

Protection of Freedoms Bill

Second Reading: Parliamentary Briefing



February 2011

GeneWatch UK has consistently argued that new legislation governing the DNA Database could be adopted which significantly improves protection for human rights, is compliant with the European Court of Human Rights' judgment on this issue¹, regains much of the loss of public trust in policing, and does not have an adverse impact on crime detection or prevention.

GeneWatch welcomes the introduction of the Protection of Freedoms Bill as a significant step towards achieving this aim.

This briefing outlines a number of amendments that would improve the Bill.

GeneWatch's main recommendation is that Police National Database (Police National Computer) records and photographs should be deleted at the same time as DNA database records and fingerprints.

In addition, we would like to see further restrictions on the retention of data from persons given cautions, reprimands, warnings or convictions for a single minor offence; and some improvements to the other proposed safeguards.

About GeneWatch

GeneWatch UK is a not-for-profit organisation which aims to ensure that genetics is used in the public interest. GeneWatch began investigating the issues associated with the expansion of the National DNA Database (NDNAD) in 2003 and published the first report about the database for members of the public in January 2005.² GeneWatch has previously supplied written and/or oral evidence on the National DNA Database to the Scottish Parliament's Justice 2 Committee in 2006; the Science and Technology Committee; the Constitution Committee; the Home Affairs Committee; and to the European Court of Human Rights on behalf of S. and Marper. GeneWatch is regularly contacted by members of the public who have records on the DNA database, or whose children do so.

Background

The National DNA Database (NDNAD) was set up to contain the DNA records of convicted criminals in 1995 by Conservative Home Secretary Michael Howard. Two changes in the law, made by the Blair Government in 2001 and 2003, led to a massive expansion of the database, which now contains the records of approximately 5 million people (8% of the UK population, by far the largest proportion in the world)³. These changes in the law (amendments to PACE introduced by the Criminal Justice and Police Act 2001 and the Criminal Justice Act 2003) allowed DNA samples and records to be collected routinely from everyone arrested for any recordable offence, from the age of ten, and retained indefinitely whether or not they were charged or convicted.

The human rights concerns relate to the widening of the group of *individuals* (not crime scene samples) from whom DNA can be taken and then *retained* on the database. This is because:

- DNA can be used to track individuals or their relatives, so the Database could be misused by Governments or anyone who can infiltrate the system;
- DNA records are linked to Police National Computer records of arrest, which can be used to refuse someone a visa or a job, or lead to them being treated differently by the police;
- DNA is not foolproof, so people on the Database can be falsely implicated in a crime;
- Stored DNA samples contain additional private genetic information (e.g. health-related information).

Examples of people affected by the DNA database expansion include: a 12-year old-schoolboy arrested for allegedly stealing a pack of Pokemon cards⁴; a grandmother arrested for failing to return a football kicked into her garden⁵; a ten-year-old victim of bullying⁶; a 14-year-old girl arrested for allegedly pinning another girl's bra⁷; a 13-year-old who hit a police car with a snowball⁸; a computer techie wrongly accused of being a terrorist⁹; Janet Street-Porter¹⁰; comedian Mark Thomas¹¹; and MPs Greg Hands and Damian Green.

An estimated 986,185 unconvicted persons had records on the NDNAD at 24th April 2009. A small minority of these people will be still under investigation: the remainder will have been found innocent of any crime. During 2008/09, only 283 innocent individuals were successful in getting their records deleted under the 'exceptional cases' procedure¹², which requires application to the relevant Chief Constable. The procedure is widely regarded as unfair: success requires considerable persistence and knowledge of the system and is strongly influenced by police area and access to sympathetic media coverage, political support and/or expensive legal advice.

Children have been particularly affected by the expansion of the DNA database, following a significant increase in the numbers of young persons arrested following minor crimes or false accusations (such as pulling each others' hair or damaging trees or fences), due to the system of police arrest targets put in place as the database expanded.^{13,14,15} In addition, there has been a disproportionate effect on black and ethnic minority communities, with negative impacts on trust in policing in these communities:

estimates suggest that 37% of black men¹⁶ and 77% of young black men, aged between 15 and 34, may have records on the National DNA Database.¹⁷

Further, Home Office figures highlight that the significant expansion in the size of the DNA Database has not helped to solve more crimes. Collecting DNA is often very useful during a criminal investigation, but storing DNA profiles from hundreds of thousands of innocent people has made a minimal contribution to solved crimes (especially to serious crimes). This is probably because most of these people are extremely unlikely to go on to commit the type of crimes for which DNA evidence might be relevant. A detailed analysis of the available crime detection statistics and cases is available in GeneWatch UK's January 2010 submission to the Home Affairs Committee.¹⁸ More facts and figures are on the GeneWatch website.¹⁹

High profile cases involving the use of DNA (such as the Sally Ann Bowman and Ipswich murder cases) – which have often been cited in favour of the DNA database expansion - would not be affected by the proposed retention policy, because records would only be deleted after an investigation is complete and searches have been made against all stored crime scene DNA profiles. Retention of an individual's DNA profile and fingerprints is only useful if they commit a future crime in which DNA evidence has been obtained from the crime scene: such cases are overwhelmingly dominated by volume crimes committed by repeat offenders.

As far as GeneWatch is aware, after ten years' retention of innocent people's DNA records, no murder cases have been identified that would not have been solved had such records been deleted from the database. Provided DNA evidence from crime scenes is analysed promptly, the handful of relevant rape cases would be captured by the temporary retention of records from persons arrested and/or charged with qualifying offences as proposed in the Bill.

Retention of individuals' DNA records also plays no role in exonerating innocent people: only the crime scene DNA needs to be retained for this purpose as an accused or wrongly convicted person carries their DNA with them at all times. Similarly, known suspects (identified through other means) do not need a record on the DNA database in order to have their DNA sample taken and their profile compared with any crime scene evidence.

Further support for restricting the size of the database is provided by the evidence which shows that the number of crimes detected using DNA is driven by the number of crime scene DNA profiles loaded to the database, not by the number of individuals' DNA profiles retained. This has been confirmed by more recent research by the RAND Corporation in the USA, which states:²⁰ *"In assessing how DNA analysis is used to aid investigations in the U.S. system, we found that database matches are more strongly related to the number of crime-scene samples than to the number of offender profiles in the database. This suggests that "widening the net," which research indicates has only a minimal deterrent effect, might be less cost-effective than allocating more effort to samples from crime scenes. Indeed, the UK Home Office reached this same conclusion in an analysis of its National DNA Database (NDNAD) performance"*.

Comments on Protection of Freedoms Bill

Deletion of innocent people's DNA and fingerprint records (Clauses 1 to 4)

GeneWatch UK welcomes these provisions which introduce an approach similar to Scottish legislation for the automatic deletion of DNA profiles and fingerprints from persons who are not convicted of any offence. As outlined above, the Bill would allow the benefits of the use of DNA and fingerprints in solving crimes to be retained whilst significantly increasing the protection of the rights of innocent people.

However, it is important to note that people's details are entered on three (not two) databases on arrest: the National DNA Database, the fingerprint database (IDENT1) and the Police National Database (PND) (formerly the Police National Computer, PNC). Photographs are often also taken.

Currently, people who make a successful application under the 'exceptional cases' procedure have all their data deleted: including their records on the PNC or PND and their photographs. Thus, clause 1 as written would leave a number of people, including persons whose arrest was unlawful, worse off than before. PNC and PND records and photographs should therefore be included in Clause 1 as "Section 63D material".

The retention of PNC and PND records to age 100 is a matter of serious concern to many innocent people and to adults and children with records in relation to minor offences. These records can be used to refuse someone a visa or a job simply because they have a record of arrest and can lead to stigma and discrimination when accessed by officers on the beat.²¹ The US embassy now states that anyone who has been arrested must apply for a full visa, rather than using the visa waiver scheme.²² Visa applicants must then pay the ACPO Criminal Records Office (ACRO) to release their record to the US embassy as part of the expensive and time consuming application process.²³ This has major implications for a large proportion of the population who may no longer be able to travel freely simply because they have been arrested. An estimated 25% of adult men and 7% of women have been arrested at least once.²⁴

Innocent people's police records used to be removed after 42 days: those with cautions after 5 years; and those with single convictions for minor offences after ten.²⁵ By 2006, these guidelines had been abandoned in favour of retention of all PNC records, from everyone arrested for any recordable offence, to age 100.²⁶ The change was made as a matter of ACPO policy and never debated by parliament. The justification provided at the time was that the police needed to retain PNC records to see whether or not they had already taken a DNA sample from an arrested individual, and to help them track an individual down in the event of a DNA match.²⁷ This no longer applies if new legislation requires a person's record on the DNA database to be deleted.

Restrictions on retention of records from persons convicted of a single minor offence (Clause 7)

GeneWatch UK welcomes the inclusion of provisions to set time limits on the retention of DNA database and fingerprint records from children convicted of a single minor offence. However, it is again important that PNC and PND records should also be deleted.

Further, this provision should be extended to adults convicted of a minor offence but with a ten year rather than 5 year retention time. Home Office data suggests that the

likelihood of re-offending falls rapidly with time and is less than the male peak offending rate five years after an offence.²⁸ There is therefore no justification for retaining data from persons convicted of a single minor offence for longer than ten years.

Reprimands, warnings and cautions (Clause 18)

The system of reprimands and warnings was set up specifically to avoid children entering the criminal justice system unnecessarily, recognising extensive evidence that labeling children as criminal at a young age can be counter-productive.²⁹ A reprimand or final warning is not a finding of guilt in law, and they can be administered without the consent of the child or their parent. It is therefore surprising that the Bill allows children with more than one warning or reprimand to have their records retained for life.

When the DNA database was first set up, records were supposed to be deleted at the same time as Police National Computer Records: typically after 5 years for cautions or ten years for a conviction for a single minor offence. Failure to delete DNA database records for cautions in many cases was a result of administrative failure rather than a decision that indefinite retention of such data is necessary or proportionate.

The definition of “Persons convicted of an offence” in Clause 18 should therefore exclude persons given cautions, reprimand and warnings. Instead a 2-year retention time should be adopted for reprimands and warnings and a 5-year retention time for cautions (consistent with the ACPO guidelines in place until 2005). Time limits should be applied consistently to DNA profiles, fingerprints and PNC and PND records and photographs.

Destruction of DNA samples (Clause 14)

GeneWatch strongly welcomes the provision to destroy all DNA samples once the computerised DNA profiles (a string of numbers based on parts of the DNA) have been obtained from them. The storage of large numbers of DNA samples in commercial laboratories has raised significant privacy concerns and storage creates unnecessary costs (approximately £1 per sample per year). Only the DNA profiles – not the samples – are needed for identification purposes. This provision is consistent with past recommendations by the Human Genetics Commission and a similar safeguard has already been implemented by a number of other countries (e.g. Germany, Belgium, Switzerland).

National security (Clause 9 and Schedule 1)

GeneWatch UK welcomes the inclusion of provisions to delete the records of innocent persons whose DNA has been collected at ports and borders or by the security services (Schedule 1). The introduction of a mechanism for oversight of national security determinations by a Commissioner is also welcome. However, it is unclear why the provision to allow potentially indefinite retention of biometric data on national security grounds (subject to two-yearly renewals) has been applied to data collected from persons other than terrorist suspects, including persons arrested at any age for any recordable offence and those wrongfully arrested. In GeneWatch’s view the application of this power should be restricted to terrorist suspects.

Destruction of copies (Clause 13)

The Bill requires any copies of DNA profiles or fingerprints held by the police to be destroyed but it does not include copies held by other agencies e.g. the security

agencies and UK Border Agency. Copies held by these agencies should also be destroyed.

Use of retained material (Clause 16)

The listed uses of retained material includes at 63S(1)(d) “*for purposes related to the identification of a deceased person or of the person to whom the material relates*”.

Use of retained DNA profiles and fingerprints for identification of a living person outside the context of criminal or terrorist investigations has been an allowed use under PACE only since the Counter Terrorism Act 2008 (Clause 14 (5)). Use of the DNA and fingerprint databases for identification purposes was first proposed by the previous government when it sought (unsuccessfully) to expand the routine collection of biometrics to all persons arrested for non-recordable offences, such as dropping litter and parking fines, and to allow individuals to be held for four hours in Short Term Holding Facilities (STHF) in shopping centres whilst their identity was verified using their DNA and fingerprints.³⁰

In its evidence to the European Court the Home Office stated (correctly, at the time, excepting inadvertent disclosures) that an individual’s identity would only be revealed if there was match between a crime scene DNA profile and an individuals’ DNA profile. The extension of uses to identification of a person is a significant change of use in this respect. It allows the use of DNA to track any individual with a record on the database (for example, by examining DNA left on a beer glass or coffee cup) in any circumstance (for example, allowing the police or secret services to identify whether or not someone has attended a political meeting, rather than a crime scene). Such uses would raise significant human rights concerns in any authoritarian state, due to the potential for tracking dissidents or political opponents (and potentially also relatives, using familial searches of the DNA database).

GeneWatch UK therefore recommends that the use of the DNA database and fingerprint database for “*identification ... of the person to whom the material relates*” should be restricted to identification of specific persons on UK police or Interpol wanted lists.

Commissioner for the Retention and Use of Biometric Material (Clauses 20 to 22)

GeneWatch UK welcomes the inclusion of the oversight powers to be exercised by the proposed Commissioner for the Retention and Use of Biometric Material. However, we support calls made by a number of other organisations to streamline the system, clarify responsibilities, improve communications and cut costs by creating a single Privacy Commissioner to fulfil the assorted roles and responsibilities proposed or already undertaken by the Biometrics Commissioner, the CCTV Commissioner, the Interception of Communications Commissioner, the Office of Surveillance Commissioners and the data protection aspects of the Information Commissioner’s Office.

Summary of recommendations

GeneWatch strongly welcomes the destruction of DNA samples and the provisions to delete DNA database and fingerprint records from innocent people and from children convicted of a single minor offence. However, Police National Computer (Police National Database) records and photographs should also be deleted if innocent people are not to be in a worse situation than those individuals who are currently successful under the 'exceptional cases' procedure.

GeneWatch recommends amendments to the following clauses:

Clause 1: "Section 63D material" should also include records stored on the Police National Computer and Police National Database, and photographs.

Clause 7: A new clause should be introduced replicating Clause 7 for adults convicted of a single minor offence, but with a longer retention time (ten years instead of five).

Clause 9: The power to retain data on national security grounds should be restricted to terrorist suspects.

Clause 13: Copies of material held by other agencies e.g. the security agencies and UK Border Agency should also be destroyed.

Clause 16: The use of the DNA database and fingerprint database for "*identification ... of the person from whom the material came*" should be restricted to identification of specific persons on UK police or Interpol wanted lists.

Clause 18: "Persons convicted of an offence" should exclude persons given cautions, reprimand and warnings. Instead, new clauses should be introduced to set a 2-year retention time for reprimands and warnings and a 5-year retention time for cautions.

Clauses 20-22: The multiple existing and proposed commissioners should be replaced by a single Privacy Commissioner.

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travelling. Available on: http://london.usembassy.gov/add_req.html . See also the US Visa Waiver Wizard: <http://london.usembassy.gov/root/visa-wizard/pages/index.html> .

²³ US visa fee is currently \$140 and requires a visit to the US embassy. Fees are currently £35 (standard) or £70 (premium) to obtain a copy of the police record:

http://www.acpo.police.uk/documents/Application_Form.doc . Reported costs are 60p per record:

<http://www.dailymail.co.uk/news/article-1145581/Body-charge-UK-policing-policy-18m-year-brand-charging-public-70-60p-criminal-records-check.html>

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²⁷ The National DNA Database Annual Report 2005/06 (page 9) states: "*In support of the powers provided by Section 82 of the CJA [Criminal Justice and Police Act] and Sections 9 and 10 of the CJA [Criminal Justice Act], it has become necessary to retain a nominal record of every person arrested for a recordable offence on the Police National Computer (PNC) to enable a link to be made between the DNA profile held on the NDNAD and fingerprints held on the national automated fingerprints database (IDENT1) to help the police identify and locate an individual following a match being obtained on the NDNAD*".

²⁸ Home Office (2009) Keeping the right people on the DNA database: science and public protection. Annex D, Figure 1, p.88.

²⁹ Edinburgh Study of Youth Transitions and Crime <http://www.law.ed.ac.uk/cls/esytc/>

³⁰ The proposals were included in the Home Office (2007) Modernising Police Powers Consultation and were intended to be introduced via secondary legislation. For further information see: <http://www.genewatch.org/sub-551990>