KEEPING THE RIGHT PEOPLE ON THE DNA DATABASE

SCIENCE AND PUBLIC PROTECTION

MAY 2009

You should also contact the Police Powers and Procedures Team should you require a copy of this consultation paper in any other format, e.g. Braille, Large Font, or Audio.

Foreword

Science and technology provides a major opportunity to help detect and convict criminals. The UK is proud that it leads the world in the field of forensic science and none more so than in DNA.

I measure the success of that work on how it impacts on real people, how it helps the level of public protection and how it enhances public confidence in the criminal justice system.

The use of profiles stored on the National DNA Database is a prime example where all those objectives come together. We know that between April 1998 and September 2008, there were over 390,000 crimes with DNA matches, providing the police with a lead on the possible identity of the offender. In 2007-08, 17,614 crimes were detected in which a DNA match was available. They included 83 homicides, 184 rapes and a further 15,420 additional detections

These are real crimes affecting real people. The impact of crime on victims and their families should never be underestimated. I am conscious of the impact that any changes in our ability to detect offenders and potential offenders sends out those who have suffered directly from the consequences of crime.

That is why in a speech I made last December I responded directly to the Bowman family whose daughter Sally Anne was murdered in 2005 when I said "I have real sympathy for all those with concerns that any move could undermine a system that helped trap Sally Anne's killer. And I want to reassure Sally Anne's father that I will not let that happen".

The proposals in this paper confirm that commitment.

My aim is to ensure that those who should be on the database, are on the database. Public protection lies at the heart of our criminal justice system. That means having a structure which ensures the safety and security of all our citizens. Public protection also means delivering our commitment to protecting the rights of the individual.

I want consideration of this important issue to focus on what can and should be done with biometric data to help detect and convict criminals; and what can be done to use the message of the success of the DNA database to stop re-offending and to prevent offending happening in the first instance.

Jacqui Smith
Home Secretary

Contents

Section 1: Consultation Aims

1.1 On 4 December 2008, the European Court of Human Rights delivered its judgment in the case of S and Marper. Domestic courts had found in favour of the Government's position. However, the Court found that the blanket policy in England and Wales of retaining indefinitely the fingerprints and DNA of all people who have been arrested but not convicted was in breach of Article 8 of the European Convention on Human Rights.

1.2 The Court did, however, indicate that it agrees with the Government that the retention of fingerprint and DNA data "pursues the legitimate purpose of the detection, and therefore, prevention of crime". This paper

- sets out our proposals which will remove the current "blanket" retention policy and replace it with a retention framework which, in the words of the judgment, will "discriminate between different kinds of case and for the application of strictly defined storage periods for data".

OBJECTIVE

1.3 To develop a DNA framework which has the support and confidence of the public and achieves a proportionate balance between the rights of the individual and protection of the public.

Section 2: Executive Summary

2.1 The UK leads the world in the use of DNA to solve crimes, to catch criminals and to clear the innocent. Without this ability, we would be less safe and criminals would be more likely to get away with their crimes. It is to safeguard this crucial ability that we must maintain public confidence in our DNA database.

2.2 Furthermore, we are committed to complying with the ruling of the European Court of Human Rights (ECtHR) in the S and Marper case. This paper sets out options, while also indicating clearly where we have a preferred approach to achieving compliance with the judgement while maximising public protection. The paper also sets out some areas where additional powers could help secure improved public protection.

2.3 It is not the purpose of this consultation paper to rehearse the arguments in the case. But the judgment clearly allows a retention policy provided it is not "blanket and indiscriminate". This paper focuses therefore on the details of retention, recognising the important distinctions made in the judgement between cellular *samples,* which contain an individual's actual DNA, the DNA *profiles* on the database which simply describe for identification purposes certain non coding parts of the individual's DNA, and finally *fingerprints*.

2.4 We consider that the existing threshold in PACE for taking DNA and fingerprints on arrest from a person detained at a police station for a recordable offence is appropriate. This was not called into question by the ECtHR. Therefore, the paper sets out the future framework for retention, destruction and governance of DNA and fingerprints. The key recommendations are as follows:

- **Samples** – we are proposing the destruction of all samples taken from suspects on arrest, whether the individual goes on to be convicted or not. Samples could only be retained for as long as necessary to create a profile suitable to be uploaded onto the database, and for six months at the maximum. Samples recovered from crime scenes would, of course, be retained .
- **DNA Profiles**
  - Adults convicted of a recordable offence will have their profiles retained indefinitely
  - Adults arrested for a recordable offence which is not a serious violent or sexual or terrorism-related offence, but not convicted will have their profiles automatically deleted after six years
  - Adults arrested for a serious violent or sexual offence or terrorism-related offence but not convicted will have their profiles automatically deleted after twelve years
  - Profiles from individuals volunteering to have their DNA taken, for example for elimination purposes, will not be stored on the database
- **Fingerprints** – retention of all fingerprints and deletion after 6 years for those arrested but not convicted; and after 12 years for those arrested and not convicted of violent sexual or terrorist related offences.
- **Exceptional grounds for earlier destruction of profiles** – the paper sets out possible grounds for earlier destruction of profiles. These could be requested by application to the Chief Constable. Grounds might include cases of wrongful/unlawful arrest, mistaken identity, or in cases where it emerges no crime has been committed. The critieria which need to inform the Chief's decision could then be codified or set out in regulations.

- **Children** – the Home Secretary has stated the need to be more flexible in the approach to children
  - The DNA of all children under 10 – the age of criminal responsibility – held on the database has already been removed and will not be retained in future either
  - Those under 18 years old who are convicted of serious violent or sexual or terrorism-related offences will have their profiles retained indefinitely, along the lines of adults
  - Those under eighteen who are convicted on only one occasion of a lesser offence will have the profile removed from the database when they turn eighteen
  - Those under eighteen who are arrested but not convicted of a serious violent or sexual or terrorism-related offence will have the profile retained for twelve years, in the same way as for adults
  - Those under eighteen who are arrested but not convicted of a lesser offence on one occasion will have the profile deleted after six years or on their eighteenth birthday, whichever is the sooner. If the individual is arrested again, the same retention periods as for adults will apply
- **Governance** – the existing NDNAD Strategy Board will be rationalised and have a greater mix of operational and independent members; and an independent monitoring structure on implementation of the regulations will be introduced which will report directly to Ministers.

2.5 We believe that these measures will provide an open, transparent and accountable framework for the taking and retention of biometric data under the Police and Criminal Evidence Act (PACE). We have sought to build our options on principles set out in the ECtHR judgement, backed up wherever possible with an evidence base to justify proposed retention periods. This is not easy, and there is no existing evidence underlying retention regimes in other jurisdictions. That is because we are at the cutting edge of forensic development. In several cases we are relying on new work which has not yet been fully peer reviewed in the time available. But we now have a strong evidence base to support our proposed new retention framework.

2.6 The core judgement is around a six year retention period for the vast majority of profiles for persons arrested but not convicted. The ECtHR ruling stressed that we needed to treat non convicted individuals differently from those convicted. At the same time, the Court recognised we needed to take risk into account, and praised systems like that in Scotland where profiles are retained even in the case of individuals not ultimately convicted in certain circumstances.

2.7 To ensure public protection, we need to understand how long it takes after an arrest for a person to have no higher risk of re-arrest than a member of the general public. Some work on this suggests a figure of more than five years, other work points to between 13-18 years. A provisional model we have developed suggests a figure of 4-15 years, which forms the framework for the retention periods we are recommending.

2.8 We have selected the retention periods of 6 years and 12 years based on the likelihood of people who have been arrested and not convicted but who may go on to commit an offence. Part of that analysis has included data of those who have been arrested and convicted based on independent research carried out by the Jill Dando Institute (JDI) which found that offending rates of those arrested but not convicted were not significantly lower than for those convicted and not given a custodial sentence. The impact assessment research show that it takes 15 years before the risk of offending is at the same level as that for the general population. The JDI research shows that 52% of re-offending happens within six years. We have taken a value judgment on the associated level of risk that retention for six years provides and combined within the

ECtHR judgment, concluded that this provides a proportionate retention period. Two-thirds of re-offending happens within 12 years. We believe this a suitable period of retention for those arrested but not convicted for violent, sexual or terrorism-related offences in view of the potential level of harm associated with such offences and the issues of public confidence. With our proposal to re-start the clock of 6 years or 12 years after any subsequent arrest, we believe that a significantly greater proportion of all offending will remain detectable.

2.9. The impact assessment for this paper sets out the underlying assumptions in more detail. It is important to note that any change to the existing policy is likely to reduce the number of detections that DNA delivers, and will therefore have some adverse impact on public protection. Our policy is designed to minimise this risk while complying with the ECtHR ruling.

2.10 The destruction of all existing or legacy samples would be a significant and lengthy process and could realistically take up to two years to complete that work. The destruction of individual samples taken following the introduction of new regulations should be done within a maximum period of six months after they were taken. In practice, this may be a matter of weeks following the profile being successfully loaded onto the National DNA Database.

2.11 In terms of destroying existing or legacy profiles, we anticipate that a similar period of up to two years would be required even though there would be much smaller numbers involved i.e. profiles relating to those acquitted or not prosecuted between 1995 and 2003. That is because of the need to track progress on each case.

2.12 We recognise that some will call for faster action on deleting samples and profiles. We recognise that concern but we also recognise that the aim of the ECtHR judgment is not to create chaos in the criminal justice system nor to divert operational policing resources away from the key functions of tackling crime and upholding the law. We consider that the proposed timelines will enable a suitable and realistic operational response to this important judgment.

2.13 The Home Secretary made clear her intention to do more to strengthen the dividing line between guilt and innocence. In her speech to the Intellect Trade Association on 16 December 2008, the Home Secretary said that "for those who have committed a serious offence, our retention policies need to be as tough as possible." That is why the consultation paper also proposes that:

- those who are convicted of an offence and whose DNA or fingerprints were not taken during the criminal justice process would be subject to a requirement to provide DNA and fingerprints at any point subsequently. We are proposing that this be made retrospective, but limited to violent and sexual or terrorism-related offenders.
- UK citizens and residents who are convicted overseas of violent and sexual or terrorism-related offences should be required to provide DNA and fingerprints on return to this country.

2.14 Summaries of individual replies and a summary of responses will be published following the closing date for responses. Those responses will be used to help inform the content of draft regulations which will be subject to statutory consultation. Draft regulations will indicate the current preferred options for change. This is not to prejudge the outcome of the consultation but instead is intended to inform and assist understanding of what the suggested approach might look like.

Section 3: Public protection

"It is the only deterrent that will stop serious crimes being committed. I am a mother of four and I have five grandchildren, I would not worry about any of their details being held on a computer and everyone in our family feels the same way. I am sick to death of the people who complain about this idea. They have no idea what families like mine have been through."

Mrs Linda Bowman
(London Evening Standard 1 April 2009)

3.1 The NDNAD is an information database which provides the opportunity to detect offenders and to eliminate the innocent from enquiries quickly. It also holds out the prospect of clearing up cold cases on the basis of DNA left at the crime scene. The existence of a profile on the database does not indicate innocence or guilt of the individual to whom it relates.

3.2 The Home Secretary's Introduction and the Executive Summary make clear that public protection lies at the heart of the proposed retention framework. This consultation paper is about how to preserve public protection as much as possible while complying with the court decision in S and Marper.

3.3 There have been calls for a universal database which would eliminate the suggestion or perception of guilt. The NDNAD would then be an even more effective tool as the police would have instant access to the DNA profile of the entire population.

3.4 We have never advocated a universal DNA database. There are significant proportionality as well as practical and operational issues associated with such a database. This consultation paper does not seek views on the arguments for and against a universal DNA database.

3.5 Rather we are focussing on how to construct a proportionate retention policy which continues to help detect crime and protect the public making best use of the database in ensuring and enhancing public safety and protection while meeting the terms of the judgment by the ECtHR and ensuring we respect the rights of individuals to a private life.

Section 4: DNA in context

4.1 DNA is now part of everyday language. Advances in the fundamental understanding of the human genome and the application of DNA to our everyday life are truly astonishing. The science of genomics covers all areas of life from diagnosis and detection of illness and disease, improving our environment and energy sources, crops and the food chain, anthropology and forensic science.

4.2 The National DNA Database was developed as a means of contributing to the efficiency of crime detection. The database was set up in 1995 to store data derived from DNA profiles.

4.3 It operates on the simple premise that identifying offenders more often and more quickly should lead to increased detection of crimes and bring more offenders to justice. As importantly, it will enable the innocent to be eliminated from enquiries; indeed the very first case in which DNA was used enabled the police to eliminate an individual who had wrongly confessed to a murder. The DNA database is also intended to act as a deterrent to offending and re-offending and, importantly, it should help raise public confidence that those guilty of offending can be found and dealt with by the criminal justice system.

4.4 The use to which DNA taken in the course of a criminal investigation can be put is strictly limited under the Police and Criminal Evidence Act 1984.

4.5 The setting up of the database has revolutionised the way in which the police work to help protect the public. The majority of the active criminal population is now believed to have its DNA recorded and police forces use DNA profiles to solve thousands of cases every year.

WHAT HAPPENS TO A DNA SAMPLE?

4.6 Under PACE, samples can be taken from an individual detained at a custody suite for a recordable offence – i.e. not a minor offence. The chain of events on what happens when a sample is taken from a person and what happens when a sample is taken from a scene is set out below (Fig 1) but it is instructive to clarify some issues first:

WHAT IS A DNA SAMPLE?

4.7 This is a sample taken from an individual, such as a mouth swab, plucked hair roots or blood which contains the DNA of the individual for analysis. A sample may be taken from a person arrested for a recordable offence and detained at a police station, or from a volunteer during a mass screening process for elimination purposes, or from samples taken at a crime scene. The sample is handed over by the police to a laboratory for a profile to be taken. The sample is retained by the laboratory in secure sterile conditions and barcoded to enable the sample to be matched to the profile if necessary.

WHAT IS A DNA PROFILE?

4.8 The *profile* is shown as a numeric code on the National DNA Database. Accessing records on the NDNAD is strictly limited. When a police officer asks for a search to be carried out against a profile of a crime scene sample, he or she does not have access to the database.

4.9 Instead they are provided with details only of those profiles which provide a match. The profile is the pattern of DNA characteristics used to distinguish between individuals. The profile is taken from 'non coding' or 'junk' parts of the DNA, and does not contain personal information other than that listed at Annex B.

4.10 The NDNAD therefore contains profiles which consist of numeric data. Access to NDNAD records is restricted to around 30 staff either working in the NDNAD or the Forensic Science Service. We are confident that the security measures in place to monitor abuses or potential

abuses of the database are working well. But we are not complacent. The effectiveness of the controls is subject to ongoing review

4.11 The physical storage of samples is also subject to stringent security arrangements. The samples are held at laboratories on behalf of chief police officers. The use to which samples can be used and when are set out in the Police and Criminal Evidence Act (PACE) 1984.

4.12 The results from the application of DNA profiling to crime detection have shown the important contribution made. In 2007-08, there were 37,376 crimes with a DNA match which provided the police with an intelligence lead for further investigative follow-up. These included serious offences including 363 homicides, 540 rapes, nearly 1,800 violent crimes and more than 8,000 domestic burglary offences.

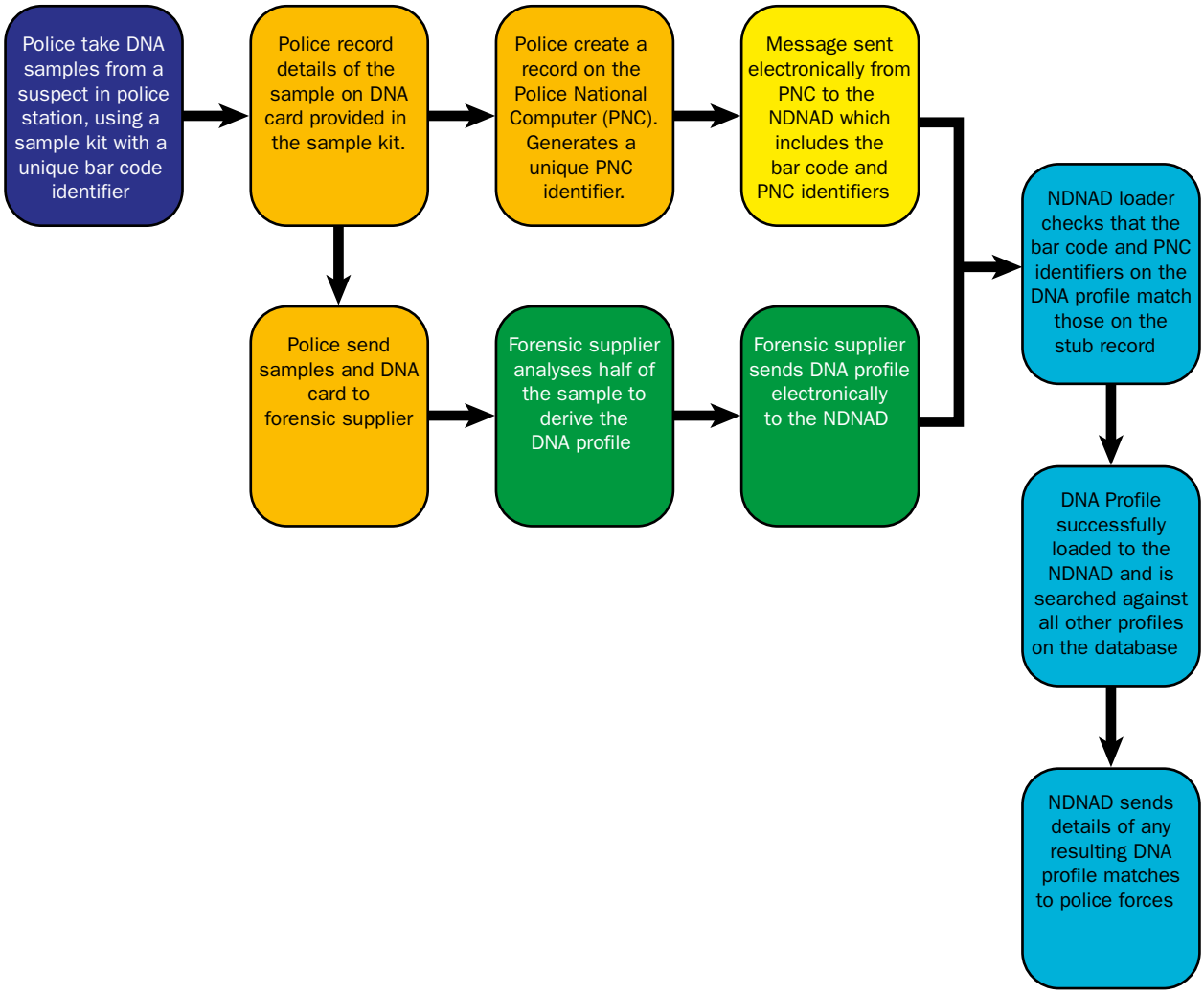
4.13 We know that from research between May 2001 and 31 December 2005 there were approximately 200,000 DNA profiles on the National DNA Database which would previously have had to be removed before legislation was passed in 2001 because the person was acquitted or charges dropped.

4.14 Of these 200,000 profiles, approximately 8,500 profiles from some 6,290 individuals have been linked with crime scene profiles, involving nearly 14,000 offences. These include 114 murders, 55 attempted murders, 116 rapes, 68 sexual offences, 119 aggravated burglaries and 127 offences of the supply of controlled drugs.

4.15 These results explain why we robustly defended our retention policy on DNA and fingerprints through the domestic courts and onto the European Court of Human Rights. Having successfully defended the policy up to and including the House of Lords, we were disappointed by but accept the judgment of the Court in the S and Marper case on 4 December 2008.

4.16 We need to comply with the judgment in the S and Marper case, while minimising the risks to public protection. The proposals outlined here for consultation seek to do that.

Figure 1: Loading a subject profile to The National DNA Database



Section 5: DNA Samples

5.1 The ECtHR judgment highlighted the sensitivity around retention of samples which contains cellular information. The Court recognised that whilst the NDNAD only held a very limited amount of data for profiling purposes, the nature and amount of personal information held by the State was particularly sensitive and constituted an interference with the private lives of the individuals concerned.

5.2 Our view is that there is scope for destroying samples of both those arrested but not convicted and for those convicted. **This goes substantially further than the requirements of the S and Marper judgment**. The reasons for doing so are set out below. It is possible that some unenvisaged circumstances may occur that would result in a failed prosecution but this must be weighed against the retention of potential genetic information for over 4.5 million people. Whilst an outcome may be to develop a retention policy on samples based on risk and benefits, we need to be satisfied that the potential implications for future public protection are fully identified. We would welcome comments on the proposal.

5.3 As at 31 March 2009, there were samples relating to over 4.5 million people held under the PACE provisions. Some concerns have been expressed that we are establishing a genetic database with a suspicion that the samples will be used for purposes other than crime investigation or research. The policy to date on retention of all DNA samples from individuals has its origins in a belief that we may need to upgrade the NDNAD as DNA technology develops and this would require re-analysis of all retained samples. This is a remote prospect as if we were to use more discriminating or different DNA methods then we would run them in parallel with the current system. Given the size of the current NDNAD there would have to be a very significant reduction in cost and increase in effectiveness to justify doing this.

5.4 The destruction of samples raises issues about the potential legal challenges demanding the production of the original sample. Given the purpose of the NDNAD is to identify or eliminate a possible suspect, they need to be located and arrested before any criminal justice action can be taken. This affords an opportunity to re-sample and confirm a DNA match if there is any doubt or procedural challenge that emerges in criminal proceedings.

5.5 There is currently a process in place where the release of samples requires the request from an ACPO officer and agreement of the Chair of the NDNAD. These are relatively infrequent (2-3 per week) and very few situations which are likely to occur where a criminal prosecution would be compromised.

5.6 If we were to adopt a destruction policy on samples, we would need, as part of the quality control system operated by the forensic providers, to provide a sufficient period in which to re-analyse samples. This requirement could be accommodated by allowing for destruction after, say, any time up to a maximum of six months; or for when a satisfactory profile is loaded onto the database.

5.7 The destruction of samples would be a statutory requirement under the proposed Regulations. The likely approach would be for the National Policing Improvement Agency (NPIA) and the NDNAD Strategy Board to consider contracting a suitable organisation to collect samples from forensic science providers and destroy them as biological waste. With the samples having an estimated physical size of $25m^3$, it is anticipated that it would take up to 12 months after agreeing a contract to deal with legacy samples.

Samples: Summary of Recommendations

- Samples to be destroyed for all existing and future cases, both for persons arrested and not convicted and for those who have been convicted.
- Samples to be retained for up to six months maximum for possible re-examination purposes only. Samples to be destroyed when an effective profile is on the NDNAD.
- Legacy samples to be destroyed within 12 months of date of commencement of regulations.

Section 6: Implementing the judgment: DNA profiles

6.1 The ECtHR judgment identified England, Wales and Northern Ireland to be the only jurisdictions within the Council of Europe to allow the indefinite retention of DNA material of any person of any age suspected of any recordable offence. Other jurisdictions (e.g. France) have very long retention periods for some crimes even in non-conviction cases, sometimes for as long as 25 years.

6.2 The court has accepted there is a justification in retaining profiles in non-conviction cases. The question is for how long. We have sought to examine the evidence base which could inform this decision. The challenge now is to devise a framework that is evidence based and proportionate whilst retaining as far as possible the benefits to public protection that the existing scheme offers.

KENSLEY LARRIER – arrested in May 2002 for the Possession of an Offensive Weapon. His DNA was taken at this time and loaded to the DNA database in June 2002. The proceedings were discontinued in October 2002. Larrier's DNA was retained under the provisions of the Criminal Justice and Police Act 2001.

In July 2004, a rape was committed in the North of England. DNA from this investigation was speculatively searched against the NDNAD and matched against the acquittal sample. He was arrested, and charged with the offence in November 2004.

Larrier was convicted in June 2005, jailed for 5 years and was entered on the sex offenders register for life.

6.3 Therefore, in the light of the judgment, research has been undertaken to establish the latest evidence to help to consider the options available to inform a retention period for those arrested but not convicted or against whom no further action was taken.

6.4 First, we considered the simple approach of destroying all profiles for people arrested but not convicted. The judgment does not require that we must delete all fingerprints, samples and profiles for persons arrested but not convicted. This option would have resulted in around 850,000 records having to be destroyed. Such a reduction – going well beyond what is required by the ECtHR judgment – would have significant impact on resources and, more importantly, on future ability to detect offenders.

6.5 The research paper from the Jill Dando Institute (JDI) is attached at Annex C. This should be read in conjunction with the Impact Assessment at Annex D. Importantly, the JDI research concludes that the seriousness of the initial offence for which the person was arrested does not necessarily predict the seriousness of subsequent offences with which the person may be associated. As a result, a policy which only retained profiles where an individual was arrested for a serious or violent offence (as applies, for example, in Scotland) would risk missing numerous detections. For example, the most common offences for which profiles ultimately linked to murder cases were originally taken are drug offences.

6.6 In determining the most suitable retention period, the key question is one of risk. We have sought to assess how many years after arrest an individual's risk of being rearrested is the same as the risk of an individual in the general population.

6.7 Some US studies have looked at this from the point of view of criminal record checking for potential employees. The first paper (Kurlycheck, Brame and Bushway) considers the 'hazard rate' for a Philadelphia cohort of individuals born in 1958. The key point from this report is that after 5 years the difference between hazard rates for arrested and non arrested individuals is still significant at over 1%.

6.8 The second paper (Nakamura) considers the hazard of rearrest for a cohort of people arrested for the first time in 1980 in New York. It investigates the effect of being arrested for different crime types on the time for the arrestees' hazard rate to reach the population hazard rate. The paper concludes that for first time arrestees of age 18 who were arrested for robbery, the period is 14 years, for arrestees of age 16 arrested for burglary, the period is over 13 years.

6.9 We have sought to replicate this work looking at data on the PNC. The nature of the material here means that we are forced to use PNC conviction and reoffending data.

6.10 For this to be valid, we would have to believe that the risk of offending following an arrest which did not lead to a conviction is similar to the risk of reoffending following conviction.

6.11 This is obviously a controversial assertion, but it does appear to be borne out by some work carried out by JDI on a cohort from the mid 1990s (see fig 3). This work suggests that the risk of subsequent conviction is at least as high in the group who were subject to no further action to those who received a caution or a non-custodial sentence. Nothing here detracts from the legal principle of the presumption of innocence of any individual who is not convicted, but we believe the sort of analysis carried out is legitimate in assessing underlying risks.

6.12 The Home Office analysis looked at a cohort of offenders who had been convicted of an offence in 2001. The reconvictions for this cohort were investigated in each of the following six years, with extrapolations for future years. The research suggests that within 4 years the 'hazard rate' converges with that for the peak offending age group (males aged 16-20). The cohort converges with the general population around 14-15 years.

6.13 On the basis of our own work and the US evidence, we have concluded that a retention period of around 6 years for most offences seems reasonable, with a longer period for serious sexual and violent offences. The evidence for reoffending in more serious and violent cases is unclear, but we believe a longer retention period is a commonsense approach given the more serious consequences of reoffending and therefore the damage that a missed detection would imply.

Figure 3: % cases arrested again within risk period

Year (Risk Period)	NFA	Caution	Non-Custodial Sentence	No of cases
1996 sample (30 months)	28	42	23	206
1995 Sample (42 months)	50	47	50	227
1994 Sample (54 months)	48	50	38	99
Combined	40	46	35	532

Source: Jill Dando Institute, April 2009

6.14 Some may want a shorter period of retention, some may want a longer period and others no retention period at all. We welcome views on the suggested approach and supporting evidence which would assist in determining whether an alternative period is more appropriate.

TERRORISM

6.15 We also believe that profiles obtained and retained in relation to terrorism and national security should be deleted automatically after 12 years unless the person is convicted of a recordable offence. This includes profiles obtained under Schedule 8 to the Terrorism Act 2000 (from persons arrested as a suspected terrorist or persons detained under Schedule 7 to the 2000 Act), profiles of those individuals subject to a control order and profiles retained under section 18 of the Counter-Terrorism Act 2008.

6.16 In the case of samples taken from controlled individuals, the profiles will be retained for a period of twelve years from the point at which the individual is no longer subject to a control order.

RETENTION PERIOD FOR CHILDREN

6.17 The Home Secretary indicated in her speech on 16 December 2008 that she wants to adopt a different approach to young people. This recognised that whilst the typical residual career length for those who get involved in crime at an early (teen years) age is 16 years, for many young people involvement in crime at that age is often an isolated incident and can be relatively minor.

6.18 We are therefore proposing a policy of deleting profiles of children who are convicted once only of minor offences. If a child commits a serious offence or two minor offences, the profile will be retained indefinitely, as for adults.

6.19 Similarly for those arrested but not convicted of minor offences, we are proposing that profiles be deleted after six years or on the eighteenth birthday, whichever is the sooner. For serious violent or sexual or terrorism-related offences, the same 12 year rule will apply to children and adults.

DESTRUCTION OF PROFILES ON EXCEPTIONAL GROUNDS

6.20 These automatic destruction periods will ensure that profiles will be removed at predictable points without requiring any further action. There may still be cases, however, where members of the public feel their profiles and samples should be removed immediately. Examples might be where there has been a wrongful arrest, or a case of mistaken identity, or where it turns out that no crime has been committed. There is already a right to appeal to the Chief Officer on exceptional grounds, though it is rarely exercised.

6.21 The current process under the Exceptional Case Procedure of making an application to the chief officer would remain in place. That is because Chief Officers have the discretion to authorise the destruction of DNA and fingerprints. That discretion would remain subject to judicial review.

6.22 We do, however, propose two significant changes. First, procedures should be renamed 'application process for record deletion'. The change in title is not cosmetic. Applications for deletion will still be possible but will need to be made and considered against defined criteria. The criteria for deletion would be set out in Regulations. It is not possible to define comprehensive criteria in legislation for what will be in practice a based on the individual circumstances of each case. However, it should, for example, involve cases where the arrest was unlawful, where the taking of the sample was unlawful, or where no offence existed e.g. where a suspected unlawful killing turns out to be a death by natural causes. Draft regulations will set out proposed criteria.

PROFILES OF CONVICTED PERSONS

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

6.24 We do however recognise the need to co-ordinate our approach on DNA profiles with that of retention of other police records. Central to this is the development of criminality information policy and implementation of Sir Ian Magee's recommendations following his independent review. These include outstanding recommendations from the Bichard Inquiry report.

LEGACY PROFILES OF PEOPLE ARRESTED BUT NOT CONVICTED OR ACQUITTED

6.25 The Government has given effect to the S and Marper judgment by destroying the relevant samples of S and of Marper and by providing just satisfaction for costs and expenses. The judgement was made in respect of the case of the two applicants.

6.26 But we have to consider the position of people in similar circumstances to the two applicants. In other words, the profiles already on the database of people who have not been convicted.

6.27 There are approximately 850, 000 legacy profiles of which approximately 500, 000 have no linked PNC Record. This means it is not possible to tell whether the latter profiles relate to persons arrested and not convicted or subject to no further action, or to people who have been convicted.

6.28 It is possible that a proportion of the non-reconciled profiles relate to a conviction. At this stage it is difficult to estimate what percentage would be deleted because the information is not currently held by police forces in a format which can provide such an assessment. Dealing with this group represents the biggest challenge and has the greatest resource implication.

6.29 Therefore, there are two issues relating to legacy cases: first, those whose profile is linked to a PNC record. In those cases, we are proposing that the 6-year or the 12-year retention criteria is applied depending on the offence

6.30 The second issue relates to profiles were there is no linked PNC record. There are two options. The least expensive and most efficient process would be to delete the 500,000 profiles. The second approach is for the police to match profiles against records and where a record is identified, apply the six-year rule, the 12-year rule or the conviction rule. The Home Secretary has made clear her intention that the DNA database should contain profiles of those who should be on it.

6.31 Deleting such a volume of profiles without better understanding of the associated risk is therefore potentially a high risk option. The Home Secretary has asked the Association of Chief Police Officers (ACPO) to carry out further work on this aspect and provide a detailed impact assessment which can be published as part of the Summary of Responses to the consultation exercise on this paper.

6.32 The reference to subsequent arrest refers to arrest for an offence not related to the original offence. For example, a person arrested for attempted murder subsequently reduced to grievous bodily harm would not be considered as a new arrest for biometric retention purposes. Similarly, the re-arrest of a person on fresh evidence would not constitute a second or subsequent arrest for biometric retention purposes.

Profiles: Summary of Recommendations

- All profiles to be retained for six years for persons arrested for a recordable offence but not convicted.
- Profiles of persons subject to arrest within that period to be subject to an automatic retention period of a further six years.
- Profiles of persons arrested but not convicted for specified violent or sexual terrorism-related offences or to be retained for 12 years.
- Persons over the age of 10 years and under 18 years of age to have profiles deleted at reaching 18 years old whether or not convicted (subject to the violent or sexual offences criteria) unless arrested for a subsequent offence before they reach 18, in which case the rules applicable to adults apply.
- Regulations to set out criteria for making an application for deletion of profiles.
- Six year and 12 year retention periods to start from date of arrest, except in the case of a control date where the period of retention will commence from the date of the order.
- Deletion of profiles on the database for persons arrested but not convicted to be applied from six years from the date of commencement of the regulations.

Section 7: Taking samples – additional categories

7.1 The proposed regulations relate only to the retention and use of DNA and fingerprints. We are proposing in future primary legislation to be introduced when Parliamentary time allows to provide additional provision for the taking of samples in three specific instances:

- **Post arrest** – where a person has provided a sample and it has proved to be insufficient for profiling purposes. We are proposing that the police should have a power to require a person to provide a further sample.
- **Post conviction** – currently a sample may be taken if a person is convicted and in prison custody and a sample was not taken during the investigative or court process. If a person is convicted or charged but not subject to a prison sentence, the police must request within one month of the conviction or charge, or within one month of the police being informed that the sample is not suitable for analysis, that the person attends the police station for a sample to be taken. We are proposing that the police may require a sample in these circumstances at any time post-conviction. The particular operational focus will be on ensuring that the profiles of those convicted of the more serious offending will be on the NDNAD.
- It is important to strengthen public protection by ensuring that the profiles of those UK residents and nationals convicted of sexual or violent or terrorism-related offences overseas are retained in the NDNAD in view of the risk they may pose here.

Taking Samples: Summary of Recommendations

- Provide the police with a power to take a sample and fingerprints following arrest if the initial data is not sufficient for profiling or IDENT1 needs.*
- Provide the police with a power to take data post conviction of persons who were not sampled or fingerprinted during the investigation or court process.*
- Provide the police with a power to take data from UK nationals and UK residents convicted of violent or sexual offences overseas.*

* Proposals for primary legislation.

Section 8: Fingerprints

8.1 The ECtHR judgment recognised that fingerprints do not contain as much information as either samples or DNA profiles. As a result, the Court found that the retention of fingerprints has less impact on a person's private life than the retention of samples or DNA profiles. The Court considered that the retention of fingerprints pursued the legitimate purpose of the detection and therefore prevention of crime. The Court also recognised that fingerprints do not contain subject information and that, accordingly, they do not have the same impact on private life as cellular samples and the DNA profile. Nevertheless, the Court did conclude that the blanket retention of fingerprints constitutes an interference with the rights to respect for private life.

8.2 The main focus of the judgment was, however, clearly on the impact of DNA samples and profiles. Concern lay in the potential for detailed personal information to be used outside the context of the immediate investigation. Fingerprints do not provide any additional information other than being able to confirm the identify of the person.

8.3 The national fingerprint database is known as INDENT1. Fingerprints are a key identifier of a person as well as an investigative tool. We are proposing that we retain fingerprints for those arrested and not convicted for 6 years and for 12 years for those arrested and not convicted for a violent, sexual or terrorist related offence.

8.4 In proposing this approach, we are recognising the benefits that fingerprints bring and have brought for over a century to enable the police to confirm who they are dealing with and in more personal situations, help in the identification of victims in disasters and other incidents. It could be argued that this applies also to DNA. However, as the ECtHR judgment recognised, cellular samples and DNA profiles constitute a much greater risk of being used for subjective analysis. For that reason we have also impact assessed a retention period of 15 years for fingerprints.

8.5 PACE places specific requirements on the retention and use of fingerprints. There is no provision within the 1984 Act to use fingerprints in connection with the National Identity Scheme.

8.6 There is a current provision within PACE which allows a person to make a request to witness the destruction of his or her fingerprints. We are proposing to remove this entitlement.

Fingerprints: Summary of Recommendations

- INDENT1 database to retain for 6 years for persons arrested but not convicted on all offences; and 12 years for those arrested and not convicted for a violent, sexual or terrorist related offence.
- Audit trail of any copying of fingerprints and their use.
- Automatic destruction of copies when no longer required for investigative purpose.
- Removal of individual's ability to witness destruction of fingerprints.

Section 9: Volunteer samples and profiles

9.1 Volunteers consent to provide their samples in one of two ways: either as part of a mass screening in a geographical area or on an individual basis. In both instances, the request must be related to a specific offence. The profiles are searched against the relevant crime scene sample.

9.2 In giving their consent to the sample, the volunteer is also asked whether they wish to give their consent for their profile to remain on the NDNAD. If such consent is given, the volunteer is not then able to subsequently require that the sample and profile are destroyed.

9.3 We are proposing that a volunteer who gives their samples for elimination purposes are not placed on the NDNAD. Whilst consent will continue to be required for the taking of the sample, consent will not be sought for the sample or fingerprints to be retained on a national database and subject to future speculative searches.

9.4 Existing 'volunteer' samples will be removed from the database whether or not the person has consented for its retention. That process is already under consideration by the NDNAD Strategy Board and ACPO will be writing out shortly to all chief officers to inform them that future volunteer samples and profiles should be handled through a distinct and separate process from the NDNAD and that existing samples should be removed from the NDNAD.

9.5 This will mean that future volunteer profiles will only be searched against crime scene samples relating to the specific offence under investigation.

Volunteers: Summary of Recommendations

- Existing volunteer samples to be removed from the NDNAD.
- Future profiles and samples to be destroyed when no longer required for investigative purposes.
- Future volunteer samples and profiles to be subject to distinct processes from speculative searching on the NDNAD

Section 10: Governance and accountability

10.1 We have responded promptly to the judgment by removing S and Marper's relevant details from the NDNAD; made payment on costs and expenses as required by the judgment; and submitted an initial report to Council of Europe Committee of Ministers on implementation progress.

10.2 The Home Secretary's speech on 16 December just 12 days after the judgment, reflected the importance attached to this important area and the need for change. Since the Home Secretary's commitment in that speech to deal with under 10s on the NDNAD, their profiles have all since been removed.

10.3 This paper sets out proposals to introduce statutory regulations setting out the criteria for the making and consideration of applications to have DNA and fingerprints deleted where someone considers that their data should not be retained. Procedures on deletion of such data by the police will be more transparent.

10.4 We are further proposing that a strategic and independent advisory panel is tasked with the function of monitoring the implementation and operation of the Regulations. This would not be an appeal mechanism – it would be inappropriate for an administrative body to rule on the decisions of a chief police officer – but would exist to monitor the application of the new approach and provide advice and guidance to Ministers through an annual report. Part of their function would be to comment on application of the regulations by individual forces. This would be achieved by examination of statistical information, currently some of which is already supplied by forces to the NPIA. It may be that this role can be carried out by an existing body but we are keen to ensure that such a group is able to adopt an entirely independent and constructively critical approach.

10.5 The National DNA Strategy Board has already commenced a review of their existing governance structure. A key part of that consideration is focussed on having more external and independent membership represented on the Board.

10.6 The introduction of the Regulations would be accompanied by a code of practice under section 66 of PACE. Currently Code D deals primarily with the taking of biometric data as well as other means to identify the person. There is considerable scope to expand the Code to reflect the proposed new Regulations on the retention and destruction of biometric data. Work has already started as part of the PACE Review on re-drafting and re-designing the Notes of Rights and Entitlements given to detainees.

Summary of Recommendations: Accountability and Governance

- Restructuring of the National DNA Strategy Board to have more external, independent membership.
- The establishment of a strategic and independent advisory panel to monitor and scrutinise the retention policy and the processes of consideration for destruction of profiles.
- Annual reporting by the independent advisory panel to Ministers.
- Quarterly/Annual publication of the key statistics on NDNAD numbers, speculative searches, deletions and applications for deletions.