

**Equality and
Human Rights
Commission**

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The Equality and Human Rights Commission's response to the government's consultation on:

Keeping the right people on the DNA database

August 2009

Introduction

The Commission acknowledges that the national DNA database is an important crime-solving tool and that retention of fingerprint and DNA information pursues the legitimate purpose of the detection and prevention of crime. However, in revising the law on DNA retention the government needs to strike a fair balance between that aim and the competing public interest of protecting individuals' right to privacy in order to comply with the European Convention on Human Rights (the Convention). The Commission thinks that these proposals fail to strike the appropriate balance and if they become law are likely to breach Article 8 of the Convention and be unlawful.

The judgment

In the case of *S and Marper v United Kingdom*, the European Court of Human Rights (the Court) found that the 'blanket and indiscriminate' nature of the powers of retention of fingerprints, DNA samples and profiles of persons suspected but not convicted of offences in England and Wales interferes with their right to respect for their private lives (Article 8). Such a retention regime is not proportionate and fails to strike a fair balance between the competing interests. The court emphasised the general principle that an interference with an individual's right to privacy will only be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is **proportionate to the legitimate aim pursued and if the reasons adduced to justify it are 'relevant and sufficient'** (emphasis added).

The Commission's view

The Commission acknowledges that the proposals are more proportionate than the current regime in the sense that they:

- aim to treat DNA samples, profiles and fingerprints differently from each other
- take some account of the need to treat profiles and fingerprints of those convicted of offences differently from those who are acquitted (or not charged)
- take some account of the seriousness of the offence
- take some account of the unique situation of children, and

- take account of the unique situation of volunteers.

However, the Commission thinks that the government has interpreted the judgment too narrowly (seeming to take comfort from it in a way that the court did not intend) and that the proposals do not go far enough to give full effect to the judgment. The Commission also thinks that some aspects of the proposals lack the necessary level of proportion or lack sufficient justification to be Convention compliant.

The Court emphasised that the United Kingdom has a narrow margin of appreciation when it comes to determining permissible limits of the interference with private life in this sphere. In particular, it considered that any state claiming a pioneer role in the development of new technologies (as the UK does) bears special responsibility for striking the right balance. The Commission believes that if the proposals become law the government is likely to be in breach of Article 8 of the Convention and be acting unlawfully. The Commission has obtained advice from leading counsel that supports this view. If the government proceeds with these proposals it will open itself up to further legal challenges.

The Commission's view is that the basic principle ought to be that profiles are destroyed when a final decision has been made in a particular case, subject to limited exceptions. This aligns with the Council of Europe's guidance on the use of DNA within the framework of the criminal justice system¹ that the Court relied on heavily. The limited circumstances can be summarised as follows:

- when there has been a conviction
- when the conviction concerns a serious criminal offence against the life, integrity and security of a person
- the storage period is strictly limited
- the storage is defined and regulated by law, and
- the storage is subject to control by parliament or an independent supervisory body.

The Commission does not think that there can be sufficient justification to retain DNA profiles indefinitely. The Court stated emphatically that

¹ Committee of Ministers Recommendation No. R (92) 1, paragraph 8, and the related Explanatory Memorandum: referred to in paragraphs 43 and 44 of the Court's judgment in *S and Marper v United Kingdom*.

'The core principles of data protection require the retention of data to be proportionate in relation to the purpose of collection **and insist on limited periods of storage** (see paragraphs 41–4 of the judgment). The table below contains the Commission's position on specific proposals in relation to which the Commission takes issue.

The government has explained that it needs 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 to ensure public protection. The proposals are said to be based on a provisional model which suggests a figure of four to 15 years. The research upon which the proposals are based has been heavily criticised.² The Commission recommends that the government is cautious about relying on research in this area that has yet to be peer reviewed and that it is careful not to conflate risk of re-arrest with risk of re-offending. There is no direct evidence that the more DNA is retained the more crimes are solved. In terms of preventing crime there is also no evidence about the database's deterrent value. Focusing on the probability of people in certain categories offending or reoffending also tends to underplay the privacy right against which the diminution or elimination of such risk is to be balanced.

There are a number of matters that the consultation paper failed to address but which the Commission thinks are highly relevant to the question of keeping the right people on the database, ensuring compliance with the Convention and the public sector equality duties. These are:

- the situation in Scotland
- the disproportionate representation of black men, particularly young black men, on the database, and
- whether DNA should continue to be taken for such a broad range of offences when DNA evidence is not necessarily relevant.

Scotland

The Scottish system is based on the principle that DNA samples and profiles must generally be destroyed if the individual is not convicted or is granted an absolute discharge. The exception to this is if the individual is charged with a violent or sexual offence, in which case DNA is

² Hirsch, A. 19 July 2009. 'DNA database plans based on "flawed science", warn experts'. Available from: <http://www.guardian.co.uk/politics/2009/jul/19/dna-database-crime-privacy-discrimination> [Accessed 5 August 2009]

retained for three years, with the possibility of an extension of two years with the consent of the sheriff. The Court spoke favourably of the **limitations** imposed by Scotland as opposed to the **extent** of retention.

The proposals for England and Wales, by comparison, interfere with individuals' right to privacy to a far greater extent. The consultation paper does not refer to any evidence that the Scottish approach has caused any detriment to the fight against crime in Scotland. This is a significant omission given that the government claims to have a strong evidence base to support the proposals.

Disproportionate representation

Black men are significantly over-represented on the database. The available information indicates that it holds about a third of all black men and about three-quarters of all young black men (aged 16 to 34) resident in the UK. Black men are four times more likely to be on the database than white men. There is some evidence to suggest that black (and also Asian) defendants are less likely to be convicted than white defendants, and therefore that if profiles were retained only of those **convicted**, the proportion that relate to black people would be lower. The Home Office's own research indicates that black people have lower lifetime offending rates than their white counterparts.³ The stigma of such extreme over-representation for one racial group has unknown, but possibly serious, social consequences making justification a crucial issue.

Vulnerable people such as children (as young as 10) or people with mental illnesses are over-represented on the database. DNA samples can be taken if one is sectioned under the Mental Health Act 1983 and (materially) black people are also 44 per cent more likely to be sectioned than their white counterparts.⁴ The proportion of Asian people on the database is increasing beyond their proportion to the general population. There is also speculation that Muslims are over-represented in arrests for terrorism related offences.

The consultation paper does not make any attempt to deal with these issues. In fact, the government's proposals could be said to enhance the problem by effectively criminalising the database further. That is, the removal from the database of volunteer profiles and a significant number of profiles from those who have not been convicted will change the

³ Sharp, C. and Budd, T. 2003. 'Minority ethnic groups and crime: Findings from the Offending, Crime and Justice Survey 2003'. Home Office

⁴ Black Mental Health UK

nature of the database from one based on simple contact with the criminal justice system to one based more on criminality. While the Court noted that the retention of an unconvicted person's private data cannot be equated with the voicing of suspicion, it recognised the role that perception has to play and it would be unrealistic not to recognise the consequences of particular racial groups entertaining particular perceptions.

The Commission therefore thinks that the government's failure to address these matters engages Article 14 of the Convention, which guarantees the rights and freedoms specified in the Convention, including the right to private life, without discrimination. The disproportionality therefore requires justification from the government.

The Commission is aware that the government is carrying out work to assess the equality impact of present database arrangements. However, there is no evidence that these proposals have been informed by this work, particularly in relation to over-representation of particular groups, or that they have been subject to an equality impact assessment in their own right.⁵ The Home Office needs to ensure that the equality impact of this proposal is assessed and mitigated against where appropriate **as part of the policy development process**. This is particularly important given that the Home Office failed to carry out a race equality impact assessment prior to introducing sampling on arrest in 2004.

Destruction of legacy samples and profiles

The government has indicated that it will take up to two years to complete this work. If this is the case, the government will need to be prepared for a raft of requests for samples and profiles to be destroyed or removed from the database in advance of this on the basis that people's right to privacy has been breached. This is particularly the case in relation to individuals who have not been convicted of any crime.

⁵ The Home Office is subject to the race equality duty, which means that it must have due regard to the need to eliminate unlawful racial discrimination, promote equality of opportunity, and promote good relations between people of different racial groups (the general duty). It is also subject to specific duties made under order by the secretary of state under section 71(2) including in relation to assessing and consulting on the likely impact of its proposed policies on the promotion of race equality (Race Relations Act 1976 (Statutory Duties) Order 2001).

Table 1: The Commission's view in relation to specific proposals

Type of information	Situation	Government proposal	The Commission's stance
DNA profiles	Adult convicted of a recordable offence. This would also cover people given a caution, warning or reprimand.	Retain indefinitely.	<p>Retaining any profile indefinitely lacks proportionate justification and is inconsistent with the Council of Europe's guidance on the use of DNA within the framework of the criminal justice system. See Committee of Ministers Recommendation No. R (92) 1, which was cited favourably by the Court in its judgment.</p> <p>Paragraph 8 of this guidance makes it clear that the results of DNA analysis (in other words DNA profiles) should not be retained as a rule but could be, under strictly defined storage periods, where the individual concerned has been convicted of serious offences against the life, integrity or security of persons.</p> <p>Not all recordable offences could be classified as this serious. For example, there is a big difference between being convicted of murder and being convicted for begging, both of which are recordable offences. The judgment made it clear that the nature and severity of an offence ought to be taken into account in determining proportionality. The Commission thinks that treating all recordable offences the same way therefore lacks proportionate justification.</p> <p>The Commission acknowledges that it may be appropriate to retain profiles of those who are convicted of serious offences, but this should be for a limited period. The Commission acknowledges that where a custodial sentence is imposed, the retention period should exceed the date of release.</p> <p>There needs to be evidence of reasonable justification for retention in relation to the range of individual circumstances captured by each proposed category. The Commission understands the need for the system to be understandable and workable, but this should not be at the cost of reasonable proportionality or the</p>

Type of information	Situation	Government proposal	The Commission's stance
			<p>government will open itself up to further legal challenges for breach of Article 8.</p> <p>Achieving a proportionate system of retention would involve taking into account such matters as:</p> <ol style="list-style-type: none"> 1) the nature of the offence 2) the seriousness of the offence 3) the likely risk to the public by not retaining the profiles and how serious the risk 4) the period of retention that could be reasonably justified by balancing the privacy rights of the individual with the right of the general public to be protected from a crime that might be committed. <p>How useful DNA is as evidence for particular crimes may also be relevant. There is evidence that DNA is particularly useful in solving domestic burglary and motor vehicle theft cases (see National DNA Database 2006/7 Annual Report).</p>
	<p>Adult arrested but not convicted of any other recordable offence.</p>	<p>Retain for six years.</p>	<p>Treating profiles of those who are convicted of offences differently to those who have not been convicted shows a degree of proportionality. However, retaining the profiles of those who have never been convicted of any offence, let alone a serious violent or sexual offence or terrorism-related offence for six years lacks proportionate justification. The Court warning against 'indiscriminate' retention has resonance here.</p> <p>The government is relying here on its own work and evidence from the US to justify this proposal (paragraphs 6.7–6.8 of the judgment). There is no mention of the situation in Scotland, where there is no power to retain DNA material when a person is arrested but not convicted, unless the offence is a serious one. The</p>

Type of information	Situation	Government proposal	The Commission's stance
			<p>Court spoke favourably of the limitations imposed by Scotland in relation to the retention of DNA from adults charged with violent or sexual offences. Retaining profiles for lesser offences for twice that period cannot be proportionate. The paper does not refer to any evidence that the limitations applied in Scotland have caused any detriment to the fight against any crime there. The Court noted in particular that there are limited possibilities to have the data removed from the database and 'no provision for independent review of the justification for the retention according to defined criteria' (paragraph 119 of the judgment). The Commission would recommend that the government consider creating a rebuttable presumption that profiles in this category are not retained (beyond the initial period of use for the investigation/prosecution of the offence) unless certain clearly prescribed risk based criteria are met. For example, an independent adjudicator could be appointed to consider applications to retain individual profiles where specific criteria are met.</p>
	<p>Adult arrested but not convicted of a serious violent, sexual or terrorism-related offence (hereafter referred to as a 'serious offence').</p>	<p>Retain for 12 years.</p>	<p>Treating profiles of those who are convicted of offences differently to those who have not been convicted shows a degree of proportion. However, retaining the profiles of those who have never been convicted of any offence for 12 years lacks proportionate justification.</p> <p>The government concedes that the evidence for 'reoffending in a more serious and violent case is unclear' and claims to rely on 'a commonsense approach' (paragraph 6.13 of the judgment). However, again, there is no mention of the limitations in Scotland in relation to those arrested but not convicted of sexual and violent offences (see above) in relation to which the Court spoke favourably. The paper does not refer to any evidence that this has caused any detriment to the fight against any serious crime in Scotland.</p>

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			<p>The kinds of situations contemplated by this category include:</p> <ul style="list-style-type: none"> • someone arrested for statutory rape, but not convicted, where sex was nevertheless consensual, and • someone arrested for, but not convicted of, glorifying terrorism. <p>While these are serious offences, retaining profiles for 12 years where there is no conviction lacks sufficient justification.</p> <p>Recommendation No. R (92) 1 suggests that where there has been no conviction, it is only in cases where the security of the state is involved that profiles could be retained.</p> <p>The Commission would recommend that the government consider creating a rebuttable presumption that profiles in this category are not retained (beyond the initial period of use for the investigation/prosecution of the offence) unless certain clearly prescribed risk-based criteria are met (see above).</p>
	Children under 18 who are convicted of a serious offence.	Retain indefinitely (same as adults).	<p>Retaining any profile indefinitely, let alone profiles of children, lacks proportionate justification and is inconsistent with the Council of Europe's guidance on the use of DNA within the framework of the criminal justice system. See above comments in relation to retaining profiles of adults convicted of recordable offences.</p> <p>Treating the profiles of children in these categories the same as adult profiles lacks reasonable justification. This proposal fails to recognise the need to treat children differently to adults in accordance with the judgment.</p> <p>Treating profiles of a 10-year-old the same as a 17-year-old lacks reasonable justification. From a crime detection/prevention perspective it is not clear what</p>

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			<p>cogent evidence there is to justify treating them the same. From a privacy perspective it seems counterintuitive to interfere with the private life of the younger for longer.</p> <p>The Commission acknowledges that it may be appropriate to retain profiles of children who are convicted of serious offences, but this should be for a limited period.</p>
	<p>Children under 18 who are convicted of one lesser offence.</p>	<p>Remove once turned 18.</p>	<p>The Commission questions whether it is proportionate to retain a profile from a 10-year-old convicted for a lesser offence for up to eight years, when the profile of a 17-year-old convicted for the same offence would only be retained for less than one year (and in some cases not retained at all if they are very close to turning 18 at the time of their arrest/conviction).</p> <p>The proposal does not sit entirely well with the then home secretary's recognition that for many young people involvement in crimes in teen years is often an isolated incident (paragraph 6.17 of the judgment).</p> <p>The Commission would recommend that the government consider creating a rebuttable presumption that profiles in this category are not retained (beyond the initial period of use for the investigation/prosecution of the offence) unless certain clearly prescribed risk based criteria are met (see above).</p> <p>The criteria for children ought to differ from the criteria for adults.</p>
	<p>Children under 18 who are arrested but not convicted of a</p>	<p>Retain for 12 years (same as adults).</p>	<p>The Commission does not think that it is proportionate to treat children in this category the same way as adults. See paragraph 24 of the judgment:</p> <p>'[T]he Court considers that particular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of</p>

Type of information	Situation	Government proposal	The Commission's stance
	serious offence.		<p>their private data following acquittals of a criminal offence.'</p> <p>Retaining the profiles of adults, let alone children, who have never been convicted of any offence for 12 years lacks proportionate justification.</p> <p>Treating all children aged 10–17 the same lacks sufficient justification (see above).</p> <p>The Commission would recommend that the government consider creating a rebuttable presumption that profiles in this category are not retained (see above).</p>
	<p>Children under 18 who are arrested but not convicted of a lesser offence on one occasion.</p> <p>If arrested again, same retention period as for adults.</p>	<p>Retain for six years or once turned 18 (whichever is earlier), but same period as adults if rearrested.</p>	<p>The Commission questions whether it is proportionate to retain a profile from a 10-year-old until they are 16 when the profile of a 17-year-old would be retained for less than one year, possibly days.</p> <p>The Commission does not think it is proportionate to retain the profile of a child who has not been convicted of a lesser offence for six years, whether or not they have been arrested for such an offence more than once.</p>
Fingerprints	Convicted	Retain indefinitely.	<p>The Commission has fewer concerns about the retention of fingerprints as they contain far less personal information than DNA profiles and samples. However, the proposals regarding fingerprint retention must be read in the context of proposals regarding profiles and samples. The Court acknowledged that the level of interference may be different for each of these and it may be necessary to distinguish between the taking, use and storage of fingerprints on the one hand, and samples and profiles on the other, in determining the question of justification. It is therefore notable, for example, that the government proposes to</p>
	Not convicted of a serious offence.	Retain for 12 years.	
	Not convicted of	Retain for six	

Type of information	Situation	Government proposal	The Commission's stance
	recordable offence.	years.	<p>retain profiles and fingerprints of anyone convicted of a serious offence for 12 years. The Commission questions the justification for treating these the same. See comments above in relation to profiles in this category for both adults and children.</p> <p>The Commission also submits that the fingerprints of children and adults should also be treated differently in keeping with the judgment.</p>
	Removal of individual's right to request to witness the destruction of fingerprints.		The reasons for this are not stated. The Commission would recommend that individuals have some mechanism for ensuring that their personal information (including profiles and samples) has been destroyed as appropriate.
New powers	To retrospectively obtain DNA and fingerprints from those convicted of a serious offence but whose DNA or fingerprints were not taken during the criminal investigation process at any time	Retain indefinitely.	See comments above in relation to retention periods, which would limit the period in which it would be proportionate to exercise this power.

Type of information	Situation	Government proposal	The Commission's stance
	subsequently.		
	To obtain DNA and fingerprints from UK citizens and residents who are convicted overseas of serious offences upon their return to this country.	Retain indefinitely.	<p>The Commission has some reservations about this proposed power. The government would need to consider some kind of safeguard in relation to those convicted of serious crimes in countries known to breach Article 6 (fair trial) or Article 3 (torture).</p> <p>For example, DNA and samples could be obtained from such individuals on re-entry as a rule, but any individual who claimed to have been denied a fair trial or to have made a confession under torture, could make an application to an independent adjudicator to determine whether it is appropriate to retain the personal information based on clearly defined risk-based criteria.</p>
	To obtain a further sample post arrest if the sample provided proves insufficient.		The Commission recommends that this power is time limited.
Governance and accountability			Please see comments above regarding the recommended use of an independent adjudicator in specific circumstances. The Commission sees benefit in there being a mechanism for appeal to a judicial body against a refusal of destruction. This may be required by Article 6: the right to a fair trial for determination of civil rights.