GeneWatch UK comments on the Northern Ireland Criminal Justice Bill

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GeneWatch UK welcomes the opportunity to comment on the aspects of the Criminal Justice Bill which relate to the retention of samples, DNA profiles and fingerprints. We broadly welcome the introduction of the Bill and the protections it introduces for privacy and human rights. However, we have a number of important suggestions for improvement which, if adopted, could establish best practice safeguards for retention of DNA profiles and associated data in Northern Ireland.

About GeneWatch UK

GeneWatch UK is a not-for-profit organisation which aims to ensure that genetics is used in the public interest and that members of the public have a say about genetic science and technologies. GeneWatch UK published the first report for members of the public about the UK National DNA Database in January 2005. We have since received many queries from people who are concerned about the retention of their own or their children's DNA, fingerprints and associated data in England, Wales and Northern Ireland. GeneWatch's Director provided expert evidence to the applicants in the case of S. and Marper v. the UK (European Court of Human Rights) and has supplied both oral and written evidence on this issue to numerous parliamentary committees including the Scottish Parliament's Justice Committee and the Science and Technology, Home Affairs and Constitutional Committees at Westminster, as well as the scrutiny committee for the Protection of Freedoms Bill. GeneWatch UK is now working in partnership with the Council for Responsible Genetics and Privacy International to assist civil society organisations and policy makers in developing best practice human rights safeguards for DNA databases worldwide.

Background

The Forensic Science Northern Ireland laboratory (FSNI) analyses and stores DNA samples in Northern Ireland on behalf of the Police Service Northern Ireland (PSNI) and manages Northern Ireland's computer database of DNA profiles. It also exports DNA profiles to the National DNA Database (NDNAD) in England.

When the National DNA Database was first set up in 1995, DNA was collected on charge for a relatively small number of serious offences, when relevant to the investigation. DNA profiles and fingerprints were supposed to be deleted at the same time as records on the Police National Computer (PNC), following weeding rules which allowed retention of records for cautions for five years, records for minor offences for ten, and records for serious or multiple offences indefinitely. The indefinite retention of innocent persons' DNA profiles and fingerprints was introduced in 2001 in England, Wales and Northern Ireland (but not Scotland) and weeding rules for the PNC were subsequently abandoned altogether. It is important to note that if DNA database records are retained, PNC records and fingerprints must also be retained to allow tracking of the individual in the event of a match between a crime scene DNA profile and the individual's DNA profile.

The provisions for collection of DNA in the UK have subsequently been significantly extended and go way beyond most other counties, allowing routine collection on arrest for any recordable offence, without judicial oversight. Because DNA is typically collected from less than 1% of crime scenes, in most cases the DNA sample taken from the individual will not be relevant to investigation of the specific offence for which they have been arrested. Due to the low age of criminal responsibility at age ten in England, Wales and Northern Ireland, DNA will also be collected from many children accused of very minor offences. Examples of reported cases in England include: a 12-year old-schoolboy arrested for allegedly stealing a pack of Pokemon cards[1]; a grandmother arrested for failing to return a football kicked into her garden[2]; a ten-year-old victim of bullying who had a false accusation

made against her[3]; a 14-year-old girl arrested for allegedly pinging another girl's bra[4]; a 13-year-old who hit a police car with a snowball[5]; a computer technician wrongly accused of being a terrorist[6]; Janet Street-Porter[7]; comedian Mark Thomas[8]; and Conservative MPs Greg Hands and Damian Green.

The section of the Criminal Justice Act 2003 which allows DNA to be taken on arrest, rather than on charge, was introduced via a late amendment submitted by the UK Home Secretary during the first week of the Iraq war: no Northern Ireland MP from any party voted in favour it.[9] However, the provisions were later applied to Northern Ireland via the Criminal Justice (Northern Ireland) Order 2004, without consultation, whilst the Assembly was suspended.[10]

Following the judgment of the European Court of Human Rights in the S. and Marper case in December 2008, the Protection of Freedoms Act 2012 has been adopted in England and Wales, although a commencement order for the DNA provisions has not yet been issued. The Northern Ireland Criminal Justice Bill mirrors many of the same provisions, although the decision to remove provisions allowing indefinite retention of material on national security grounds (via renewable two year periods) is welcome.

DNA profiles collected from individuals in Northern Ireland and Scotland are copied to the National DNA Database in England and retained records will be searchable against any crime scene DNA collected anywhere in the EU under the EU's Prüm Decisions, once these have been implemented (implementation in the UK is delayed pending compliance of the National DNA Database with the European Court of Human Rights' judgment in the S. and Marper case).

Comments on the Criminal Justice Bill: Schedules 2 and 3

Destruction of material obtained unlawfully or as a result of unlawful arrests or mistaken identity: 63B(3)(b)
This provision requires DNA profiles and fingerprints to be destroyed if it "appears to the Chief Constable" that the material was obtained unlawfully or as a result of an unlawful arrest or mistaken identity. Even prior to commencement of the same provision in the Protection of Freedoms Bill in England and Wales, GeneWatch has received a number of calls relating to circumstances where individuals dispute the circumstances of their arrest or collection of their DNA and fingerprints. It is clear that allowing chief constables discretion in this area will be problematic. GeneWatch UK recommends that such determinations are either made by a third party or may be appealed to a third party (such as the Police Ombudsman or Northern Ireland Biometrics Commissioner).

Retention and deletion of DNA profiles and fingerprints (63D)
GeneWatch broadly welcomes the proposed approach to implementing the judgment of the European Court of Human Rights. However, we question whether it is necessary and proportionate: (1) to retain material for three years or more from persons who have merely been arrested and not charged with a qualifying offence; and (2) to retain material indefinitely from all adults convicted or cautioned for any recordable offence and all young persons convicted or cautioned for more than one recordable offence. These issues are addressed in turn below.

In addition, 63C(1) allows retention of material until the "conclusion of the investigation of the offence" or the conclusion of any proceedings. GeneWatch recommends that the wording of this clause is clarified so that individuals who have been ruled out of further inquiries do not have their data retained indefinitely in circumstances where a case is not closed (i.e. when an investigation may be continuing – perhaps for years - but the individual has been eliminated from inquiries).

Persons arrested for a qualifying offence

Section 18A of the Criminal Procedure (Scotland) Act 1995, as inserted by section 83 of the Police, Public Order and Criminal Justice (Scotland) Act 2006, which was commenced on 1 January 2007, allows retention of DNA profiles and fingerprints for three years in the first instance when "*criminal proceedings in respect of a relevant sexual offence or a relevant violent offence were instituted against the person from whom the sample was taken but those proceedings concluded otherwise than with a conviction or an order under section 246(3) of this Act*". In the Protection of Freedoms Act, and by extension here, this category of persons has been broadened to include not only those proceeded against for a relevant sexual or violent offence, but all those charged, and some persons arrested, for a qualifying offence. The extension to persons arrested but not charged is particularly problematic because there is no oversight of arrests by individual officers and hence powers of arrest are very broad and open to discriminatory use or misuse. Further, people may be arrested merely on the basis of a false accusation or because they are in the wrong place at the wrong time (for example, witnessing or even trying to stop a crime).

The main purpose of section 83 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 was to address concerns about violence against women, where it is common for proceedings to be dropped due to reluctance of the victim to give evidence or difficulties establishing lack of consent to sexual intercourse. In rare cases, men involved in such cases subsequently commit stranger rapes and in a very small subset of such crimes it is possible that a 'cold hit' on the DNA database is the only way to identify the offender as a suspect (if suspects are identified through other means, their DNA can be taken from them on arrest and it is immaterial whether they have a record on the database). However, the number of relevant cases is likely to be very small.

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.[11] Based on subsequent additional information from the Home Office, GeneWatch estimates that in 2008/09 fifty-six DNA detections (approximately 28 convictions) in England and Wales were likely to have involved the stored DNA profile of a previously unconvicted person (and therefore could potentially be missed if all innocent people's profiles were removed from the National DNA Database).[12] The vast majority of these convictions would be for volume crimes and, even if all innocent person's DNA profiles were removed from the Database, most of the estimated 28 convictions would be delayed not lost since any future re-arrest of the same individual would lead to a match with the relevant stored crime scene DNA profile. In 2008/09 0.98% of DNA detections were for rape and 0.4% for homicide (murder plus manslaughter). This suggests that of the 28 estimated convictions involving unconvicted persons records 0.27 might be for rape (about one every 3 to 4 years) and 0.11 for homicide (about one every ten years). This is probably an overestimate because the proportion of 'cold hits' in rape and murder cases is likely to be lower than for volume crimes, due to the fact that most murderers and rapists are known to their victims. This means that perpetrators of these types of crime are more likely to have their DNA taken as 'known suspects' rather than being identified using the DNA database. In reality, GeneWatch is not aware of any murder cases that were solved as a result of more than ten years' retention of innocent persons' DNA profiles (despite persistent attempts by the police to identify such cases). A very small number of rape cases have been highlighted by the police but the circumstances surrounding most these have been disputed. Northern Ireland's population is only about 3.2% of that of England and Wales, so assuming similar crime rates and detection rates, it might take a hundred years or more to solve one rape through the retention of all innocent persons' DNA records and several hundred years to solve one murder.

In view of the low threshold for arrest, the lack of any oversight of police powers of arrest, the potential for false accusations, the expected extreme rarity of relevant solved cases (especially in the small population of Northern Ireland), and the complexity of the retention

regime purely for arrests (requiring oversight by the Biometrics Commissioner), GeneWatch suggests that the power to retain material for a three year period (with possible subsequent extension) is restricted to persons who are charged with a qualifying offence, not extended to those who are merely arrested. This would require the deletion of the words "arrested for, or" in 63D paragraph (1)(a) and the deletion of paragraph (5). This change might also allow the position of Northern Ireland Biometrics Commissioner to be dispensed with altogether, saving money (including the police time that might be spent in making applications).

Convicted and cautioned persons
The Bill treats persons who have been cautioned as if they are convicted. All adults cautioned or convicted for a single minor offence, and all young persons cautioned or convicted for more than one offence will have their records retained indefinitely. More consideration should be given to whether this is necessary and proportionate.

As noted above, the original rules when the National DNA Database was first set up involved the deletion of records after five years for a caution or ten years for a single minor offence. There has been no debate about abandoning these rules, which happened merely as a matter of police policy. Recordable offences include imprisonable offences plus around fifty other offences including "Taking or riding a pedal cycle without the owner's consent".[13] GeneWatch understands that the list of recordable offences is under review but that whatever offences are recordable in future will likely be uploaded to the PNC. If DNA profiles and fingerprints are retained indefinitely it will be necessary to retain the PNC record indefinitely, and information within it will also be available for employment and visa checks, most likely on a UK-wide basis.

In 2010, the Equalities and Human Rights Commission expressed the view that the indefinite retention of all convicted persons' records is incompatible with the European Convention on Human Rights[1], and obtained a legal opinion to this effect[2]. The Opinion relies on the wording of The Committee of Ministers' Recommendation R92(1)[3], which was referred to in the S. and Marper judgment, and on the need to give due consideration to the rehabilitation of offenders.

In GeneWatch's view, time limits should be reintroduced for the retention of data from adults convicted or cautioned for a single minor offence and the retention regime for children should also be modified so that conviction or caution for more than one minor offence does not result in indefinite retention of material.

Destruction of copies: 63L(2)
This provision allows police to retain copies of DNA profiles provided the individual cannot be identified from them: but in practice anonymising DNA profiles may be impossible. In England and Wales, the inclusion in the Protection of Freedoms Act of a similar provision has been contentious and the decision to allow the retention of copies has led to some loss of public trust in the protection provided by the Act. This exception to the requirements for destruction of copies was included because multiple DNA profiles are processed in batches in the laboratories which analyse the biological samples for the police. This gives rise to

[1] Equalities and Human Rights Commission (2010) Government's proposals incompatible with European Convention on Human Rights. Press Release. 5th January 2010. Available on: http://www.equalityhumanrights.com/media-centre/government-s-proposals-incompatible-with-the-european-convention-on-human-rights
[2] Available on: http://www.equalityhumanrights.com/uploaded_files/counsels_advice_dna_database.pdf
[3] Available on: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=573811&SecMode=1&DocId=601410&Usage=2

computerised batch files which contain multiple DNA profiles from a group of persons some of whom will subsequently be convicted of an offence and some of whom will not. Extracting individual profiles from the batch files for deletion is regarded as expensive and unfeasible: however the possibility of changing laboratory processes to avoid this problem is now being explored in England and Wales. It remains unclear why the batch files need to be retained beyond the period necessary for analysis and quality assurance (i.e. the period allowed for retention of biological samples in 63M). In GeneWatch's view the explanation given by the Home Office that batch files may need to be revisited in case of a dispute of DNA evidence in court is unconvincing. Disputes in court about the reliability of an individual's DNA profile (as opposed to a crime scene DNA profile) should normally be resolved by a fresh analysis of that individual's DNA, which can easily be collected from the accused, rather than by tracking back the profile to the batch file in the laboratory. A fresh analysis is essential to avoid errors due to sample mix-ups or laboratory contamination which may not be identified simply by revisiting computer files.

GeneWatch UK recommends that the status and use of batch files created at Forensic Science Northern Ireland (FSNI) is clarified, preferably with the assistance of the Information Commissioner's Office Northern Ireland, including: (i) whether or not such batch files are in practice created and retained at FSNI; and (ii) whether indefinite retention of such files is really necessary and proportionate. A revised provision should then be introduced which ideally eliminates the retention of copies altogether or, at minimum, provides a time limit or other restrictions on the retention of such data.

Destruction of samples: 63M

GeneWatch UK welcomes the provisions for the destruction of samples once the computerised DNA profiles needed for identification purposes have been obtained from them. This is an important protection for privacy and human rights because stored DNA samples contain unlimited genetic information, including health-related information. Temporary retention of samples is necessary for quality assurance purposes and the stated period of six months' retention is clearly adequate for this, especially since Chief Constables may request an extension if necessary in complex cases. Biological samples are already destroyed in some countries with DNA databases, such as Germany, and will be destroyed in England and Wales once the Protection of Freedoms Bill is implemented. Adoption of this provision is therefore in line with best practice internationally.

Use of retained material: 63N(1)

There are two problems with the provision 63N(1) which defines the uses to which retained material can be put.

Firstly, the phrase "purposes related to" the prevention or detection of crime can be interpreted broadly and is open to abuse. In England and Wales, this phrase was used to allow controversial research attempting to predict people's ethnic appearance from their DNA profiles, on the grounds that such research involved a purpose related to the prevention or detection of crime. Whilst research relevant to improving operation of the database (e.g. checking for errors and false matches) should be allowed, it is unethical to conduct research which attempts to link DNA profiles or other genetic information with physical characteristics or other attributes without people's consent. GeneWatch recommends that an additional clause is added to specifically prevent such uses.

Secondly, the use of material to identify "the person to whom the material relates" is also open to abuse. This phrase first appeared in the Counter-Terrorism Act 2008: it was not part of the original purpose for which the DNA database was established in 1995. This use goes beyond the identification of deceased persons and body parts to allow the identification of living persons who are not suspected of committing a crime. Living persons who are suspected of crimes or might be the victims of crimes (e.g. missing children or kidnapped

persons) are adequately covered by provision 63N(1)(a), which allows their DNA records to be used for purposes related to the prevention or detection of crime. It is extremely questionable whether the police should be allowed to use DNA or fingerprints to track individuals who are not suspected of committing (or being a victim of) an offence. This provision would, for example, allow the police to collect DNA from mugs or glasses left at a political meeting and see if anyone present had a record on the DNA database, thus identifying them by name and allowing the stored information in, or linked to, their DNA database record to be used to track them down. Because parts of an individual's DNA are shared with relatives, the database could also be searched to find relatives of the individuals present at the meeting using a "familial search" (which identifies partial matches with DNA profiles that may belong to relatives). Such searches can be used to track down biological relatives and to identify paternity and non-paternity. Since DNA database records in Northern Ireland are copied to the UK National DNA Database in England, use of these records for the identification of living persons not suspected of committing any crime would extend to police forces there. Further, this provision sets a poor precedent for other countries which are currently debating legislation to establish or expand DNA databases (e.g. Brazil, India, South Africa) or have proposed creating DNA databases of their whole populations (UAE, Pakistan, Uzbekistan). The phrase "the person to whom the material relates" should therefore be deleted and replaced with "body parts".

For further information contact:

Dr Helen Wallace
Director
GeneWatch UK
60 Lightwood Rd
Buxton
SK17 7BB
Email: helen.wallace@genewatch.org
Tel: +44-(0)1298-24300
Website: www.genewatch.org

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