NORTHERN IRELAND HUMAN RIGHTS COMMISSION

RESPONSE TO HOME OFFICE CONSULTATION ON

'KEEPING THE RIGHT PEOPLE ON THE DNA DATABASE'

Summary

This is the Commission's response to the Home Office consultation on retention of data on the national DNA database produced in light of the *S and Marper v UK* judgment in the European Court of Human Rights (December 2008). The judgment found that the "blanket and indiscriminate nature of the power of retention" in the Government's policy regarding the DNA data of innocent persons (for those arrested for offences but subsequently acquitted or those who have had charges dropped) breached Article 8 (right to private life) of the European Convention on Human Rights (ECHR).

The consultation document sets out a new proposed system for DNA retention for England, Wales and Northern Ireland. The Commission questions if the Home Office proposals are compatible with the judgment or with international standards to which the UK is party.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights,[1] and advising on whether a Bill is compatible with human rights.[2] In all of that work, the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies. In accordance with its mandate the Commission has also recently delivered advice to government on the content of a Bill of Rights for Northern Ireland.[3]

2. The Commission welcomes the opportunity to respond to the Home Office consultation on retention of data on the national DNA database produced in light of the *S and Marper v UK* judgment in the European Court of Human Rights.[4] The Commission received a request from the Northern Ireland Office to respond to the consultation. The Commission's response is set out in this submission which makes a number of brief points regarding the compatibility of the proposals with the judgment and with relevant international standards. This response does not more broadly engage with the range of arguments in relation to DNA retention and human rights compliance. The Commission is happy to elaborate on such matters if requested to do so.

3. The judgment of the European Court of Human Rights in *S and Marper* found that the policy of retaining DNA from persons suspected but not convicted of offences breached Article 8 (right to private life) of the European Convention on Human Rights (ECHR). While this judgment referred to England and Wales, similar legislative provision applies in Northern Ireland and the new proposed policy is intended to apply here. Separate policy applies in Scotland.

4. The judgment found that the "blanket and indiscriminate nature of the power of retention" of the DNA data of persons suspected but not convicted of offences did not strike a fair balance between private and public interests. It drew

[1] Northern Ireland Act 1998, s.69(1).
[2] *Ibid,* s.69(4).
[3] *Ibid*, s.69(7).
[4] App nos 30562/04 and 30566/04, 4 December 2008.

attention to the indefinite nature of the retention, irrespective of the gravity of the alleged offence. Attention was also drawn to the limited possibilities of challenging the retention and absence of provision for independent review. The Court also commented that the "retention of the unconvicted person's data may be especially harmful in the case of minors".[5]

5. The judgment created an expectation among many persons who had been arrested but acquitted in court, or who have had charges dropped, that they would be removed from the DNA database, and hence, more broadly, that the practice of holding innocent persons' DNA on the national database would be discontinued.

6. Rather than taking this approach, the proposals set out in the consultation document envisage the retention of data of innocent persons for a time period that varies in relation to the offence for which the accused was not prosecuted or was found not to have committed. The proposals outline that:

- Persons aged over 10 arrested for a recordable offence but not convicted will have their profiles retained for six years (or if aged 10-18 six years or on their 18th birthday, whichever is sooner).

- Persons aged 10 or over arrested for a serious violent or sexual or terrorism-related offence but not convicted will have the profile retained for 12 years.

7. In relation to guilty persons, all persons over ten years of age will continue to have their profiles retained indefinitely, except those aged 10-18 convicted once of a lesser offence, whose profile will be removed at 18. Following the judgment, children aged 10 or under have now had their profiles removed from the DNA database and will not have profiles retained in the future. The age of 10 is derived from the age of criminal responsibility; however, this age level is not compatible with international standards to which the UK is a party.[6]

---

[5] *Ibid*, paras 119 and 124.

[6] The United Nations' Committee on the Rights of the Child has concluded that, a minimum age of criminal responsibility below the age of 12 is not internationally acceptable. It further recommended that state parties, of which the UK is one, to the Convention on the Rights of the Child, should consider raising the age of criminal responsibility to 14 or 16 years of age (General Comment No 10 (2007) *Children's rights in Juvenile Justice,* Committee on the Rights of the Child, Forty-fourth session, Geneva, 15 January-2 February 2007, para 16.).

8. The proposals provide for exceptional grounds for earlier destruction of profiles. Although examples are provided of wrongful arrest, mistaken identity and cases where it turns out that no crime has been committed, the precise criteria have not yet been set out, and will be subsequently by way of regulations. The right to appeal will continue to be vested in the Chief Police Officer, with judicial review remaining as the only independent path to review, rather a specific power of review being vested in an independent body.

9. The Commission is not convinced that it is necessary in a democratic society and proportionate to continue to retain data of innocent persons in this way. It is questionable whether such an approach will be deemed compatible with the execution of the judgment.

10. The Court, in issuing its judgment, drew on international standards including Recommendation R(92)1 of the Council of Europe's Committee of Ministers, which was adopted without reservation by the UK. This recommendation sets out that the results of DNA analysis should be routinely deleted when it is no longer necessary to keep them for the purposes for which they were collected, and that retention should only take place "where the individual concerned has been convicted of serious offences against the life, integrity or security of persons" subject to "strict storage periods defined by domestic law". The only exception set out for retaining the DNA analysis of a person who has not been convicted of, or charged with, an offence is in relation to national security, or at the express request of the individual.[7] In light of this, the Commission would urge review of the proposals set out for consultation which do not appear to be compatible with the judgment or with standards to which the UK is party.

11. The Commission is also concerned as regards the legislative vehicle which will be used to bring in the proposals to Northern Ireland, namely by regulations subject to the negative resolution procedure.[8] The power would allow for regulations which amend provisions in an Act or in Northern Ireland legislation. The Commission has been consistently

[7] Recommendation no R(91)1 of the Committee of Ministers on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system (adopted by the Committee of Ministers on 10 February 1992 at the 470th meeting of ministers deputies (para 8)).

[8] A similar mechanism has been proposed for England and Wales, and this power is being sought through amendment to PACE through clauses 96 and 98 of the Policing and Crime Bill.

concerned that measures that engage matters of human rights compliance are best contained in primary legislation rather than regulation, in order to afford them sufficient Parliamentary (or, in the event of devolution, Assembly) scrutiny.

July 2009

Northern Ireland Human Rights Commission
Temple Court, 39 North Street,
Belfast BT1 1NA
Telephone: (028) 9024 3987
Textphone: (028) 9024 9066
Fax: (028) 9024 7844
Email: information@nihrc.org
Website: www.nihrc.org