elsewhere in the park. The young man was arrested along with other young black men who were also in the park at the time. He was held at the police station for 8 hours. He was eventually released without charge and it was subsequently confirmed that no further action would be taken against him. He has no previous arrests, convictions or cautions, However, under the proposals in this Bill, his DNA, prints and photographs would be retained for a further 6 years.

Case Study 3

A young girl aged 16 has long been a victim of bullying at school, which is well documented by the girl's parents and has been acknowledged by the school. The young girl became involved in a fight with an alleged perpetrator who had been bullying her for over two years. The police were called to the school and the girl were arrested on suspicion of assault. DNA, prints and photographs were taken from the girl. The custody record states that "this matter does not belong on the criminal justice system and certainly does not meet the sufficiency of evidence to consider a charge". However, her DNA was nonetheless retained. Under the proposals in this Bill, because the girl is 16 and assault would be considered a qualifying offence, her DNA would be retained for a further 6 years.

Case Study 5

A young black man in was in a park having a water fight with friends. At another point in the park, an assault took place. The police came and took the young man's details, along with the other boys in the park. Four days later at 7am the police came to the man's house and arrested him. He was taken to a police station and his DNA, prints and photographs were taken. After being interviewed, the police did not charge the young man and no further action was taken. Despite this, the man's DNA was retained. Under the proposals in the Bill, his DNA would be retained for another 6 years.

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