



The Information Commissioner's response to the Home Office consultation paper on the retention, use and destruction of DNA data and fingerprints.

The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000 (FOIA). He is independent from government and promotes access to official information and the protection of personal information. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

The Information Commissioner welcomes the opportunity to comment on the proposals in the Home Office consultation paper, "Keeping the right people on the DNA database". The following comments are made from a data protection viewpoint.

Background

The Commissioner¹ first raised serious concerns about the indefinite retention of the DNA of innocent people in a letter to the Home Secretary in April 2003 when the Police and Criminal Evidence Act (PACE) was amended by the Criminal Justice and Police Act.

The Commissioner's concerns were and still are whether the processing of personal data in the circumstances is consistent with the requirements of the Data Protection Act 1998 ("the Act"). In particular whether the obtaining and indefinite retention by the police of personal data in the form of DNA and DNA profiles is consistent with the requirements of the First Principle of the Act that personal data should be processed fairly and lawfully, the Third Principle that personal data should be adequate, relevant and not excessive for its purposes and the Fifth Principle that personal data should not be kept longer than is necessary for the specified and lawful purposes of the data controller.

The amendment to PACE removed the obligation on the police to destroy DNA in the event of there being no prosecution or acquittal, as long as the DNA sample had been lawfully taken. This change to the law resulted in DNA being taken and retained indefinitely for all persons arrested for a recordable offence even when no charge or conviction followed.

The Commissioner was concerned that the change would lead to differences in the treatment of innocent people who had been arrested but not convicted of any offence and those who had not. He had no doubt that many more

¹ Up to 29 June, the Information Commissioner was Richard Thomas CBE. The current Information Commissioner is Christopher Graham

people who came into contact with the police in this way would suffer “real and ongoing intrusion into their private lives”.

The Commissioner was also concerned that there had been no public consultation on such a major change in the law. He described the matter as “worthy of widespread consultation” and he urged the Home Secretary to “pause and consult widely” rather than introduce the extension of the DNA database as an amendment to the Criminal Justice Bill. Despite the Commissioner having raised these concerns no public consultation took place.

In his reply to the Commissioner the Home Secretary referred to the S and Marper cases which, at that time, had recently been to the Court of Appeal where the Government’s view on retention of DNA had been upheld. He also referred to the fact that S and Marper had been given leave to take their cases to the House of Lords later that year. Although S and Marper lost their appeal to the House of Lords they subsequently took their cases to the European Court of Human Rights (ECHR).

The Information Commissioner followed with interest the progress of the S and Marper cases and the ECHR judgment on 4 December 2008 which ruled that the “blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences” was in violation of Article 8 of the European Convention on Human Rights.

The Commissioner does not regard the retention of DNA as an isolated issue and continues to focus on the various ways in which the police process personal data. For example, there are clear links between the retention of DNA data on the national database, fingerprint information on INDENT1 (the national fingerprint database) and prosecution/conviction information on the PNC (the Police National Computer). It is the latter, in particular, that can have the most tangible effect on an individual’s privacy.

In 2007 the Commissioner took enforcement action against five police forces in individual cases in which, for the most part, the only information retained on the PNC related to very old convictions for minor offences committed many years previously. In 2008 the Information Tribunal upheld his decision to require the police to delete the data in these cases. The police appealed against the Tribunal’s decision and the case is currently awaiting the judgment of the Court of Appeal following a hearing held on 22 and 23 June 2009.

Evidence based approach and supporting research.

Following the ECHR judgement, and in order to produce evidence to support its retention proposals, the Home Office commissioned research from Professor Ken Pease, Visiting Professor of Crime Science at the Jill Dando Institute UCL. This research was intended to ensure that the Home Office’s proposals for the retention of DNA were based on clear and well researched evidence.

Initially, the Information Commissioner was encouraged by this approach as it appeared to offer the prospect of an evidence-based and dispassionate method of developing proposals about what can be a sensitive and emotive issue.

However, the Information Commissioner was disappointed to find that the research fell short of providing the clear and reliable evidence to support the proposals for which he had hoped. In addition, some of the comments in the consultation papers were contradictory and have further added to his concern that perhaps the research had not been as extensive as it might have been and had been somewhat rushed, due to the challenging time constraints.

For example, although the consultation paper says “we now have a strong evidence base to support our proposed new retention framework” it also says, “...there is no existing evidence underlying retention regimes in other jurisdictions.” The paper also says that “we are relying on new work which has not been fully peer-reviewed in the time available”. In addition, in his comments on the Impact Assessment in Annex D to the documents, the Chief Economist commented that “The decision to opt for 6 years (retention period)...is based only on limited evidence. Ideally a fuller consideration of different retention periods would have been helpful but I accept this was not possible in the time available”.

It is also made clear in the research that due to the lack of available data it is not possible to make direct comparisons to calculate the likelihood of someone who was arrested being subsequently re-arrested. The research therefore assumes that the “hazard rate” of arrest for someone previously arrested can be estimated by comparing it to the conviction rate of people who had been previously convicted. There does not appear to be a sufficiently reliable case made that this is a valid comparison and the research report casts further doubt on the matter by describing it only as “a strong assumption”.

It also appears that the research and proposals are aimed primarily at providing a response to the ECHR judgment rather than producing proposals for public consultation around the broader issues.

Given that this issue centres on the fair and lawful use of personal data the Commissioner was very surprised to find that there were no references to the relevant requirements of the Data Protection Act 1998 in the main body of the consultation paper. The only reference to the Data Protection Act 1998 (“the Act”) is in the ‘Confidentiality and Disclaimer’ section of the consultation papers as advice to prospective respondents.

The “blanket and indiscriminate” obtaining and retention of DNA samples and profiles and fingerprints clearly engages the fairness and lawfulness requirements of the First Principle of the Act and in this respect the ECHR judgement indicates that this use of personal data is unlawful in that it breaches Article 8 of the Convention on Human Rights. In addition the

indefinite retention of such personal data clearly engages the requirements of the Third and Fifth Principles of the Act that personal data should be adequate, relevant and not excessive and kept for no longer than necessary for the purposes. Although compliance with the DPA is fully engaged, no specific attempts have been made in the consultation paper to address any of the obvious data protection compliance issues.

In view of his initial doubts about the research the Information Commissioner asked Brian Francis, Professor of Applied Statistics and Keith Soothill, Emeritus Professor of Social Research at the Centre for Applied Statistics, Lancaster University to examine and comment on the Professor Pease's research.

In March 2008 Professors Francis and Soothill produced research on behalf of the Information Commissioner as part of his evidence to the Information Tribunal in the enforcement action against five police forces referred to earlier in this response. Their report was entitled "When do ex-offenders become like non-offenders? A statistical approach".

Professors Francis and Soothill's initial examination of Professor Pease's research identified a number of problems. Professor Pease's first analysis is concerned with how alike arrestees are to the general criminal population. The problems that Professors Francis and Soothill identified with this included, amongst other things, a failure to control for important criminological variables when looking at follow-up arrest rates and differences in the prior criminal histories of arrestees.

Professor Pease's second analysis is concerned with residual number of offences and residual criminal career length. Their initial examination of this revealed problems including a sample size that was so small as to be hardly representative of the general offending population and an analysis that appears to work on timings from the first official process or conviction but with a follow-up time that varies from case to case and could lead to biases.

Professors Francis and Soothill have now produced a paper entitled "Keeping Innocent People on the DNA Database" commenting in more detail on Professor Pease's research and the Home Office proposals. The paper has now been published in the New Law Journal and is attached as Appendix 1 to this response

In the paper Professors Francis and Soothill refer to problems with, amongst other things, the counting procedure on which the proposed 6 year retention period is based, the lack of recourse to existing evidence relating to the chance of people arrested for more serious offences committing further crimes and the "fallacious" assumption that after the 6 year period the remaining 52% of offending will not have DNA profiling available.

These comments and others within the paper confirm the Commissioner's initial view that the research carried out by Professor Pease does not provide

the “strong evidence base to support our proposed new retention framework” that the Home Office desires.

Consultation and legislation.

In the Commissioner’s view real opportunities were missed in the past to give this major public issue the appropriate level of public discussion and consultation that it required.

The Commissioner recognises the pressure that the Government is under to provide a response to the ECHR and applauds the efforts that have been made in trying to develop an evidence based approach in a short space of time. However, he is disappointed to find that sufficient time has still not been allowed for considered and thorough research into this highly important matter. This is of particular concern at a time when we have seen enquiries in both Houses of Parliament into the impact of surveillance on the privacy of individuals.

This hurried approach to the development of policy is all the more disturbing given that the Government has made it clear that it intends to use secondary rather than primary legislation to introduce any new retention arrangements for DNA. Whilst the Commissioner recognises the value in being able to change the retention periods without undue delay and difficulty as and when new and convincing research findings emerge he is nevertheless concerned that any proposals in this matter of major public significance may only be subject to limited parliamentary debate and scrutiny.

Proposals for retention periods

As previously explained, the processing of personal data in the form of DNA samples and profiles and fingerprints clearly engages the First Principle of the Act which requires, amongst other things, that personal data should be processed fairly and lawfully. It also clearly engages the requirements of the Third and Fifth Principles of the Act that such personal data should be adequate, relevant and not excessive and kept for no longer than necessary for the lawful purposes specified by the data controller.

The ECHR judgment is a clear indication that the present arrangements for the processing of DNA samples and profiles and fingerprints by the police would also be unfair and unlawful in data protection terms. It is also clear from the judgment that the police have failed to satisfy the ECHR of the necessity for the retention of such personal data for their purposes. In addition the ECHR judgment makes it clear that the Government would have to put forward “weighty reasons” to justify the present position.

In the circumstances the Commissioner’s current view is that the starting position for any debate on the question of whether the retention of DNA and fingerprints complies with the Data Protection Act 1998 is that the police

should hold no information indefinitely on persons who have been arrested for but not convicted of any offence.

Beyond this it is up to the police to show clearly that the processing of personal data in such circumstances is necessary for the legitimate purposes of the detection and prevention of crime in a democratic society. It is also up to the police to show that the personal data being processed is adequate, relevant and not excessive and that it is being retained no longer than is necessary for their purposes.

This would also mean the police being able to produce evidence to show why, as the Home Office has proposed, it is necessary in some cases for the purposes of the detection and prevention of crime to retain personal data relating to different types of alleged offences for different periods of times.

As far as the present proposals are concerned, the deficiencies that Professors Francis and Soothill have identified in Professor Pease's research cast real doubts on the value of the "strong evidence base" that the Home Office claims is supporting its proposals for a new retention framework.

In particular the research does not provide any clear evidence to support the proposed retention periods of 6 and 12 years. The Executive Summary and other sections of the consultation paper appear rather confused over this question and refer to a number of different timescales ranging from "more than 5 years" to "between 13-18 years" and "a provisional model we have developed (which) suggests a figure of 4-15 years, which forms the framework for the retention periods we are recommending".

The comment of the Chief Economist in Annex E, quoted earlier in this response, is also of interest here, "The decision to opt for 6 years (retention period)...is based only on limited evidence. Ideally a fuller consideration of different retention periods would have been helpful but I accept this was not possible in the time available".

The summary of the research in Annex C concludes by saying that "It is estimated that a retention period of some 24 years would be necessary to maximise profile value in detecting future crime". It also ends by saying "A wider criminological research programme is advocated to maximise the prospective value of forensic DNA work....."

In view of the deficiencies that Professors Francis and Soothill have identified in Professor Pease's research and the absence of any clear evidence to the contrary in the Home Office paper, it is the Commissioner's view that the Home Office's current proposals for retention of DNA profiles and fingerprints of individuals who have not been convicted of any offence for periods of 6 and 12 years are out of step with the requirements of the Data Protection Act 1998.

The Commissioner has based his view on the fact that the evidence produced so far by the Home Office to justify the retention of such personal data for the

proposed periods is insufficiently reliable or robust. Furthermore the Commissioner is concerned that the Home Office are not applying the right test. The fifth data protection principle requires that “personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes”.

For DNA profiles on those who have not been convicted the retention period needs to be necessary for the purpose of policing. “Necessary” in this context means more than useful. It implies a proportionality test where the benefits to policing have to outweigh any intrusion into the private lives of individuals. Given that those individuals will not have been convicted of any offence the extent to which this is the case must be substantial.

Whether the retention of DNA profiles is justified needs to be judged not on the basis of how likely someone who has been arrested but not convicted is to offend when measured against the general population but against the particular segment of the population in which that person sits. For example if a 20 year old male from a particular area is arrested but not convicted it is hard to see how it helps to know that the person has 30% higher risk of future offending than the population as a whole if in fact 20 year old males from the same area who have never been in contact with the police also have a 30% higher risk of future offending. For these reasons the Commissioner does not consider that the proposed retention periods and the very broad range of circumstances that they each encompass are justified.

The Commissioner welcomes some of the other proposals such as the destruction of DNA samples, the removal of the profiles of all children under 10 from the national database and the decision not to store the DNA profiles of volunteers on the database. He has provided further comments on some of these issues later in this paper.

He also wishes to make it clear that he recognises the value and power of DNA profiles and fingerprints for the legitimate purposes of the detection and prevention of crime in society. He accepts in principle that there could be certain types of situations and clearly defined alleged offences in which the police may be able to demonstrate convincing reasons why it necessary to retain the DNA profiles of individuals who have been arrested for but not convicted of such an offence.

In its judgment the ECHR referred to “the particular significance” of the current position in Scotland, in which the DNA of un-convicted adults suspected of certain sexual or violent offences can be retained for three years only with the possibility of an extension for further two year periods via the courts.

The Commissioner is not aware of the evidence, if any, on which the three year period in Scotland is based but he is aware that the Scottish model has not yet been running for 3 years so it may not yet be possible to assess how effective the approach has been.

Nevertheless, the Commissioner agrees with the ECHR judgement that the Scottish approach is of particular significance and thinks that it could offer a possible way forward for the rest of the UK.

Comments on specific issues

While the Commissioner has made it clear that the Home Office's current retention proposals appear to be out of step with the requirements of the Data Protection Act 1998 he also wishes to offer his comments on some of the more specific issues in the consultation paper.

Serious violent or sexual or terrorism related offences.

This term is used throughout the consultation paper and the Commissioner thinks its exact meaning should be made clear, for example does "serious" apply to violent and sexual offences or just violent offences? To confuse matters further the term is used sometimes with the word serious and sometimes without. The Commissioner assumes that "serious" applies only to violent offences but would welcome some clarity around this point.

Despite this lack of clarity the Commissioner welcomes the attempt to distinguish between different types of offences that may warrant longer periods of retention such as sexual offences.

However, even with these types of offences there can be difficult areas such as cases where there is consensual sexual intercourse between partners of a similar age but with one partner still just below the legal age of consent. Under the present proposals such cases would result in the DNA profile of the "offender" being retained for 12 years where the concerns about future conduct may not be sufficiently strong so as to justify prolonged retention.

Consistency of records for sexual offences

There seems to be a clear difference of approach between the proposed 12 year retention period for the DNA profiles of individuals arrested for but not convicted of a sexual offence and the prescribed notification periods for convicted sex offenders on the Sex Offenders Register under the Sex Offenders Act 1997 as amended by the Criminal Justice and Court Services Act 2000.

Interestingly, in December 2008 the High Court ruled in the case of *F & Anor, R v Secretary of State for the Home Department* that the indefinite retention of information about sex offenders on the Sex Offenders Register was incompatible with Article 8 of the European Convention on Human Rights.

Entries on the Sex Offenders Register relate to the length of the sentence imposed on conviction for the particular sexual offence. For example,

imprisonment for life or for more than 30 months or admission to a hospital under a restriction order for a sexual offence will result in the offender's personal data being retained on the Sex Offenders Register indefinitely. This correlates directly with the proposal for the indefinite retention of DNA profile for all adults who are convicted of a recordable offence.

However, none of the other notification periods for convicted sex offenders on the Sex Offenders Register are longer than 10 years which is for a sentence of imprisonment for a sexual offence for more than 6 but less than 30 months. For a Caution the notification period is only 2 years and for a conditional discharge it is for the length of the period of discharge. These prescribed periods contrast with the proposals to retain the DNA of non convicted individuals arrested for a sexual offence for a period of 12 years.

In the Commissioner's view there is a clear link between the two types of records and the purposes for which they are both used and he would therefore have expected there to be some correlation between the retention periods that apply to both types of record. In the circumstances the Commissioner would expect the Home Office to have well reasoned arguments for the difference of approach that has been proposed here.

PNC records

As mentioned at Page 2 of this response the Commissioner does not regard the retention of DNA as an isolated issue and continues to focus his attention on the various ways in which the police process personal data. In particular he is mindful of the link between DNA records and records held on the PNC.

It is clear from Figure 1 in Section 4 of the consultation papers that when a DNA profile is created and loaded onto the national DNA database an identity record relating to the arrest from which the DNA sample was obtained is automatically created on the PNC. What is not clear is whether this PNC record is also deleted when the DNA profile is removed from the national DNA database.

The Commissioner requested clarification of this point from the Association of Chief Police Officers Criminal Records Office (ACRO). ACRO confirmed that in the majority of cases a request for the removal of one record (PNC, DNA or fingerprints) would be considered as a request for the removal of all three records. However, ACRO also confirmed that if the removal of DNA and fingerprints is ultimately required as a result of the ECHR judgement this will not be taken as meaning that the corresponding PNC record must also be removed as the police wish to retain a complete PNC history for policing purposes. ACRO also commented that the pending decision of the Appeal court referred to earlier in this response may also provide a steer on this question.

This highlights the Commissioner's view that the retention of DNA is not an isolated issue but links clearly with other records, in particular the PNC record,

and that the existence of a PNC record can be more intrusive than other linked records such as DNA or fingerprints.

At present all records held on the PNC are readily accessible to any serving police officer acting in his or her official capacity and this access is frequently used to run a “name check” on individuals who come into contact with the police. Given this level of access the Commissioner is concerned that the very existence of a PNC 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 when that record is accessed.

As previously stated, ACRO have confirmed that a request for the deletion of one record would be considered as a request for the deletion of all records including the PNC record. Given this approach the Commissioner can see no reason why the police should continue to retain a PNC identity record which is linked to other records that the police have accepted should be deleted. This would appear to be contrary to the Fifth Principle of the Data Protection Act 1998.

Additionally, there appears to be no consideration as to whether more privacy friendly information processing techniques may provide better alternatives. If it is the potential power of a DNA profile to help detect unsolved crimes that justifies prolonged retention but retention of the PNC record on its own would be of less value than a more privacy friendly solution could be developed.

It should be possible to develop technical solutions so that the retained PNC record is “locked down” and only becomes accessible to certain authorised police officers when a DNA sample or crime scene stain matches a DNA profile and ‘unlocks’ the related PNC record. This would mean that the potential unwarranted detriment and risk to an individual due to the wide availability of a PNC record would be significantly reduced whilst preserving the ability to match a profile with a scene of crime sample.

Exceptional grounds for the early destruction of records.

The Executive Summary of the consultation paper refers to arrangements for the destruction of DNA profiles on exceptional grounds and Section 6 of the paper refers to the destruction of profiles and fingerprints on exceptional grounds.

The Commissioner is under the impression that the existing Exceptional Case procedures apply to all three types of records i.e. DNA, fingerprints and records on the PNC. The consultation paper refers to the procedures as though they only apply to DNA and fingerprints and that the Chief Officer’s discretion only applies to the deletion of DNA and fingerprints. It is very important that this point is clarified before any action is taken to change the existing procedures and develop new arrangements for their operation.

The paper makes it clear that the proposed new arrangements will apply “where members of the public feel their profile and samples should be removed immediately”. Examples given are situations of wrongful arrest or a case of mistaken identity where it turns out no crime has been committed.

These arrangements will in effect be the same as the existing Exceptional Case Procedure under which there is already a right of appeal to the Chief Officer of the particular force on exceptional grounds “though it is rarely used”. According to the paper, “Chief Officers have the discretion to authorise the destruction of DNA and fingerprints...subject to judicial review”.

The paper proposes two changes to the existing procedures. The first is to re-name the procedure “application process for record deletion”. The second and more significant change is that applications will “need to be made and considered against defined criteria... set out in Regulations”. The paper goes on to say that “it is not possible to define comprehensive criteria in legislation for what will be in practice based on the individual circumstances of each case”. The Executive Summary says that “the criteria which need to inform the Chief’s decision could then be codified or set out in regulations”.

The Commissioner welcomes the proposed changes to the Exceptional Case Procedures but feels that the development of criteria and the setting out of these in a Code or Regulations in relation to this important and significant matter should be carried out openly and be subject to full public discussion and consultation.

He also feels that the decision to delete a record or not to put it on the appropriate database in the first place should be a pro-active one made by the Chief Officer rather than one that is only triggered by the individual to whom the record relates making a complaint. Otherwise the retention of a record that should not be retained, for example a record of an offence that has been re-classified and is no longer an offence, would be contrary to the requirements of the Data Protection Act 1998.

The Commissioner also recommends that if the final decision on a complaint under the Exceptional Case Procedures remains one that is made entirely at the discretion of the Chief Officer there should be a right of appeal beyond that to an entirely independent body, for example the IPCC. This would help to ensure that all such decisions are made fairly and in accordance with the agreed criteria.

Volunteer samples

At present DNA samples that are given voluntarily with the individual’s consent, either as part of a mass screening in relation to a police investigation or on an individual basis, are held on the National DNA database (NDNAD) even though the individuals concerned have not been arrested.

Under current legislation individuals who provide a DNA sample voluntarily are unable to withdraw their consent for this at a later date. This issue has

concerned the Commissioner for some time and he has raised it with the NDNAD Strategy Group. The Commissioner understands that there is now draft legislation in preparation in the form of the Police and Criminal Evidence Act 1984 (Retention of Samples etc) Regulations 2009 which, when enacted, will amend PACE so that consent can be withdrawn in these circumstances. The Commissioner welcomes this proposed change in the existing law.

The Home Office consultation paper is proposing that all existing volunteer samples and profiles will be removed from the NDNAD and that future volunteer samples and profiles will not be held on the NDNAD. It is also proposing that future volunteer profiles will only be searched against crime scene samples relating to the specific offence under investigation and that future profiles and samples will be destroyed when no longer required for investigative purposes.

The Commissioner welcomes these proposals in general but feels that some parts of them require further clarification and expansion.

For example, the Commissioner understands that there will be provision for the retention of the DNA of some individuals who request this but their DNA will not be retained on the NDNAD. These will be individuals who perceive themselves as potential future victims of crime and who request that their DNA is retained for this reason. This would include prostitutes and potential victims of honour based violence. Their DNA would be retained separately on a proposed database of missing and vulnerable persons not on the NDNAD, and would not be searched against the NDNAD.

The Commissioner would expect that the consent in such cases is freely given by the individual without any coercion and with the unfettered capability to withdraw consent at a later date.

Retrospective powers to take DNA and fingerprints.

The consultation paper includes proposals for the introduction of retrospective powers to allow the police to take DNA and fingerprints “at any point subsequently” from individuals who have been convicted of “violent and sexual or terrorism related offences” and whose DNA or fingerprints were not previously taken during the criminal justice process.

The paper also proposes a similar requirement on UK citizens and residents who have been convicted overseas of violent and sexual or terrorism offences to provide DNA and fingerprints on return to this country.

As previously mentioned earlier in this response the word serious in relation to the term violent or sexual or terrorism related offences is omitted from these particular proposals. It is not clear whether this is deliberate and somehow relates to the fact that the proposals relate to convictions for these types of offences or whether this is an oversight; either way this lack of consistency it is not helpful.

The Commissioner is concerned about the wide ranging nature of these proposed powers and would therefore expect that these powers will be applied on a case by case basis and only in relation to cases of convictions for serious violent and sexual offences or terrorism related offences where the seriousness of the particular offence indicates a strong likelihood of re-offending.

Children

The consultation states that the DNA of all children under the age of 10 has already been removed from the NDNAD and will not be retained in future.

The paper makes a number of proposals in relation to children over age of 10 and under the age of 18 as follows:

Those under 18 years of age who have been convicted of a serious violent or sexual or terrorism related offence will have their DNA sample and profile retained indefinitely along the same lines as adults

Those under 18 who are convicted on only one occasion of a “lesser offence” will have their DNA profile removed from the NDNAD when they turn 18 years of age. Unfortunately the paper does not make it clear what is meant by a lesser offence although the Commissioner assumes that this is anything other than a serious violent or sexual or terrorism related offence.

Those under 18 who are arrested for but not convicted of a serious violent or sexual or terrorism-related offence will have their DNA profile retained for twelve years in the same way as the proposals for adults.

Those under 18 who are arrested for but not convicted of a lesser offence on one occasion will have their DNA profile deleted after 6 years or on their eighteenth birthday whichever is the sooner. If the individual is arrested again the same retention period will apply as for adults.

The Commissioner welcomes these proposals in general and the idea that appears to lie behind them of giving young people who are convicted of or arrested for a lesser offence on only one occasion a “clean sheet” when they become adults. However, the Commissioner is concerned that the way some of these proposals may work in practice has not been properly thought through.

These concerns centre on the issue that the Commissioner has already raised elsewhere in this response, that is the lack of clarity around the terms “serious violent or sexual or terrorism related offences” and “lesser offence” as used in the consultation paper.

The paper provides a list of “Offences which would fall under Violent and Sexual Offences provisions” in Annex C of the consultation. Interestingly murder is not included on the list in Annex C as a serious violent offence. Nor

does the consultation paper provide any detail as to what is meant by terrorism related offences.

The Commissioner assumes that these are oversights perhaps resulting from the haste in which the consultation proposals appear to have been developed.

The Commissioner sees this lack of clarity around types of offences as a key issue in that the proposed 6 and 12 year retention periods for individuals DNA profiles are determined to a great extent by the type of offence for which an individual has been arrested or convicted. This can be of particular significance in relation to the proposals for children.

For example under the proposals as they stand a child of 14 who has been arrested for but not convicted on only one occasion of a “lesser offence” such as shoplifting would have his or her DNA retained for a period of 4 years until he or she reached the age of 18. However, a child of 17 who has been convicted of a lesser offence such as possession of a bladed article, which despite public concern about knife crime amongst young people is not listed in the proposals as a serious violent offence, would only have his or her DNA profile retained until he or she was 18 years of age.

The Commissioner feels that the definitions of serious violent and sexual or terrorism related offences must be thoroughly reviewed before any of the proposals are taken any further.

Conclusion

The Information Commissioner welcomes a number of the proposals in this consultation paper in particular the commitment to destroy the DNA samples of both those arrested but not convicted and those convicted which goes further than the requirements of the ECHR judgment. Although he is concerned about the validity of the evidence base actually used by the Home Office, he is nevertheless encouraged by the evidence based approach that the Home Office has adopted in developing the proposals on retention periods.

The Commissioner first made clear his concerns about the indefinite retention of the DNA of innocent people in 2003. The processing of DNA samples and profiles by the police clearly engage data protection principle and has done for some time. However, the Commissioner does not regard the processing of DNA as an isolated issue; he is also concerned about the other ways in which the police process personal data and the links between the different types of records they keep on individuals.

The Commissioner had expected that the current consultation would be an opportunity for the development of well researched and evidence based proposals on this important and significant issue. Unfortunately, due mainly to difficulties with the extent and reliability of the research supporting the latest proposals the Commissioner considers that this opportunity may well have

been missed. As a result he is not persuaded that the proposed retention periods are consistent with the requirements of the Data Protection Act.

The Commissioner does not rule out some limited retention of DNA profiles for some of those arrested but not convicted but he considers that the periods currently proposed are over long and do not discriminate sufficiently between different categories of arrestees. He would prefer to see significantly shorter periods in most cases albeit that he recognises that longer periods might be justified in the future as credible research evidence is built up. It is though always important to bear in mind that the issue at stake here is the retention of personal information by the police on those who have not been convicted of an offence and that the ECHR confirmed that such retention is “an interference with the applicant’s right to respect for their private lives”.

The Commissioner also has concerns about some of the more specific parts of the proposals as described below;

- The clarity of the terminology relating to serious violent and sexual offences and terrorism related offences.
- The consistency of the retention periods for records of sexual offences
- The consistency of approach to linked records such as DNA samples, profiles and fingerprints and records held on the PNC.
- The transparency and fairness of the proposed exceptional case procedures.
- The clarity of the proposals for DNA samples provided voluntarily.
- The use of the proposed powers to take DNA samples retrospectively.
- The fairness of some of the proposals relating to children.

Despite these concerns the Commissioner intends to remain involved in the continuing debate over these matters. He also understands that the Home Office intend that research into retention periods will now be ongoing and that any changes resulting from this research will be introduced via secondary legislation. Whilst he would normally advocate the use of primary legislation for such changes in the law he recognises and accepts that secondary legislation would be more flexible in the circumstances. However, he expects that all such changes will be subject to the proper level of parliamentary scrutiny and debate before they become law.

Appendix 1

KEEPING INNOCENT PEOPLE ON THE DNA DATABASE

Keith Soothill and Brian Francis²

There is no doubt that the Government is in a serious dilemma regarding the judgment of the European Court of Human Rights delivered on 4 December 2008 (*S and Marper v United Kingdom*, 2008). The unanimous decision by 17 judges produced the damning verdict that the blanket policy in England and Wales of retaining indefinitely the fingerprints and DNA of all people who had been arrested but not convicted was in breach of Article 8 of the European Convention of Human Rights. However, the Court did leave the door slightly ajar by agreeing with the Government that the retention of the Fingerprint and DNA data “pursues the legitimate purpose of the detection, and therefore, prevention of crime”. The question has become one of how far the door should be pushed open.

The Home Office has suggested a new policy and has provided the opportunity to comment on the ‘reasonableness’ of these proposals (Home

² Keith Soothill is Emeritus Professor of Social Research, Lancaster University, UK and Brian Francis is Professor of Social Statistics, Lancaster University, UK.

Office, 2009)³. Under this policy, the DNA profiles and fingerprints of adult *convicted* criminals are still to be retained indefinitely. The issue is primarily concerned with how long innocent people should be adjudged as ‘honorary’ criminals, that is, being dealt with as more akin to criminals than upright citizens.

The consultation document sets out to develop a DNA framework that achieves a proportionate *balance* between the rights of the individual and protection of the public. In effecting a balance, both individual rights and public protection will be compromised. The task, therefore, is seen as constructing a *proportionate* retention policy.

There are three constituencies being considered in the consultation document – firstly, all those arrested but not convicted; secondly, those arrested but not convicted for violent, sexual or terrorism-related offences; thirdly, those convicted when aged under 18. The Home Office has selected retention periods of 6 years and 12 years respectively for the first two groups “based on the likelihood of people who have been arrested and not convicted but who may go on to commit an offence.” For juveniles, there is some recognition of youthful indiscretion, with those convicted or arrested for a single less serious offence having their DNA record deleted when they are 18; otherwise they are treated as adults and DNA profiles will be retained indefinitely.

³ The consultation period ends on 7 August 2009.

We focus on the first two groups. We had expected that the argument for retaining those arrested for more serious offences for a longer period would be on the basis of a greater likelihood of committing a more serious offence, not simply the likelihood of committing any crime. The latter seems a curious logic.

The notion of 'arrest' is the main criterion used for action in the document. While police arrests are not whimsical, they come at the beginning and not the end of the criminal justice process. Some people are disproportionately at risk of being taken into questioning by the police and being arrested. In contrast, a conviction is the outcome of evidence being tested in court.

In fact, arrests are useful indicators of police action but not of guilt. Re-arrests are dangerous indicators. Sadly, making arrests the pivotal criterion encourages the notion that we are moving towards becoming a police state. The most serious abuse to avoid is an arrest by the police at the end of a retention period in order to get a further retention period on the DNA database.

The argument is that arrestees who are not convicted have the same level of subsequent criminality as those where guilt is admitted or proved. Pease's analysis in Annex C of the consultation document suggests that the level of subsequent criminality of arrestees is on a par with the subsequent

criminality of those given non-custodial sentences. We are willing to concede on this point.

So what is the problem? In much of the consultation document there is confusion between two types of discourse – a discourse relating to crime and a discourse relating to criminals. A discourse on crime interests the police and largely underpins the scientific analysis in Annex C, while a discourse on ‘honorary’ criminals who are created by retention policies interest those concerned with civil liberties. The danger is to assume a one-to-one relationship between a crime and a criminal. In fact, there are many more crimes than criminals. Indeed, there is a remarkable lack of discussion about persistent criminals – a topic that has exercised the mind of the Home Office in recent years. In brief, there is widespread evidence that around 6 or 7 per cent of the population account for one-half of all convictions⁴. So what is the importance of this?

A crucial step in the argument is displayed in Figure 1 (p.33) which purports to show the ‘Percentage of criminality lost by retention period’. It suggests that by the six-year point just over one-half of the crime that is going to be committed will be committed after this point and essentially will be lost to DNA profiling. The Home Office claim is that this provides a reasonable basis for a six-year retention period for all those arrested but not convicted of crime.

⁴ “In the classic Philadelphia cohort study, Wolfgang *et al.* (1972) showed that 6 per cent of the males (18 per cent of the offenders) accounted for 52 per cent of all the juvenile arrests. In the Cambridge study in *Delinquent Development*, seven per cent of the males accounted for around half of all the convictions up to the age of 50 (Farrington *et al.*, 2006)” (Soothill *et al.* 2009, p.82).

Unfortunately, we believe that the counting procedure on which this proposal is based is wrong.

Their calculation is based on the residual number of offences from "first official process" (p.32). While this "first official process" is not clear (i.e. is it an arrest or a conviction?), the author (Ken Pease) is looking at the percentage of crime left after a certain number of years from *first* official process. But this is not how a retention period could possibly work. In brief, DNA information would not be deleted after a certain number of years from *first* arrest, but from their *last* arrest. If an adult has another arrest, then the clock is restarted. DNA information would only be deleted after a certain number of crime-free years and the first arrest is not relevant if there is a subsequent arrest or conviction. By calculating crimes from the *last* arrest, this shortens the retention period that is necessary to meet the criterion used.

Furthermore, there is also an assumption made that after the six year period, the remaining 52% of offending will not have DNA profiling available. But this is fallacious. Some of these 52% of offences will also be arrested or be prosecuted and convicted, and DNA profiles will again be retained. The percentage of crime lost to DNA profiling will therefore be substantially less than 52% and, therefore, the cut-off period for a 50/50 split will be somewhat less than six years.

The Home Office is in even more difficulty with the proposed 12-year retention period for those alleged to have committed more serious offences.

The consultation document can say no more than that such people have a heightened chance of committing (or at least of being arrested for) any sort of crime than the general population. We suggest that there is some science that can do more. After all, one of us (KS) showed nearly thirty years ago (Soothill *et al.*, 1980) that the subsequent criminal profiles of those acquitted of rape are almost identical to the subsequent criminal profile of those convicted of rape. – in fact, a greater proportion of the former had subsequent violent convictions. However, there is no recourse to this kind of evidence. Their demand for a 12 year retention period is backed up by what we call the smokescreen of versatility.

Pease's discussion about the degree of versatility among offenders is seductive stuff starting with the highwayman, Dick Turpin, being first arrested for theft and then identified and hung for murder. In fact, we accept that most criminals are versatile in their criminal activity. However, the versatility argument must be linked with empirical evidence that arrestees have significant crime-free periods, for otherwise they will be on the database anyway. Versatility is related to frequency of offending or arrest, and those who commit much crime also tend to commit many different varieties. In short, the notion of versatility – with no evidence that versatility is interspersed with significant crime-free periods – must be regarded as irrelevant in the argument for or against retention periods.

But our contention is that one can say much more about the likelihood of future serious crime than they do. The problem stems from a failure to

break out from a traditional stranglehold that criminals are *either* specialised or versatile. Pease seems to take the latter view. In our work on sexual offenders (Soothill *et al.*, 2000), we argue that offenders can be at the same time both specialists and generalists. More recently, McGloin *et al.* (2008) provide evidence that offenders may favour certain offence types during the short term, largely because of opportunity structures, but that because of changing situations and contexts over the life-course, their offending profiles aggregate to versatility over their criminal career as a whole. This supports our recent work where we have found, for example, that five out of every 100 kidnapping offenders will be reconvicted for this offence within 20 years (Liu *et al.*, 2008). However, the greatest danger comes in the early years after their first kidnapping conviction – they are in still their short-term specialisation phase to use McGloin *et al.*'s terminology.

So, to conclude. We recognise the dilemma of the Home Office and we are trying to help! As Pease points out, “the S & Marper judgment casts the retention issue as one of balance between the principles of individual privacy and public protection” (p.37). We believe that a more appropriate analysis is needed to justify a retention period of six years. Secondly, if one is making a case for longer retention periods for those arrested for serious offences, then the only reason for them to be treated differently is that they have a greater risk of a *serious* offence. In contrast to the consultation document, we do believe that one can measure a heightened risk of a subsequent serious offence, and it should be on this basis that one moves forward with a longer retention period.

At the end of the day neither the police nor the civil rights lobby will probably be happy about the outcome. By destroying some of the DNA current database because of recognition of individual rights will enable some people to go free who otherwise may have been captured. Lawyers in the past have been indoctrinated with Blackstone's notion, "Better that ten guilty persons escape than that one innocent suffer". We now need a similar mantra for arrested persons to remind ourselves that individual rights are worth keeping even though, for some 'honorary' criminals, they are being abandoned in the short-term.

References

- Farrington, D.; Coid, J.; Harnett, L.; Jolliffe, D.; Soteriou, N.; Turner, R. and West, D. (2006) *Criminal careers up to age 50 and life success up to age 48: new findings from the Cambridge Study in Delinquent Development*. 2nd edition (Home Office Research Study 299) London: Home Office <http://www.homeoffice.gov.uk/rds/pdfs06/hors299.pdf>
- Home Office (2009) *Keeping the right people on the DNA database: science and public protection*. Downloaded from <http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/> on 16 June 2009.
- Liu, J., Francis, B. and Soothill, K. (2008) 'Kidnapping offenders: their risk of escalation to repeat offending and other serious crime', *Journal of Forensic Psychiatry and Psychology*, 19, 2, pp.164-179.

- McGloin, J.M., Sullivan, C.J. and Piquero, A.R. (2009) 'Aggregating to versatility: Transitions among offender types in the short term', *British Journal of Criminology*, 49, 243-264.
- S and Marper v United Kingdom*, applications nos 30562/04 and 30566/04, Council of Europe: European Court of Human Rights, 4 Dec 2008.
Downloaded from <http://echr.coe.int/echr/en/hudoc> on 16 June 2009.
- Soothill, K., Fitzpatrick, C. and Francis, B. (2009) *Understanding Criminal Careers*. Cullompton: Willan.
- Soothill, K., Francis, B. and Liu, J. (2008) 'Does serious offending lead to homicide? Exploring the interrelationships and sequencing of serious crime', *British Journal of Criminology*, 48, 4, July, 522-537.
- Soothill, K., Francis, B., Sanderson, B. and Ackerley, E. (2000) 'Sex Offenders: Specialists, Generalists – or Both?' *British Journal of Criminology*, Vol. 40, pp. 56-67.
- Soothill K, Way C and Gibbens T C N (1980) 'Rape Acquittals', *Modern Law Review*, 43(2), 159-172.
- Wolfgang, M. E., Figlio, R. F. and Sellin, T. (1972) *Delinquency in a Birth Cohort*. Chicago: University of Chicago Press.