House of Commons
Home Affairs Committee

The National DNA Database: Government Response to the Committee's Eighth Report of Session 2009–10

Sixth Special Report of Session 2010–11

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The Home Affairs Committee

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The current staff of the Committee are Elizabeth Flood (Clerk), Joanna Dodd (Second Clerk), Sarah Petit (Committee Specialist), Eleanor Scarnell (Inquiry Manager), Darren Hackett (Senior Committee Assistant), Sheryl Dinsdale (Committee Assistant), Victoria Butt (Committee Assistant), and Alex Paterson (Select Committee Media Officer).

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Report

On 8 March 2010 the Home Affairs Committee published its Eighth Report of Session 2009-10, *The National DNA Database*, HC 222. The Government's response to the report was received on 2 March 2011, and is published as an Appendix to this Special Report.

Government Response

Introduction

The Home Affairs Select Committee published its report "The National DNA Database" on 8 March 2010. This Appendix sets out the Government's response to the conclusions and recommendations of that report.

The Committee's report includes eleven conclusions and recommendations for action by the Government, the Home Office, the National Policing Improvement Agency and the Information Commissioner. In this response the recommendations are identified according to the paragraphs in which they appear in Home Affairs Select Committee 's report. Some responses are grouped together where they respond to the same issue.

It is currently impossible to say with certainty how many crimes are detected, let alone how many result in convictions, due at least in part to the matching of crime scene DNA to a personal profile already on the database, but it appears that it may be as little as 0.3%—and we note that the reason for retaining personal profiles on a database is so that the person can be linked to crimes he/she commits later. (Paragraph 6)

While it is true that only a small proportion of all crimes are detected as a result of a DNA match, the Government does not consider that a rudimentary analysis of the number of crimes reported and the number of DNA matches provides a meaningful basis for examining the effectiveness of the National DNA Database. This is because there are many types of crime, such as fraud or forgery, where there is no 'scene of crime' from which biometric material can be obtained for matching against the Database.

Nonetheless, this Government has committed to ensuring that all those in prison are on the Database, along with all those with previous convictions for serious offences. A summary of our proposals is set out in the Annex and you will note that the Protection of Freedoms Bill, published today, gives effect to these measures.

We wish to make it clear at the outset that we are strongly of the belief that DNA profiling and matching are vital tools in the fight against crime; and that it is essential, wherever possible, to gather, profile and store information relating to DNA discovered at crime scenes. Although it is very unlikely that DNA on its own could bring about a conviction for a crime—and, indeed, we understand that the Crown Prosecution Service requires further corroborative evidence before it will bring a prosecution—as Sir Hugh Orde, the head of ACPO, told the Public Bill Committee, DNA evidence places a person at the scene of the crime and he/she then has to explain why they were there or prove that the DNA match is faulty. (Paragraph 11)

The Government agrees with the Committee that taking DNA samples from all those arrested for recordable offences, and the comparison of that DNA with previous crime scenes, is essential. That is why we are proposing a change to the position in Scotland, so

that all samples taken will be profiled and speculatively searched against the NDNAD before being destroyed, irrespective of whether a decision has already been taken to discontinue the investigation.

Nor do we question the taking of DNA samples from everyone arrested for a recordable offence. We note that the identification of perpetrators of some very serious crimes, including murder, has been made possible by the matching of a personal sample taken in connection with a later, less serious offence with a crime scene sample. We also support the principle, as set down in the Crime and Security Bill, of destroying the actual personal samples as soon as practicable, not least as they could theoretically be used to derive other personal information about the individual such as family relationships or information about health. In this Report we are solely concerned with the retention of personal profiles on the database: whose profiles should be retained, for how long they should be stored, and the processes for getting one's profile deleted from the database. (Paragraph 12)

The Government agrees with the Committee that the proposal of the previous administration to destroy biological samples once they have been profiled and loaded to the Database is an important safeguard against any perception that such samples might be misused. We have therefore included in the Protection of Freedoms Bill a requirement that all such samples be destroyed within six months of being taken.

Retention of personal profiles

It is not known how many crimes are solved with the help of the stored personal profiles of those not previously convicted of a crime. The highly complicated calculations made by GeneWatch to try to answer this question on the basis of information from various sources already in the public domain, and the provisional nature of its conclusions, underline the need for the Home Office to undertake research specifically on this issue. (Paragraph 15)

The Government does not believe further research in this area is required. As set out in more detail below, the judgment of the European Court of Human Rights in Marper was clear in its endorsement of the Scottish Model for DNA retention. Many respondents to the previous Government's consultation on DNA retention, including Black Mental Health, the Equalities and Human Rights Commission, GeneWatch, Liberty and the National DNA Database Ethics Group, also endorsed the Scottish model. Finally, the Government made clear in the Programme for Government that it was committed to the adoption of this model and, in the light of this widespread endorsement of the Scottish model, the Government does not consider that further research in this area would represent value for money.

Equity and proportionality

It could therefore be argued that the DNA from those never charged with an offence should be treated differently from those charged but not convicted. However, this runs counter to the principle in England and Wales that in law people are either innocent or guilty by introducing gradations of innocence. It also does not tackle the nub of the problem: arrest should be a high threshold. At least in part, the anomalies have arisen in the current system because of the way in which offences are treated—for example, far more incidents are now classified as crimes of violence even if no physical assault has taken place—and target-driven policing has encouraged police officers to treat minor incidents formally in order to reach targets. We hope that both these trends will be mitigated by the move back to 'commonsense policing'; if so, the number of arrests for flimsy reasons should decline sharply. We therefore do not recommend the return to the pre-2004 situation of DNA being collected only on charging not on arrest. (Paragraph 28)

However, the counter-balance to this is that it should be easier for those wrongly arrested or who have volunteered their DNA to get their records removed from the database. We recommend some changes to make this possible later in this report. (Paragraph 29)

The Government agrees with the Committee that biometric data should be taken following arrest, rather than charge, in order to gain maximum advantage from biometric technology. The Government also agrees with the Committee that the previous administration's target-driven culture has had an unfortunate effect on policing methods, and would wish to see a return to the 'commonsense policing' that the Committee describes. The Government further agrees that the process to request removal from the Database should be more transparent and consistent; further details of this are set out below.

It is arguable on the basis of natural justice and the Equalities and Human Rights Commission's judgment that those suspected of committing the most serious crimes should be treated differently from those suspected of more minor crimes. Ms Abbott, Liberty and GeneWatch clearly thought so. We support the distinctions made among juveniles, not least because numerous studies have shown that many 'get into trouble with the law' for something comparatively minor and never offend again. This leaves the question whether the same distinction should be made among adults. The police argued that enough people progressed from committing 'minor' crimes to serious crime that the effectiveness of the database would be seriously undermined if those suspected of minor crimes had their DNA profiles deleted earlier than others. We accept this, and therefore do not recommend that the Bill's provisions relating to adults make a distinction between those arrested for major and minor crimes. (Paragraph 31)

The Government notes this recommendation but, having given it careful consideration, does not accept it. The European Court of Human Rights, in considering the case of S &

Marper vs. the UK in December 2008 took particular note of the position in Scotland, stating at paragraphs 109 & 110 of its judgment:

> The current position of Scotland, as a part of the United Kingdom itself, is of particular significance in this regard…the Scottish Parliament voted to allow retention of the DNA of unconvicted persons only in the case of adults charged with violent or sexual offences and even then, for three years only, with the possibility of an extension to keep the DNA sample and data for a further two years with the consent of a sheriff.
>
> This position is notably consistent with Committee of Ministers' Recommendation R(92)1, which stresses the need for an approach which discriminates between different kinds of cases and for the application of strictly defined storage periods for data, even in more serious cases…

The Government considers that the rights of those who are innocent of any crime, notwithstanding their arrest for a minor crime, outweigh the potential public protection benefits of the retention of their biometric data. The European Court took a similar approach at paragraph 112 of its judgment:

> The Court observes that the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests.

The Government has also taken account of the conclusion of the previous Joint Committee on Human Rights when it considered the Crime & Security Bill proposed by the last administration. In its Twelfth Report of Session 2009-10 (*Legislative Scrutiny: Crime and Security Bill et al*), the Joint Committee noted at paragraph 1.73 that:

> In our view, various approaches could comply with the Marper judgment—from no retention of DNA of those not ultimately convicted to the Scottish model, where DNA is retained for those charged but not convicted of serious offences. The Bill could be amended to adopt the Scottish model, which complies with the guidance of the Grand Chamber in Marper and the Council of Europe in its Recommendation on the use of DNA in the criminal justice system (R (92) 1). The Scottish Government does not consider that this approach has undermined the ability of Scottish police to investigate criminal offences. While the Government argues that its approach has greater value for the purposes of the investigation and prevention of crime, the Scottish model is more likely to strike a proportionate balance between this important public interest and the right to respect for private life of those individuals whose samples are taken on arrest but who are subsequently not charged or convicted.

The Government therefore considers that a model that differentiates between those arrested for, but not convicted of, offences of differing degrees of seriousness, as used in

Scotland, is appropriate in all the circumstances. The proposals set out in the Annex reflect that.

Length of time for retaining profiles

The Home Secretary is right to caution against a simple identification of a second arrest, with no indication of outcome, as being proof of guilt. If faced with a crime such as burglary, where it is known that a high proportion of offences is committed by a limited number of repeat offenders, it is right for the police to look first at suspects previously arrested for a similar crime, rather than to the general population. Arrest to arrest data reveal the likelihood of being arrested again, but do not equate to the risk of offending after an initial arrest. (Paragraph 34)

The Government believes that the determination of an appropriate retention period is essentially a matter of political judgement, and agrees with the Committee's assessment that the previous Government's arrest to arrest data does not provide a firm enough basis upon which to form policy. Given the widespread endorsement of the Scottish model set out above, the Government does not believe that public and Parliamentary debate would be significantly better informed by a further examination of the statistical data on the propensity to offend in the future of those individuals arrested for or charged with offences but not subsequently convicted.

The Government has given careful consideration to the position of juveniles in the light of the European Court's finding, in its Marper judgment, that particular attention should be paid to the protection of juveniles from any detriment resulting from the retention of their data. However, the broader criminological literature suggests that early contact with the Criminal Justice System is a strong risk factor for persistent offending in later life. The Government has therefore taken into account the particular position of children in society in deciding not to extend the period of retention in their case.

We are not convinced that retaining for six years the DNA profiles of people not convicted of any crime would result in more cases being cleared up—let alone more convictions obtained—than retaining them for three years. We therefore recommend a three year limit, and a draft amendment to the Crime and Security Bill to this effect is in the Annex to this Report. (Paragraph 37)

The Government agrees with the Committee's views on the legislation proposed by the previous administration and, in particular, considers that a six-year retention period would impose an unwarranted intrusion on the rights of innocent individuals without a significant improvement in public protection. The Government's proposals set out in the Annex therefore seek to implement the proposals in the Coalition Agreement to 'adopt the protections of the Scottish Model' for DNA Retention.

Removing records from the Database

The Government has tabled amendments at Report Stage of the Bill to give the National DNA Database Strategy Board the central co-ordinating role, as the organisation to which applications for deletion of records would be made, handling the case, making a recommendation to the relevant chief constable based on the statutory guidance that it (the Board) would issue, and informing the applicant of the result. We support these proposals. (Paragraph 40)

This Government is committed to abolishing the 'postcode lottery' where residents of one force area would have their biometrics deleted, while a resident of another force area with almost identical case would not. As a further safeguard, we have also decided to place the National DNA Database itself on a statutory footing, as a number of organisations have previously called for. While we will not therefore be bringing into force what became section 23 of the Crime & Security Act 2010, we agree with the Committee that such provision is appropriate and have included provision to that effect in clauses 23 and 24 of the Protection of Freedoms Bill.

We consider that the then Home Affairs Committee should be consulted by the Board on the draft guidance. The Home Secretary cited an example of where DNA data should not be retained—that of someone arrested for shoplifting when trying to exchange goods for which she was carrying the receipt. This example is absolutely cut and dried; we expect the guidance to allow for the destruction of data in a far wider range of cases. (Paragraph 41)

The Government agrees that a wide range of opinion should be canvassed on the proposed Strategy Board Guidance, in order to ensure the process is as transparent and fair as possible. We will work with the Board to ensure that draft Guidance is circulated as soon as possible to the Committee and other interested parties and views sought on its contents. The comments subsequently received will be passed to the Strategy Board for its consideration in finalising the Guidance.

Annex

BIOMETRIC RETENTION FRAMEWORK – SUMMARY OF PROPOSALS

Crime & Security Act 2010

Sections 2-7 of the Act will be commenced, enabling the taking of biometrics from those previously convicted in a wider range of circumstances and giving the National DNA Database Strategy Board Guidance statutory backing.

Sections 14 and 16-23 of the Act will be repealed.

Protection of Freedoms Bill

Provisions in the Protection of Freedoms Bill meet the commitment in the Programme for Government to adopt the protections of the Scottish model for DNA retention. Specific provisions will:

- require the immediate destruction of fingerprints and DNA profiles taken from adults and juveniles following arrest for a minor crime once a decision is made not to charge or to discontinue proceedings, or following acquittal;
- enable all DNA taken on arrest to be 'speculatively searched' against the national databases, including previous crime scenes (i.e. 'cold cases'), even if a decision to discontinue has already been taken;
- enable the retention of fingerprints and DNA profiles taken from adults and juveniles following charge for a qualifying offence (or, in certain restricted circumstances where it is deemed the victim of the crime could be vulnerable, following arrest) for three years, with a single extension of two years available from the courts;
- enable the retention of fingerprints and DNA of juveniles on first conviction, reprimand or warning for a minor offence to be retained for 5 years, if the sentence is non-custodial, or for the length of sentence plus 5 years for those sentenced to immediate youth custody;
- enable the retention of fingerprints and DNA from juveniles receiving a second reprimand or warning or a further conviction or, where a custodial sentence of over 5 years is imposed for a first offence, to be retained indefinitely; a first conviction for a juvenile for a qualifying offence will also result in indefinite retention;
- continue the indefinite retention of fingerprints and DNA profiles of convicted adults;
- treat those who have accepted cautions as if they have been convicted by a court, but include in the statutory guidance to be issued by the National DNA Database Strategy Board the possibility of deletion on application after 5 years, where the chief officer is satisfied that the individual does not pose a risk of re-offending;

- enable the retention of DNA profiles and fingerprints of those issued with Penalty Notices for Disorder for two years; and
- require the destruction of all biological DNA samples within six months of being taken.
- The Bill will also provide a common framework for the management of fingerprints and DNA profiles;
- A 'qualifying offence' will continue to be defined as per the list in section 7 of the Crime & Security Act 2010, with the addition of the serious and violent offence of robbery.

National Security

The Protection of Freedoms Bill also makes provision for the retention of biometric information obtained under terrorism legislation. Specifically it will:

- Enable the retention of fingerprints and DNA profiles of those arrested under s41 of the Terrorism Act 2000 for a period of three years or those detained under Schedule 7 of the 2000 Act for a period of 6 months, with the ability to extend retention by periods of two years;
- Enable the retention of fingerprints and DNA profiles obtained under the Counter-Terrorism Act 2008, also with the ability to extend retention by periods of two years; and
- Require that the process of retention of such material is overseen by an independent Commissioner.

This approach ensures the right balance between the need to retain potentially valuable intelligence for national security (including counter-terrorism) investigations with the rights of individuals whose data is retained through appropriate safeguards, including independent oversight.