



Statewatch Analysis

UK government's "clumsy, indiscriminate and disproportionate" approach to DNA retention

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The UK government intends to keep innocent people on the national DNA database for six years despite the European Court of Human Rights having ruled the practice to be unlawful

Innocent people who have been arrested, but never convicted of a crime, will have their DNA records stored on the national database for a period of six years under plans unveiled in the government's new *Crime and Security Bill*. The Bill, presented to parliament by Home Secretary Alan Johnson on 19 November 2009, also includes a number of new rules for the collection, retention and use of DNA and fingerprints in England and Wales. These new measures are belatedly being introduced in response to the December 2008 European Court of Human Rights (ECHR) landmark judgment in the case of *S and Marper v the United Kingdom*. The court ruled that the UK government's policy of indefinitely retaining the DNA of everyone arrested is unlawful.

The Bill's six-year time limit aims to address this finding, but civil liberties groups have called the response inadequate and criticised the overtly draconian nature of the policy. A *Liberty* report published in January 2010 described the new proposals as "wholly disproportionate" and "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." [1] The DNA database is also the subject of a highly critical report published in November 2009 by the UK government's advisory body, the Human Genetics Commission. The report found that police are routinely arresting people simply to obtain a DNA sample; that black men aged 18-35 are "highly over-represented" in the database; that unchecked "function creep" has severely altered the database's role; and that there is little concrete evidence to identify its "forensic utility."

The UK National DNA Database

The UK national DNA database is the largest in the world containing the biometric samples of approximately 5.1 million people. It owes its record size to the fact that, since April 2004, anyone aged ten or over who is arrested in England and Wales for a "recordable offence" (which includes menial offences such as begging and being drunk in a public space) automatically has a DNA sample taken, usually by mouth swab, which is then used to create a profile (a string of numbers based on parts of the genetic sequence of the individual) to be entered into the database. Both are retained indefinitely regardless of a

person's age, the seriousness of the offence for which they were arrested, and whether or not they are eventually charged and convicted of a crime. Those who voluntarily provide a genetic sample to assist an investigation also find their data permanently stored. Home Office figures estimate that around one million people on the database have no criminal conviction. No legal right to be removed currently exists: an individual can ask the police force that arrested them to delete their DNA profile, but the decision is made at the discretion of the chief constable and there is no formal process of appeal.

S and Marper v the United Kingdom

Michael Marper was arrested in March 2001 for harassing his partner, but they later reconciled and the case was dropped. "S" was arrested in January 2001 at the age of 11 for attempted robbery but was exonerated five months later. The pair instigated legal proceedings after South Yorkshire police refused to destroy their DNA samples or remove them from the national database. In December 2008 the ECHR overturned the judgments of the House of Lords, Court of Appeal and High Court when it ruled that the UK government's practice of DNA retention breached Article 8 of the European Convention on Human Rights which covers the right to respect for private and family life. In one of the clearest and most damning condemnations of UK law, the 17 judges said they were "struck by the blanket and indiscriminate nature of the power of retention in England and Wales" and warned that it poses a "risk of stigmatisation."^[2]

Hopes that this judgment would serve to expedite the removal of innocent people from the database faded when the government insisted it would retain the current system while ministers considered the legal implications of the court's findings. Police forces have been encouraged to adopt a wait-and-see approach until new legislation is passed. The Association of Chief Police Officers (ACPO) sent a letter to chief constables telling them that "until this time, the current retention policy on fingerprints and DNA remains unchanged" and that "it is therefore vitally important that any applications for removals of records should be considered against current legislation."^[3] As a result, only 377 people were removed from the database in 2009.^[4] By contrast, in the same time period the biometric profiles of roughly 487,000 people were added. Furthermore, in December 2009 freedom of information requests made by the shadow immigration spokesman, Damian Green, illustrated that anyone who attempts to have their record removed from the database faces a "postcode lottery" with huge variations in police policy. For example, South Yorkshire police granted 83% of the requests it received in 2008-09, but other forces such as Cambridgeshire and Nottingham refused to remove anyone from the database.^[5]

Crime and Security Bill 2009

The UK government responded to the ECHR judgment by adding clauses to the 2009 Policing and Crime Bill. In May 2009 it was announced that police would be allowed to keep individuals who have no criminal record on the database for a period of between six and 12 years, depending on the seriousness of the crime for which they were arrested. The move was met with widespread opposition from civil liberty campaigners who argued that reducing the length of time people spent on the database did not address the court's concerns that the policy was indiscriminate and stigmatising in nature. In parliament there was extensive cross-party opposition to the fact that the government was using secondary legislation to address such an important issue. Only 90 minutes was allocated for parliament to debate the proposals, the absolute minimum required. In October 2009 the government eventually backed down and announced that the clauses relating to DNA retention would be removed from the Bill and reconsidered.

In November 2009, many of the proposals were reintroduced in clauses 2-20 of the *Crime and Security Bill*. [6] These clauses will amend the *Police and Criminal Evidence Act 1984* and alter the way in which DNA samples and fingerprints are collected and retained.

Clauses 2 to 13 relate to new powers afforded to the police to collect DNA and fingerprints. The two most significant provisions are that:

- Police will have the power to take the DNA and fingerprints of a person who has been arrested but is no longer in police custody. In theory this could mean that police will be able to take samples outside police stations, even on public streets.
- Police will have the power to take the DNA and fingerprints of UK nationals and residents who have been convicted of a serious criminal offence outside England, Wales or Northern Ireland. A list of “qualifying offences” is given in clause 7; most are crimes of a sexual or violent nature.

Clauses 14 to 20 address the ECHR judgment and relate to the way in which DNA and fingerprints are retained. Clause 14 has fifteen provisions, the most significant being:

- Individuals over 18 years of age who are arrested for a recordable offence but not convicted will have their DNA profiles held on the UK national database for six years.
- Under-18s who are arrested for a recordable offence but not convicted will remain on the database for three years, unless their offence is sexual or violent in nature and they are 16 or 17 years old in which case their profiles will also be retained for six years.
- Individuals over 18 years of age who have received a conviction, caution, or have been given a final warning or reprimand for any recordable offence will have their profile held on the database indefinitely.
- Under-18s convicted of a serious offence will also have their records retained indefinitely. If they have committed a minor offence they will have their record deleted after five years. However, if they commit a second minor offence their records will be held indefinitely.
- Individuals subject to a control order will have their DNA profile and fingerprints retained for 2 years after the control order ceases to have effect.
- Biometric samples must be destroyed as soon as they have been used to create a DNA profile and uploaded to the national database, or within six months at the latest.
- The samples and profiles of people who have volunteered their biometric data to aid an investigation must be destroyed as soon as they have fulfilled their purpose.
- The chief officer of each police force can, at any time, decide to retain an individual’s DNA or fingerprint profiles “for reasons of national security” for a period of two years.

Under clause 19, these new rules will be applied to the estimated one million innocent people currently on the national DNA database: anyone without a criminal conviction over the age of 18 who has had their profile held for over six years should automatically be removed. The clause requires the Secretary of State to make a statutory instrument (secondary legislation used to exercise a power granted by primary legislation) that will prescribe the manner in which DNA samples and profiles will be destroyed. However, no timeframe is given for this process, and the explanatory notes accompanying the Bill admit that “this exercise may take some time to complete.” [7]

Incompatibility with ECHR judgment

In January 2010, Liberty published a *Second Reading Briefing on the DNA provisions in the Crime and Security Bill in the House of Commons* to highlight fundamental flaws in the new legislation. The report argues that the government’s proposal to hold the DNA of arrested but unconvicted adults for six years:

fails to acknowledge the presumption of innocence; takes no account of the stigmatisation of inclusion on the NDNAD [National DNA Database]; 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.[8]

The Liberty report argues that the UK government has demonstrated a persistent “unwillingness to engage fully with the particular issue of retaining the DNA of innocents’.”[9] As a result, the new Bill does not sufficiently comply with the ECHR’s judgment. The report highlights the findings of the Committee of Ministers of the Council of Europe which met in September 2009 and determined 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.[10]

Further, nothing has been done to address the ECHR’s concern that innocent people are being stigmatised because the database is associated with criminality. This is particularly damning for children, a disproportionate number of whom come into contact with police. Stigmatising individuals who have never been convicted of a crime at an early age is incredibly damaging, and Liberty argues that they should be removed from the database as soon as possible except in the most exceptional of circumstances. If the Bill is introduced as it currently stands, Liberty believes legal challenges regarding its compatibility with Article 8 of the Human Rights Act are inevitable.

No appeals process

Liberty considers the permanent retention of DNA profiles of children and adults who have been convicted of minor offences to be disproportionate. Permanent retention is particularly worrying because the Bill fails to establish an appeals process for individuals who believe their biometric data is being held erroneously. The ECHR states in its judgment that the minimal possibilities a person currently has of being removed from the list and the lack of an independent system of review contributed significantly to their finding that the UK’s system of DNA retention was unlawful.

National security clause

In addition, the discretionary power given to chief police officers allowing them to retain an individual’s DNA profile for two years on the basis of national security will effectively give police the ability to bypass the new system. The primary concern here is that no guidance or framework for the application of the new power is included in the Bill, and this could lead to it being used arbitrarily. Liberty’s report emphasises that “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.” [11]

Police National Computer

Alarming, the policy research and public interest group Genewatch argues that the Bill’s provisions are actually worse than the existing mechanisms for removal because records of arrests will now be held indefinitely on the Police National Computer (PNC). Created in 1974, this computer system is accessible 24 hours a day and is extensively used by UK law

enforcement agencies. *The Observer* reports that records of arrest used to be deleted if charges were dropped or an individual was acquitted, but since 2005 they have been permanently retained to help police locate an individual following a successful DNA match. [12] The office of the information commissioner emphasised that use of the PNC is widespread and frequent:

Given this level of access, the commissioner is concerned that the very existence of a police identity record created as a result of a DNA sample being taken on arrest could prejudice the interests of the individual to whom it relates by creating inaccurate assumptions about his or her criminal past.[13]

These people could be unfairly stigmatised when applying for jobs if their potential employer conducts an enhanced criminal records check.

“Evidence based” approach

Liberty is highly critical of the “evidence-based” approach adopted by the UK government to formulate and justify the new proposals. The Bill’s Explanatory Notes acknowledge that uniformly retaining the DNA profile of every adult arrested but not convicted for a period of six years “runs counter to the steer in Marper” but argued that “this approach is supported by the best available evidence.” [14] Liberty disputes this claim, arguing that the new proposals are in fact based on “not much evidence at all”. [15] The government originally cited research conducted by the Jill Dando Institute for Crime Science, but it was widely contested by the scientific community and the institute’s director later admitted that the work was unfinished and should not have been used.

The Home Office subsequently published an authorless internal report to substantiate the need for a six year retention period. However, the report uses data from the PNC that only dates back three years to April 2006 and admits that statistical analysis in this field is limited. Liberty argues that “the statistical data is therefore so incomplete and misguided as to amount to guesswork and conjecture” and that the government is currently in no position to pursue an “evidence-based” approach. Further, the report warns that “over-reliance on statistics with little or no role for principle or ethic can lead to dangerously discriminatory outcomes.” [16]

Over-representation of ethnic minorities

This is evident in the significant over-representation of ethnic minorities on the database. Over 30% of the UK’s black population over the age of 10 have their records held, in large part because black people are four times more likely to be arrested than white people. The fact that arrest alone, and not conviction, is reason enough to collect and retain a DNA sample highlights the discriminatory effect of the system. Liberty says that a race impact assessment should have been carried out before legislation was drafted and has asked the government to account for its failure to do so.

The Home Office is required by law 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.[17]

The Human Genetics Commission (HGC) voiced similar concerns in a November 2009 report, *Nothing to hide, nothing to fear?*, in which it claimed that the DNA profiles of over three-quarters of black men aged 18 to 35 have been collected and retained on the national database. The report warns of the disproportionate inclusion of ethnic minorities and people from vulnerable groups, such as individuals with mental health conditions and children, because they are more likely to come into contact with a police force increasingly eager to make arrests. The report cites evidence from a retired senior police

officer who details the police's changing approach to arrest making. While in the past officers were encouraged to arrest individuals only as a last resort:

It is now the norm to arrest offenders for everything if there is a power to do so - It is apparently understood by serving police officers that one of the reasons, if not the reason, for the change in practice is so that the DNA of the offender can be obtained.[18]

Function Creep

The database's role has drifted from that of confirming suspicions to identifying suspects. The HGC report argues that "function creep" (the expansion of the way in which information is collected and used for purposes that were not originally intended) has occurred unchecked because the role of the database has never been adequately debated in parliament or given a formal legal footing. It has developed piecemeal with no safeguards in place to limit who can be added and for how long. Submitting evidence to the HGC, Dr Ruth McNally, of the Economic and Social Research Council, argued that the database has now created a category of "pre-suspects":

People whose profiles are on the database are the 'pre-suspects' ... the first to be suspected (and eliminated) whenever a new crime scene profile is entered onto the database. In this respect they occupy a different space within the criminal justice system from the rest of the population; they are under greater surveillance and, with the advent of familial searching, this differential status can be extended to their relatives too.[19]

The Prüm Treaty

This is particularly worrying because under the Prüm Treaty, signed in May 2005 and subsequently incorporated into EU law by the German EU presidency in June 2007, member states share reciprocal automated access to each other's national databases of DNA profiles, fingerprints and vehicle registrations. The UK thus shares the largest DNA database in the world with countries that only retain profiles of serious offenders and inevitably associate everyone on the UK database with criminality. Further, there is evidence that police forces are conducting "fishing expeditions" by making repeated automated searches of other country's fingerprint databases. Alarming, in October 2008 the European Council was forced to publish good practice guidelines because:

The varying scale of national databases, partly linked to population size, has led experts to doubt whether the databases of the less-populated States are able to deal with other States' searches. At times there are even concerns that databases may be damaged by overwhelming search volumes.[20]

Forensic utility

For the Human Genetics Commission, the database's shortcomings are compounded by an absence of evidence demonstrating its "forensic utility." The organisation's chair, Professor Jonathan Montgomery, said that "it is not clear how far holding DNA profiles on a central database improves police investigations." [21] Genewatch goes further, arguing that "expanding the number of individuals whose records are retained has increased the expected number of false matches, but has not increased the chances of detecting a crime using DNA." [22] Similarly, the campaigning organisation NO2ID has criticised the government's marketing of the database by incessantly drawing attention to a small

number of high profile cases, while in reality the fact “that DNA is involved in the detection of less than 0.5% of all recorded crime suggests that it is far from cost-effective.” [23]

In October 2009 the National Policing Improvement Agency published an annual report covering 2007-09 which showed that while roughly 1.2 million records had been added to the DNA database in this period, the total number of crime scene matches fell from 41,148 to 31,915. Further, the cost of maintaining the database doubled from £2.1 million in 2007-08 to £4.2 million in 2008-09. [24] In January 2010, Chief Constable Chris Sims, an ACPO spokesman, told the House of Commons home affairs select committee that DNA matches contributed to solving only 33,000 of 2009’s 4.9 million recorded crimes. [25]

The UK DNA database of *offenders* has evolved unchecked into one of *suspects*. Its size and role have been greatly extended, without significant parliamentary debate, and this has disproportionately affected individuals belonging to social groups that are statistically more likely to be arrested, such as ethnic minorities and children. The government’s new proposals are based on flawed statistics and fail to strike a reasonable balance between the need to conduct criminal investigations, and the need to protect an innocent person’s right to privacy.

Footnotes

[1] *Liberty’s Second Reading Briefing on the DNA provisions in the Crime and Security Bill in the House of Commons, January 2010*, pp. 11-12: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-2nd-reading-briefing-on-crime-and-security-bill-dna.pdf>

[2] *Case of S. and Marper v. The United Kingdom, European Court of Human Rights Grand Chamber Judgment*, 4.12.08, p.21: <http://www.statewatch.org/news/2008/dec/echr-marper-judgment.pdf>

[3] *Guardian*, 7.8.09: <http://www.guardian.co.uk/politics/2009/aug/07/dna-database-police-advice>

[4] As revealed by Home Office minister Alan Campbell in January 2010; <http://www.telegraph.co.uk/news/newstoppers/politics/lawandorder/6990617/Just-one-innocent-DNA-profile-removed-by-police-from-national-database-every-day.html> (*Telegraph*, 14.1.10).

[5] <http://www.guardian.co.uk/politics/2009/dec/31/dna-records-police-deletion-tories>: *The Guardian*, 31.12.09.

[6] *Crime and Security Bill 2009-10*: <http://services.parliament.uk/bills/2009-10/crimeandsecurity.html>

[7] *Crime and Security Bill Explanatory Notes*, #62: <http://www.publications.parliament.uk/pa/cm200910/cmbills/003/en/10003x-a.htm>

[8] *Liberty’s Second Reading Briefing on the DNA provisions in the Crime and Security Bill in the House of Commons, January 2010*, p. 11

[9] *ibid*, p. 17

[10]

http://www.coe.int/t/DGHL/MONITORING/EXECUTION/Reports/Current/United_Kingdom_en.pdf

[11] *Liberty's Second Reading Briefing on the DNA provisions in the Crime and Security Bill in the House of Commons, January 2010*, p. 24

[12] *The Observer*, 20.12.09:

<http://www.guardian.co.uk/politics/2009/dec/20/dna-police-database-rights>

[13] *The Information Commissioner's response to the Home Office consultation paper on the retention, use and destruction of DNA data and fingerprints*, p. 10:

http://www.ico.gov.uk/upload/documents/library/data_protection/notices/response_to_ho_consultation_may09.pdf

[14] *Crime and Security Bill Explanatory Notes*, #236:

<http://www.publications.parliament.uk/pa/cm200910/cmbills/003/en/10003x-c.htm>

[15] *Liberty's Second Reading Briefing on the DNA provisions in the Crime and Security Bill in the House of Commons, January 2010*, p. 13

[16] *ibid*, p. 15

[17] *ibid*, p. 17

[18] *Human Genetics Commission report, Nothing to Hide, Nothing to Fear? November 2009*, p. 22:

<http://www.hgc.gov.uk/UploadDocs/DocPub/Document/Nothing%20to%20hide,%20nothing%20to%20fear%20-%20online%20version.pdf>

[19] *ibid*, p. 48

[20] See: <http://www.statewatch.org/news/2009/aug/eu-prum-databases.pdf>

[21] *Human Genetics Commission website*, 24.11.09:

http://www.hgc.gov.uk/Client/news_item.asp?Newsid=134

[22] *GeneWatch UK response to the HGC consultation: The forensic use of DNA and the National DNA database*, November 2008:

http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/HGC_DNAconsul08_GW.doc

[23] *Human Genetics Commission report, Nothing to Hide, Nothing to Fear? November 2009*, p. 67

[24] *National DNA Database Annual Report 2007-09*, p. 35:

<http://www.npia.police.uk/en/docs/NDNAD07-09-LR.pdf>

[25] *The Guardian* 5.1.10:

<http://www.guardian.co.uk/politics/2010/jan/05/dna-database-crime-police-vaz>

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