

Protection of Freedoms Bill: Committee stage House of Lords

GeneWatch UK
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1. 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.
2. GeneWatch began investigating the issues associated with the expansion of the National DNA Database in 2003 and we published our first report about the database in January 2005. Since then, we have responded to every consultation on this issue, published articles, and supplied written and/or oral evidence to numerous committees, including to the Scottish Parliament's Justice 2 Committee in 2006, and to the European Court of Human Rights on behalf of S. and Marper. GeneWatch is regularly contacted by members of the public who are concerned about the indefinite retention of their or their children's DNA and associated records and has published extensive information on its website to enable people to play an informed role in the debate.
3. GeneWatch 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 issue, regains much of the loss of public trust in policing, and does not have an adverse impact on crime detection or prevention.
4. GeneWatch UK broadly welcomes the introduction of the Protection of Freedoms Bill, but we would like to see some further restrictions on the retention of data in some circumstances, and clarification of wording in some places. Our main concern is the lack of a provision to delete Police National Computer (PNC) records at the same time as DNA database records and fingerprints.
5. This evidence is informed by our own analysis of published evidence relating to the National DNA Database, and by issues raised directly with us by members of the public.

Background

6. When an individual is arrested in England or Wales for any recordable offence (from aged ten or above) their details are now entered on three linked databases as a matter of routine: the Police National Computer (PNC); the National DNA Database (NDNAD); and the fingerprint database (IDENT1). All records are kept indefinitely (ACPO policy is to retain all records to age 100).
7. This system of databases was set up in 1995 but has expanded significantly due to two changes in the law. The Criminal Justice and Police Act 2001 amended the Police and Criminal Evidence Act 1984 (PACE) to allow all samples (and fingerprints) collected in England, Wales and Northern Ireland to be retained indefinitely, irrespective of whether the person had been convicted or acquitted. The Criminal Justice Act 2003 extended police powers further to allow DNA profiles, fingerprints and other information to be taken without consent from anyone arrested in England or Wales on suspicion of any recordable offence (earlier legislation had required people to be charged, unless the sample was directly relevant to the offence under

investigation). Because DNA is collected from less than 1% of crime scenes, most people now have their DNA collected on arrest solely for the purpose of adding their DNA profile to the National DNA Database, rather than for the investigation of a specific crime.

8. The PNC record contains an Arrest Summons Number (ASN) which is also contained in the individual's record on the NDNAD, linking the databases together. It also contains information about which laboratory the DNA sample was sent to and on what date.
9. The NDNAD record contains a barcode which allows it to be linked back to a spare DNA sample stored in the laboratory where the individual's DNA was analysed. The NDNAD record contains the individual's name and (until recently) ethnic appearance (this is now being discontinued), but limited other identifying information. PNC records (linked to the NDNAD by the Arrest Summons Number) are used to provide further information collected at the time of arrest (e.g. a description and the date of arrest, plus any previous arrests or convictions). PNC records also provide a link to the individual's record on the fingerprint database, IDENT1.
10. The Police National Database (PND) is a new system which allows police forces to share information more effectively. It contains a snapshot of the PNC records that are held locally by each police force, flagging up issues of concern.
11. Collection of DNA routinely on arrest is not the norm in other countries, where a court order is generally required and the collection and retention of DNA is usually restricted to persons accused of serious offences or convicted prisoners.¹

Comments on provisions in the Bill

12. The Bill is a significant step forward in protecting the rights of innocent people whose DNA has been collected by the police. Approximately one million innocent people, plus a number of children given a conviction, reprimand or final warning for a single offence, will benefit from the provisions in the Bill. Examples of relevant cases, the impacts on vulnerable people, including children and the mentally ill, and the racial bias in whose records are retained are detailed in GeneWatch's submission to the Commons Scrutiny Committee for the Bill.²
13. The inclusion of provisions to destroy all individuals' DNA samples not later than six months after they are collected is also welcome. Storing individuals' spare DNA samples in the laboratories which analyse them is expensive, raises important privacy concerns, and is unnecessary for identification purposes once the computerised DNA profiles have been obtained.
14. Nevertheless, there are some important areas in which the Bill should be improved. Specific comments on various aspects of the Bill are provided below.

DNA profiles

15. The time period for retention of individuals' DNA profiles has been a subject of a number of proposed amendments. GeneWatch opposes proposals to increase retention times and would like to see further restrictions on retention in some areas to ensure the retention regime is proportionate to the need to tackle crime.

Proposals to increase retention times

16. Proposals to increase the retention time for innocent people's DNA profiles to six years for anyone arrested for any recordable offence are based on a misunderstanding of the role the DNA database plays in solving crimes. GeneWatch is opposed to these amendments.
17. Although some people who have been arrested but receive no sanction for a crime may well be arrested and receive a sanction in the future, this does not mean that retaining their DNA profiles would have helped to solve more crimes. Under the provisions in the Bill, everyone who has their DNA record removed will have had their DNA profile searched against all past stored crime scene DNA profiles: retaining their profile is only useful if it allows them to be identified as a suspect for a future crime and if they would not be identified as a suspect for this future crime in any other way.
18. Much attention has focused on the likelihood of subsequent sanction (conviction, caution, reprimand or final warning) for any recordable offence of an unconvicted but arrested person, compared to a person selected at random from the general population. However, this approach ignores the limited role that retention of an individual's DNA profile plays in solving crime. The appropriate question is whether or not 'widening the net' to retain the DNA profiles of persons who are not convicted for six years following arrest is proportionate to the need to tackle crime (the test applied in Article 8 of the European Convention on Human Rights). The onus on governments is to justify retention, not on individuals to justify removals.
19. The most relevant figure in this context is the number of detections or convictions that arise from retaining innocent people's DNA profiles on the database. Calculations of numbers of detections were provided by the Home Office in the context of the consultation 'Keeping the Right People on the DNA Database' in 2009. GeneWatch's preliminary estimate at the time was that the Home Office's calculations could be up to two orders of magnitude in error.^{3,4,5} One major problem with the Home Office's calculations was the failure to account for the fact that people whose profiles have been deleted but who commit future crimes are much more likely to be caught through other means than they would have been through retention of their DNA profile on the DNA database. Only a tiny proportion of the expected re-arrests of unconvicted persons will involve people who are caught because their DNA profile has been retained. This is because crimes solved through 'cold hits' on the DNA database are rare. Most crimes are not solved using DNA, and most that are involve DNA taken from a known suspect, or matched against a stored crime scene DNA sample, not matches with stored individuals' profiles. In addition, most of the cases that do rely on stored crime scene profiles from individuals involve repeat offenders who commit a string of volume crimes, such as burglaries or car thefts (where prior identification of suspects may be difficult), not unconvicted people.
20. The latest Home Office figures fill an important gap in that previously the Home Office assumed that unconvicted persons were as likely as other persons on the database to commit crimes that might be solved by using DNA (based on discredited research^{6,7,8,9}). The implications of the new figures are explained in a recent GeneWatch briefing.¹⁰ Using this new data, GeneWatch estimates that in 2008/09 fifty-six DNA detections (approximately 28 convictions) are likely to have involved the stored DNA profile of a previously unconvicted person (and therefore could potentially be missed if innocent people's profiles are removed). Any missed detections will be overwhelmingly dominated by volume crimes (since 'cold hits' for murder and rape cases are extremely rare) and the majority will be delayed not lost since any future re-arrest of the same individual will lead to a match with the relevant

stored crime scene DNA profile. GeneWatch has previously estimated that 2006 DNA detections in total 2008/09 relied on the retention of an individual's DNA profile on the database: our new calculations suggest that only 2.8% of these detections (56 out of 2006) relied on the retention of an unconvicted person's DNA profile. Since at the time about 1/5 of the individuals with records on the database had no previous sanction, this suggests that unconvicted persons are perhaps about a tenth as likely to commit a crime which is detected through their stored DNA profile as other people with records on the database.

21. The benefits of widening the net to include more people on the database tail off rapidly as the database gets bigger, to the extent that there has been no noticeable increase in DNA detection rates as a result of the changes to the law made in 2001 and 2003 which allow DNA to be retained indefinitely and collected on arrest.¹¹ This must be balanced against the intrusion on individuals' rights and privacy and the potential for false matches and miscarriages of justice (which will increase significantly when DNA database matches are shared across the EU as a result of the EU Prüm Decisions¹²).
22. In contrast, a policy decision to speed up crime scene sample analysis and to collect DNA from more crime scenes (particularly from burglaries) has been effective. This finding is supported by more recent research by the RAND Corporation in the USA, which states:¹³ *"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..."*
23. In GeneWatch's view, a six year blanket retention time for all DNA profiles taken from all persons arrested for any recordable offence is clearly disproportionate to the need to tackle crime. It is therefore questionable whether proposals to implement a six year retention time for innocent people's DNA profiles would withstand challenge in the courts. Previous proposals for a blanket six year retention time for DNA profiles and fingerprints from unconvicted persons were considered by the Council of Europe's Committee of Ministers who, whilst welcoming steps forward and the proposal to destroy DNA samples¹⁴: *"nevertheless noted that a number of important questions remain as to how the revised proposals take into account certain factors held by the European Court to be of relevance for assessing the proportionality of the interference with private life here at issue, most importantly the gravity of the offence with which the individual was originally suspected, and the interests deriving from the presumption of innocence (see paragraphs 118 – 123 of the judgment), and requested, accordingly, that the Secretariat rapidly clarify such questions bilaterally with the United Kingdom authorities"*. The Committee also noted that further information was also necessary as regards the institution of an independent review of the justification for retention in individual cases.

Provisions for temporary retention of unconvicted persons' DNA profiles

24. The origin of the law adopted in 2006 in Scotland which allows temporary retention of DNA profiles from some unconvicted persons was a recognition that there are some circumstances, particularly in cases of violence against women, where proceedings are dropped because a witness is intimidated and refuses to give evidence. In such cases, a failed prosecution may be a warning sign of future criminal behaviour. This issue would be better addressed by improving policies to address violence against women (most of which is directed against partners, rather than strangers, so that

DNA is not required for identification purposes). However, in the meantime it may be necessary to weigh up the importance of tackling the rare subset of rape cases that may involve a 'cold hit' with a stored DNA profile on the Database, against the dangers of wrongly stigmatising a group of men based on allegations that may be entirely false. The 2000 ACPO Guidelines for retention of Police National Computer (PNC) records state: "*Details may be retained for a period of five years of offences where a sexual offence is alleged, but the subject is acquitted, or the case is discontinued because of lack of corroboration or allegation of consent by the victim, providing identity is not an issue...*". These guidelines informed the policy discussion which took place in Scotland in 2006, which led to a decision to allow temporary retention of DNA profiles from a somewhat broader category of individuals accused of serious violent or sexual offences against whom proceedings had been instigated but later dropped.

25. As GeneWatch has highlighted above, cases where retention of a DNA profile from an unconvicted person might prove useful to solve a future violent crime are extremely rare and the statistical data is insufficient to draw definitive conclusions about potential benefits and risks. Collecting more data will not resolve this issue as outcomes will be determined by a small number of rare, individual cases and "what if" scenarios. It is nevertheless clear that collecting more DNA from crime scenes (including from rape victims) or from known suspects for a crime (i.e. acting on tip offs and avoiding police blunders where a suspect is identified by a member of the public but is not interviewed) would contribute a lot more to solving serious cases than retaining unconvicted suspects' DNA. For murders and rapes, taking DNA from known suspects for a crime, and storing crime scene DNA so that multiple crimes can be linked together, is far more effective than widening the net to include DNA profiles from much larger numbers of people who have simply been arrested.
26. The provisions for temporary retention of DNA profiles in the Bill allow the retention of DNA profiles and fingerprints from a significantly greater number of alleged offenders than is the case in Scotland (all persons charged with these offences and some persons who have merely been arrested). GeneWatch is therefore opposed to suggestions that this category should be expanded further to include all persons arrested for any qualifying offence. Any attempts to simplify the process should restrict rather than expand this category.

Provisions for retention on National Security grounds

27. GeneWatch is not opposed to some provision for temporary retention of some individuals' DNA profiles on national security grounds, and we welcome the establishment of a Biometrics Commissioner to oversee such cases. However, we are concerned that the current provisions are too widely drawn. Issues include: application of the provision to anyone arrested for any offence from the age of ten (rather than being restricted to persons arrested on suspicion of terrorist offences); the potential for indefinite retention (via repeated two year extensions); lack of information for those individuals who will be affected.

Provisions for retention of data from convicted persons

28. In the Bill, all persons given any sanction (conviction, caution, reprimand or final warning) for any recordable offence are regarded as convicted. With the exception of children sanctioned for a single minor offence all such people will have their records on all three databases (the NDNAD, PNC and IDENT1) retained indefinitely. Although the provisions for a time limit on the retention of records from children sanctioned for a single minor offence are welcome, GeneWatch believes these

provisions do not go far enough. Only persons convicted of serious or multiple offences should have their DNA profiles and other records retained indefinitely and time limits for retention should be reinstated for all other persons on these databases.

29. In England and Wales, innocent people's Police National Computer (PNC) records used to be removed after 42 days: those with cautions after 5 years; and those with single convictions for minor offences were due to be removed after ten (see PNC records, below). These time limits reflect extensive evidence that most re-offending occurs within a short time of a person's first offence and that most crime is committed by a small number of repeat offenders. A Home Office circular, issued when the PNC and NDNAD were set up in 1995, required DNA records to be deleted at the same time as PNC records.¹⁵ However the removals process was never properly implemented because the databases were not linked and the law was changed in 2001 to allow the indefinite retention of innocent people's DNA records. Although the PNC was regularly weeded to remove old cautions, ACPO policy was changed in 2005 to allow the indefinite retention of all records before any records of conviction were due to be removed.
30. In practice, this means that time limits for the retention of DNA profiles and other data collected from persons receiving convictions or cautions, adopted as a matter of policy when the DNA database was first set up, have been completely abandoned without any democratic debate. This is a significant example of mission creep, which has serious negative implications for the rehabilitation of offenders.
31. Sanctions have been recorded for very minor offences, such as children pulling each others' hair, or adults arrested for public order offences. Cautions, reprimands and final warnings are issued by the police without any oversight by a court. It is clear that in many of these cases, indefinite retention is not proportionate to the need to tackle crime. In particular, reprimands and warnings should not be treated as equivalent to convictions by a court. 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.¹⁶ 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. A shorter (e.g. two-year) retention time should be considered for reprimands and warnings. Examples of people on the database with cautions who have contacted GeneWatch include: persons with mental health problems arrested for public disorder offences; individuals arrested in connection with peaceful protest-related offences; and a number of men who have tried to stop fights and later accepted a caution at the police station with a group of friends.
32. In 2009, a legal opinion provided to the Equalities and Human Rights Commission by Michael Beloff QC argued that indefinite retention of records for all sanctioned persons would not be proportionate.^{17,18} The Opinion relies on the wording of The Committee of Ministers' Recommendation R92(1)¹⁹, which was referred to in the Marper judgment. As with innocent people's records, the onus on governments is to justify retention, not the other way around.

PNC records

33. Individuals who are successful in securing deletion of their records under the current “exceptional cases” procedure (in which individuals apply to Chief Constables for removal from the DNA database) have their records deleted from the Police National Computer (PNC) as well as from the National DNA database and the fingerprint database. In Scotland, records on the Criminal History System are deleted within six months of a non-conviction disposal being recorded.²⁰ However, there are no provisions for the deletion of PNC records in the Bill.
34. GeneWatch believes that an individual’s PNC record should be deleted at the same time as his or her record on the DNA and fingerprint databases. The Information Commissioner agrees.
35. In England and Wales, innocent people’s PNC records used to be removed after 42 days.²¹ By 2006, these guidelines had been abandoned in favour of retention of all PNC records, from everyone arrested for any recordable offence, to age 100.²² 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.²³ This no longer applies if new legislation requires a person’s record on the DNA database to be deleted.
36. The creation of a permanent, searchable database of all recordable arrests of any citizen is unprecedented in British history.
37. Records of arrest can have serious negative consequences for individual, even in the absence of a caution or conviction: leading to refusal of visas (including a bar on access to the US Visa Waiver scheme for anyone who has ever been arrested); refusal of jobs; and stigma or misuse of data by the police (who can access PNC records directly). It is unacceptable that innocent people can be stigmatised for life purely as a result of a record of arrest. Provisions in the Bill require the deletion of DNA and fingerprint records from children convicted of a single minor offence after a period of time, because it is recognised that young people need a second chance and that branding them as criminals at an early age can be counterproductive in terms of preventing crime. This logic should apply equally to the deletion of PNC records, in order to allow for the possibility of rehabilitation. As noted above, GeneWatch believes that time limits for the retention of records should be reinstated: this should include records on all three databases (NDNAD, IDENT1 and the PNC) that are linked together.
38. The indefinite retention of innocent people’s PNC records is likely to be vulnerable to challenge in the courts. The Supreme Court ruled in May 2011 that the current police procedure for retention of PNC records, DNA and fingerprints is unlawful and stated that PNC records raised no separate issues from those raised by the retention of DNA material and fingerprints.²⁴ This judgment has been noted by the European Court of Human Rights in the context of the Goggins case in which a number of innocent individuals are seeking deletion of their DNA, fingerprint and PNC records.²⁵

Fingerprints

39. GeneWatch agrees that records should be deleted from the fingerprint database (IDENT1) at the same time as records on the National DNA Database are deleted.

Photographs

40. Photographs are not included in the Bill but the destruction of photographs is a matter of concern to many innocent people who have been arrested, and has been the subject of a consultation about implementing equivalent provisions for DNA and fingerprint records held in Northern Ireland.²⁶ In GeneWatch's view, photographs should be destroyed at the same time as other records.

Dealing with the backlog

41. Innocent people with records on the DNA database have been waiting for up to ten years for their records to be deleted. Many struggle to understand, or to explain to their children, the reason for the long delay in implementing the judgment of the European Court of Human Rights published in December 2008. On adoption, the Bill will apply to people arrested in the future, but requires a statutory order for application to the backlog of innocent people's records already on the database. The Bill should include a deadline for the police to complete the necessary removals process in order to reassure innocent members of the public that the required removal of their records will not drag on for many (more) years.

Governance and oversight

42. The expansion of the DNA database has led to a significant loss of trust and many innocent people with records on the database therefore remain to be convinced that their data will actually be deleted and destroyed. Measures that could be taken to improve oversight of the removals process include: ensuring the inclusion of independent members on the DNA Strategy Board; publishing regular statistics on the number of innocent persons' DNA profiles that are removed; and the provision of an independent appeals process.

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References

¹ More information on DNA databases internationally is available on: <http://www.genewatch.org/sub-566699>

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