

GeneWatch UK response to the Biometrics Commissioner's consultation on retention of biometric material which has been obtained from individuals who have been arrested but not charged

June 2013

GeneWatch UK welcomes to opportunity to respond to this consultation. Whilst we have doubts about the need for the provisions in the Act, which extend the retention regime for biometrics to individuals who have merely been arrested and not charged, we support the Biometrics Commissioner's proposed approach to implementing this legislation. Whilst we would emphasise the need to protect identities, we would also recommend that general statistics are published annually on the number of applications made by each police force and approved by the Commissioner, including the starting and expiry dates of any approvals of retentions.

Some more detail on our thinking is given below.

In England and Wales, biometrics (DNA and fingerprints) are collected routinely on arrest for any recordable offence from the age of ten. GeneWatch UK remains of the view that DNA collection is currently too broad as by far the majority of samples are collected when there is no specific need to compare an individual's DNA profile with a specific crime scene DNA profile (DNA is collected from the scene of about 1% of recorded crimes). In Scotland, DNA collection is similarly broad, however the law in Scotland allows DNA profiles and fingerprints from unconvicted persons to be retained in certain circumstances only if criminal proceedings in respect of a relevant sexual offence or a relevant violent offence have been instituted against the person.^{1,2} The Protection of Freedoms Act provides a much broader power for England and Wales which allows the retention of DNA profiles and fingerprints from persons who have merely been arrested, for a larger category of offences.

The power of arrest may be exercised by an individual officer, without any oversight, and may be based on a false accusation or occur in confused circumstances (for example, when a number of people are arrested at the scene of a fight, some of whom may have been trying to stop it). The retention of an unconvicted person's records on police databases impacts on their right to privacy and must be necessary and proportionate to the need to tackle crime. It is therefore important that the power to retain DNA profiles of persons who have merely been arrested is exercised with maximum restraint. GeneWatch UK therefore supports the view that, in the context of the Act, biometrics should only be retained beyond the conclusion of the relevant investigation - and that such retention will only be proportionate - where there are compelling reasons to believe that the public interest will be served by their retention.

Claims that retaining the DNA profiles of arrested persons is necessary to solve large numbers of crimes are incorrect because individuals who are arrested but not convicted have a relatively low likelihood of committing future crimes and even those individuals who do so are rarely caught through 'cold hits' on the DNA database.³ Relevant serious cases are expected to be rare, occurring less than once a year and perhaps less than once a decade. The extent to which retention of a DNA profile may be regarded as necessary and proportionate therefore relates to an assessment of whether the arrested individual poses a risk of committing an offence for which DNA evidence may be relevant in the future, especially where evidence identifying them might be difficult to obtain other than through a 'cold hit' on the DNA database. For example, even a serious crime such as murder or rape of a close relative does not require the perpetrator to have their DNA profile stored on a DNA database if they are likely to be identified as a potential suspect in other ways (e.g. as the partner or parent of the victim) because a DNA sample can be taken from them when they are suspected of the crime. On the other hand, if the individual poses a risk of committing acts of violence against strangers, perhaps in places far from their home, a cold hit on the DNA database

might be the best means of identifying them as the perpetrator of such an act. The seriousness of the potential future offence is also relevant, since some offences where the individual might be identified using their DNA (e.g. spitting on a bus) are much less serious than others (e.g. murder or rape).

We therefore agree with the view that relevant factors include:

- (i) the nature, circumstances and seriousness of the alleged offence in connection with which the individual in question was arrested;
- (ii) the strength of, and grounds for, suspicion in respect of the arrestee;
- (iii) the reasons why the arrestee has not been charged;
- (iv) the cogency of any reasons for believing that retention may assist in the prevention or detection of crime;
- (v) the nature and seriousness of the crime or crimes which that retention may assist in preventing or detecting; and
- (vi) the age and other characteristics of the arrestee.

We also agree with the view that special attention must be paid to the impacts of DNA profile retention on children and vulnerable adults; and the proposal for dealing with the sensitive issue of disclosure.

¹ 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.

<http://www.scotland.gov.uk/Publications/2008/09/22154244/26>

² Relevant violent or sexual offences. Section 19A(6) of the Criminal Procedure (Scotland) Act 1995.

<http://www.scotland.gov.uk/Publications/2008/09/22154244/27>

³ DNA database: analysis of offending figures. GeneWatch UK Briefing. November 2011.

http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/NDNADfigs_Nov11_corrected.pdf