



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Response to Consultation on Proposals for the Retention and Destruction of Fingerprints and DNA Data in Northern Ireland

Summary

This is the Human Rights Commission's response to the 2011 Northern Ireland Department of Justice consultation paper proposing a new framework for retaining DNA and fingerprint data.

In December 2008, the European Court of Human Rights in *S and Marper v UK* found that the policy of indefinitely retaining DNA samples and profiles from innocent persons who are suspected, but not convicted, of offences violated Article 8 of the ECHR (right to private life). The law in Northern Ireland needs to be changed.

The Commission's response:

- comments on whether the Northern Ireland proposals meet what was required by the judgment
- comments on the lack of interim measures since the judgment, and
- expresses concerns about a proposed UK-wide 'national security' exemption.

1. The Northern Ireland Human Rights Commission (the Commission) is the national human rights institution (NHRI) for Northern Ireland. It was created in 1999 under the Northern Ireland Act 1998, pursuant to the Belfast (Good Friday) Agreement of 1998.¹ The Commission is accredited

¹ The Commission's powers were modified by the Justice and Security (Northern Ireland) Act 2007.

with 'A' status by the UN International Co-ordinating Committee of NHRIs.² 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,³ and advising on whether a Bill is compatible with human rights.⁴ 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.

2. The Commission welcomes the opportunity to respond to the March 2011 consultation by the Department of Justice Northern Ireland in relation to proposals for DNA and fingerprint retention. The Commission has met with officials to discuss the Department's approach and has previously provided submissions to the UK government and to the Council of Europe Committee of Ministers (which oversees the execution of judgments from the European Court of Human Rights) on previous proposals to reform the DNA database.⁵ The Commission has also raised the reform of the DNA database on a number of occasions with the Justice Minister, and welcomed the commitment from the Minister to introduce a new DNA/fingerprint framework compliant with the ECHR, at the earliest opportunity.⁶ This submission will cover the background to the present proposals and provide advice on their compatibility with international standards.

² The UK has two other accredited NHRIs: the Equality and Human Rights Commission for Great Britain, except in respect of matters devolved to Scotland, which has established the Scottish Human Rights Commission. The present submission is solely on behalf of the Northern Ireland Human Rights Commission.

³ Northern Ireland Act 1998, s69(1).

⁴ As above, s69(4).

⁵ The Commission's earlier responses are available at: www.nihrc.org/submissions; see: *Response to Home Office Consultation on 'Keeping the Right People on the DNA database'* (July 2009); *Submission to the Committee of Ministers in relation to proposed UK General Measures in Response to Judgment* (August 2009) and *Submission to the Committee of Ministers in relation to proposed UK General Measures in Response to Judgment* (November 2009);

⁶ Minister of Justice, David Ford MLA, correspondence to Commission, 26 January 2011.

Background

3. In December 2008, the European Court of Human Rights (ECtHR)⁷ in *S and Marper v UK* found that the policy of indefinitely retaining DNA samples and profiles from innocent persons who are suspected, but not convicted, of offences violated Article 8 of the ECHR (right to private life). While this judgment referred to England and Wales, the Court noted that similar legislative provision applies in Northern Ireland. Separate policy applies in Scotland.
4. In order to implement the judgment and prevent further violations there must be a change in the law in England, Wales and Northern Ireland. The Council of Europe Committee of Ministers oversees the implementation ('execution') of the judgment by scrutinising the legislative and other changes ('general measures') the UK takes in response to the judgment. This is in addition to reparations to the individual victim in the particular case ('individual measures'). The Committee of Ministers regularly assesses progress on compliance with the judgment.⁸
5. 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 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 the absence of provision for independent review. The Court also considered that "the retention of the unconvicted persons' data may be especially harmful in the case of minors".⁹
6. Concurrent with the general risk of arbitrary retention is the risk of discriminatory levels of retention against particular groups. The Equality and Human Rights Commission in Great Britain (EHRC) noted the significant over-representation of black men on the DNA database, along with other groups such as persons suffering mental illness. The then available information indicated that around three-quarters of all young black men (aged 16-24) resident in the UK were on the database, and a third of black men overall, making black men

⁷ App. nos. 30562/04 and 30566/04, judgment of 4 December 2008.

⁸ Information on the status of execution of the judgment can be accessed at: http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp

⁹ As above, paras 119 and 124.

more than four times more likely to be on the database than white men. The EHRC stated: “the stigma of such extreme over-representation for one racial group has unknown, but possibly serious, social consequences making justification a crucial issue”.¹⁰

7. In response to the judgment, the UK government issued proposals in May 2009.¹¹ While these proposals would have ended the *indefinite* retention of DNA profiles from innocent persons, they provided for lengthy retention periods 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. All persons aged over 10 and arrested for a recordable offence but not convicted were to have their profiles retained for six years,¹² or 12 years if the offence was a serious violent or sexual, or terrorism-related offence. In relation to guilty persons, all persons over 10 years of age would continue to have their profiles retained indefinitely, except those aged 10-18 with one conviction for a minor offence, whose profiles would be removed at 18.
8. The Home Office cited research to justify differentiation between 12- and six-year periods depending on the seriousness of the offence, including data from the Jill Dando Institute of Crime Science regarding the risk of reoffending. This approach has been heavily criticised, not least because of the questionable reliability and quality of the research which the Institute later indicated had been incomplete.¹³ There was also specific criticism of the UK government’s use of ‘risk of re-arrest’ as an indicator justifying retention periods for innocent persons. The UK had argued that the re-arrest rate was statistically higher for six years for persons subject to a previous arrest (without subsequent charge or conviction) than it was for the general population, stating: “we... 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”.¹⁴ However, it is problematic to use an arrest, where there is no subsequent charge or conviction, as an indicator of guilt, particularly in

¹⁰ EHRC (August 2009) Response to ‘Keeping the Right people on the DNA database’ consultation, p5.

¹¹ Home Office (May 2009) *Keeping the Right People on the DNA Database*.

¹² Or if aged 10-18, for six years or until their 18th birthday, whichever was sooner.

¹³ Home Office (November 2009) *Keeping the Right People on the DNA Database, Summary of Responses to Public consultation*, para 9.2; see also Whitehead, T ‘Incomplete research sparks fresh DNA row’, *Daily Telegraph* 25 September 2009.

¹⁴ *Keeping the Right People on the DNA Database*, May 2011, para 6.10.

the context of the risk of disproportionate arrests of persons from 'suspect communities'. The Committee of Ministers queried the ECHR compatibility of an approach resting "on the principle that unconvicted individuals will commit criminal offenses" and was critical of use of research to this end, stating that it strongly contrasted with:

...the Court's concern about "the risk of stigmatisation [and] the right of every person under the Convention to be presumed innocent [which] includes the general rule that no suspicion regarding the innocence of an accused may be voiced after his acquittal."¹⁵

9. The Commission was not convinced that it was necessary in a democratic society and proportionate to continue to retain data of innocent persons in this way, and did not regard the proposals as being compatible with the judgment nor with other human rights standards to which the UK is party. The Commission also raised questions regarding the age of 10 being the minimum age of retention. This was derived from the age level of criminal responsibility; however, that level is not compatible with international standards to which the UK is a party.¹⁶ The Commission also raised concerns regarding the proposed legislative vehicle to be used to implement the proposals in Northern Ireland, namely by regulations subject to the 'negative resolution' procedure, which in effect precludes Parliamentary debate.¹⁷
10. The Committee of Ministers took a similar line and concluded that the proposals did not conform to the requirement of proportionality. In particular, it highlighted as disproportionate the stipulation, restated in the subsequent proposals, for retaining for six years the profiles of persons

¹⁵ Ministers' Deputies 1065th meeting, September 2009, Section 4.2, citing para 122 of *S and Marper* judgment.

¹⁶ 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 states parties to the Convention on the Rights of the Child, of which the UK is one, 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).

¹⁷ The negative resolution procedure involves a draft instrument being laid before Parliament; the draft is not open to amendment and is not ordinarily debated, becoming law within 40 days unless either House requests that it be annulled – a situation that has occurred only twice in the past 30 years, although several thousand such instruments are made each year. The power was being sought through amendment to existing Police and Criminal Evidence legislation, through a Policing and Crime Bill.

who had been accused of minor offences. The Committee also noted that the European Court had observed that there was a narrow 'margin of appreciation' (discretion) afforded to the UK authorities in this sphere due to a strong consensus among European states.¹⁸ Subsequently, the UK government dropped the proposals and stated that fresh proposals in the matter would not be progressed via the negative resolution procedure.

11. The then UK government issued revised proposals announced in a Written Ministerial Statement by the Home Secretary on 11 November 2009.¹⁹ The DNA profiles of convicted persons (aged over 10)²⁰ would continue to be retained indefinitely.²¹ For innocent adults the retention period would be six years, regardless of the seriousness of the offence. For those aged 10-18 years, the usual retention period would be three years.²² While the position was 'yet to be finalised',²³ a separate, longer, retention period was planned for persons accused of national security/terrorism related offences. The ministerial statement indicated that material taken under any regime could be retained for over six years on the basis of a case-by-case review on 'national security' grounds; this itself would be subject to review every two years by a senior police officer.²⁴ These proposals were legislated for under the Crime and Security Act 2010, but not commenced before the 2010 UK General Election.
12. The Commission continued to question the compatibility of the framework with international standards. The incoming coalition government subsequently decided not to commence the powers in the Crime and Security Act 2010 but rather to introduce its own retention framework based on the Scottish

¹⁸ Minutes of the Committee of Ministers 1065th Human Rights Meeting, September 2009.

¹⁹ Written Ministerial Statement, Secretary of State for the Home Department, 11 November 2009, available: <http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/> [accessed 18 November 2009].

²⁰ With one exception: 10-18 year olds on first conviction would have had profiles removed after five years (May 2009 proposals were to remove at 18th birthday).

²¹ Home Office (November 2009) *Keeping the Right People on the DNA Database, summary of responses to public consultation*, p14.

²² Or six years if aged 16-17 and were accused (but not convicted) of serious crime.

²³ As above, p15.

²⁴ Ministerial Statement, para 17.

system.²⁵ In the *S and Marper* judgment the European Court of Human Rights outlined the Scottish system²⁶ and its consideration of it:

The current position of Scotland, as a part of the United Kingdom itself, is of particular significance in this regard... the Scottish Parliament voted to allow retention of the DNA of unconvicted persons only in the case of adults charged with violent or sexual offences and even then, for three years only, with the possibility of an extension to keep the DNA sample and data for a further two years with the consent of a sheriff.

This position is notably consistent with Committee of Ministers' Recommendation R(92)1, which stresses the need for an approach which discriminates between different kinds of cases and for the application of strictly defined storage periods for data, even in more serious cases... Against this background, England, Wales and Northern Ireland appear to be the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence.²⁷

13. The coalition government has now taken its intentions forward via the Protection of Freedoms Bill at present in the House of Commons. This Bill contains similar provisions to the Scottish system in relation to persons who are arrested but not charged or convicted. It mandates destruction of DNA and fingerprint profiles, with retention for three years in the case of persons arrested for, but not charged with or convicted of, certain serious offences, with a potential further two years' retention on application to a magistrate's court. Indefinite retention is provided for if the person has a previous conviction for an offence. Among other provisions, a Chief Constable may retain profiles indefinitely if doing so on 'national security' grounds, subject to the Chief Constable reviewing his or her own decision every two years.

The proposals in Northern Ireland

14. The devolution of justice powers to Northern Ireland in April 2010 means that most of the legislative competency over DNA and fingerprint retention in the jurisdiction now sits with the Northern Ireland Assembly. The Minister had originally

²⁵ *The Coalition Agreement: Our Programme for Government*, May 2010, p11.

²⁶ Under the Criminal Procedure Act (Scotland) 1995 (as amended).

²⁷ Para 109-110 of judgment.

planned to introduce reform by seeking the Assembly's permission for Northern Ireland measures to be added to the Protection of Freedoms Bill, therefore deferring to Westminster to legislate on the matter.²⁸ Following opposition among MLAs to this, however, the Minister's present proposal is for legislation to be introduced into the Assembly. It is important to note that this will not include the aforementioned 'national security' exemption, as this power is maintained by Westminster. The Commission understands that the intention therefore is for Westminster to legislate to include Northern Ireland within the 'national security' exemption once the framework in this jurisdiction has been agreed.

15. The consultation document states that there are two separate databases in Northern Ireland: one maintained by the Police Service for Northern Ireland (PSNI) containing over 450,000 fingerprints from 250,000 individuals, and a second run by Forensic Science Northern Ireland containing DNA profiles from around 91,000 subject profiles and around 18,000 crime scene profiles. PSNI-obtained DNA profiles are also stored on the UK national DNA database. Similar to the proposals for England and Wales, the Department of Justice states that its policy proposals are "closely aligned to the Scottish model with some variations".²⁹ The proposed revised retention framework is summarised in the table below.

²⁸ Official Report (Hansard) Northern Ireland Assembly, Committee for Justice, Departmental Briefing on DNA Retention Policy, 30 September 2010, p3.

²⁹ Para 4.3 of consultation document.

| group | offence / status | fingerprint & DNA profile retention |
|-------------------------|---|--|
| Innocent persons | arrested / charged for minor offence but acquitted | immediate destruction |
| | arrested but not charged with 'serious offence' | immediate destruction, except in 'prescribed circumstances' |
| | charged with a 'serious offence' but acquitted | three years; with potential two-year extension on application to a Court |
| | any time where Chief Constable determines retention needed for 'national security' | indefinite retention subject to a review every two years by Chief Constable |
| Guilty Adults | convicted of any recordable offence | indefinite retention |
| Guilty under 18s | convicted of a minor offence on one occasion only | five years if sentence non-custodial, or five years plus length of sentence (if sentence less than five years) |
| | any time where Chief Constable determines retention needed for 'national security' | indefinite retention subject to a review every two years by Chief Constable |
| | conviction: - for 'serious offence', - two minor offences, or - with a custodial sentence of over five years | indefinite retention |

16. The definition of the terms above is as follows:

| Term | Definition |
|--------------------------|---|
| Serious offence | 'Serious, violent or sexual offence' ³⁰ |
| Prescribed circumstances | To be determined, but examples given of when minor or vulnerable adult is victim or where victim is not able or willing to come forward and give evidence |
| National security | No definition |

³⁰ Section 13 of the Crime and Security Act 2010 lists 'qualifying offences' inserted into section 53A of the Police and Criminal Evidence (Northern Ireland) Order 1989, to form the basis of 'serious offences' for the purposes of DNA retention under previous proposals. This is likely to be replicated.

17. The proposals also indicate that 'legacy' profiles – that is, DNA and fingerprints already retained on the databases – will be dealt with retrospectively by the new framework and hence deleted where applicable. While this is the proper approach, the Commission is concerned that no interim measure has been put in place to give effect to the judgment, particularly as the legislative process has taken some time. The Commission is aware that the PSNI, relying on guidance issued by the Association of Chief Police Officers (ACPO), has been declining requests from innocent persons for removal of DNA data until there is legislative reform. The UK Supreme Court has recently declared this guidance unlawful. The approach taken in this instance contrasts with the interim measures recently taken in relation to *Gillan and Quinton v UK*,³¹ whereby the UK government issued an urgent Remedial Order on 17 March 2011 to introduce, with immediate effect, a counter-terrorism stop and search power to replace the earlier power found to be incompatible with the ECHR. In this instance no interim measure has been put in place which could have mitigated against the ongoing blanket retention of DNA profiles of innocent persons.
18. The consultation document also indicates that there will be a requirement on the Chief Constable for early deletion of profiles in, for example, cases of unlawful arrest or mistaken identity.

International standards

19. In addition to noting the limited discretion ('margin of appreciation') of states parties to the ECHR the Court, in issuing its judgment in *S and Marper*, drew on international standards including Committee of Ministers Recommendation R(92)1 which was adopted without reservation by the UK. The recommendation is not legally binding but, as in *S and Marper*, can be used as an interpretive instrument for duties under the ECHR.
20. Recommendation R(92)1 states 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

³¹ ECHR application no. 4158/05, judgment of 12 January 2010.

offences against the life, integrity or security of persons”, subject to “strict storage periods defined by domestic law”. There are only two exceptions set out for retaining the results of DNA analysis of a person who has not been convicted of, or charged with, an offence: either at the express request of the individual or where the security of the state is involved; in the latter case strict storage periods are required in domestic law.³²

ECHR compatibility of devolved Northern Ireland proposals

21. The European Court of Human Rights has noted the ECHR compatibility of elements of the Scottish system on which the present proposals are based. The Commission would nevertheless urge the Department to conduct examination of the details of the Northern Ireland proposals against the framework provided by Recommendation R(92)1. At present, the consultation document provides only an outline of the proposals, with further detail to be defined in the legislation – this includes matters such as the ‘prescribed circumstances’ for retention in the case of persons arrested but not charged with a serious offence, and the ‘early deletion’ procedure. The Department may also wish to consider further safeguards for the retention databases such as publication of available monitoring data (age, gender, disability, ethnicity – including ‘community background’) relating to retained profiles in order to assess proportionate impact on groups. Overall, however, the Commission recognises the intention and steps taken by the Department towards compliance with the judgment.

ECHR compatibility of national security exemption

22. The Commission’s greatest concern at present is the proposed national security exemption. While this will be legislated for by Westminster, it is important to record our concerns here and the Department may wish to make representations on the matter in relation to the legislative intention for Northern Ireland.
23. Recommendation R(92)1 does explicitly permit the retention

³² Recommendation no. R(92)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)).

of DNA profiles from persons not charged with, or convicted of, an offence when the security of the state is involved, provided strict storage periods are defined by law. However, should such a provision be used to routinely retain a broad range of DNA profiles, and hence provide a 'back door' for effectively arbitrary DNA profile retention from a targeted group, it could run into the same ECHR compatibility questions as considered in *S and Marper*. Such a power would therefore require sufficient safeguards and legal certainty to prevent its application for purposes beyond what genuinely impacts on the security of the state.

24. Clause 9 of the Protection of Freedoms Bill, as introduced, sets out a provision for England and Wales which, if adopted, may form the basis for a Northern Ireland equivalent. Clause 9 provides for retention for as long as a 'national security determination' is in force. A 'national security determination' can be made by a chief officer of police who "determines it is necessary... for the purposes of national security". No definition is provided of 'national security', and the power can be exercised for material gathered under any offence, rather than being restricted to, for example, arrests for serious offences under counter-terrorism acts. Determinations last for up to two years but can be renewed by the chief officer of police for an indefinite number of further periods every two years.
25. The Bill provides for the appointment by the Secretary of State of an oversight Commissioner for national security determinations (Commissioner for the Retention and Use of Biometric Material) to keep under review every determination made (or renewed) and the uses to which it is put. There is a duty to provide the Commissioner with copies of determinations and other information needed for her/his functions. If the Commissioner decides that the retention is not necessary, and there is no other lawful avenue for its retention, the Commissioner may order its destruction. The Commissioner is to produce an annual report along with supplementary reports on particular cases when requested by the Secretary of State. Such reports are to be published, although there is a power for the Secretary of State to censor parts of the report if he/she believes their publication would prejudice 'national security' or be contrary to the public interest.

26. It would be reasonable to assume that the 'national security' exemption may be invoked more frequently in Northern Ireland. There is a risk that excessive use of the determinations could result in the retention of data on a broad range of persons who have been arrested (but not charged or convicted) from 'suspect communities', and hence militate against the policy intention of providing a fairer approach to retention. The introduction of an oversight Commissioner, should that office be suitably independent, has the potential to provide an important safeguard against abuse. However, there is still potential for broad application of the provision, not least because of the general lack of definition of 'national security'.

Third-party retention

27. A separate issue, not dealt with by the present Department of Justice proposals for Northern Ireland but within the Protection of Freedoms Bill for England and Wales, is regulation of the retention of fingerprint and DNA data held by third parties. The Commission is aware of complaints in Northern Ireland in relation to schools that have fingerprinted children for such purposes as verification of entitlement to free school meals.
28. The coalition government committed within its programme for government to outlawing the fingerprinting of children at schools without parental permission. Parliamentary research indicates that, for matters such as registration, cashless canteens and library borrowing, many schools (citing estimates of 30 per cent of secondary schools and 5 per cent of primary schools) have used automated fingerprint identification systems, and a smaller number have used other biometric systems such as iris, face or palm recognition equipment. The Protection of Freedoms Bill, as introduced, would therefore require schools and FE colleges to obtain the written consent of parents/guardians before processing biometric data from children; ensure that information is not processed if a child objects, and provide reasonable alternative arrangements for objectors. This will extend to England and Wales only.
29. The Department of Justice may wish to consider also addressing the issues of schools and other third parties gathering biometric data in Northern Ireland.

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