

Police Retention of DNA from Northern Ireland

A briefing for Northern Ireland MPs, MLAs and
the Northern Ireland Policing Board



June 2007

The law in Northern Ireland allows the police to take DNA samples routinely without consent from anyone aged 10 or over who is arrested in connection with any recordable offence. This law was introduced by the Secretary of State for Northern Ireland whilst the Assembly was suspended, in order to bring Northern Ireland's legislation into line with England and Wales.

Legally, all DNA samples taken on arrest may be kept permanently and the computerised DNA profiles and personal data may also be kept permanently on the Northern Ireland DNA Database, even if a person is never charged or is acquitted. Similar legislation was rejected by the Scottish Parliament in May 2006.

This law has not yet been fully implemented in Northern Ireland. DNA is not yet taken routinely on arrest for all recordable offences and Forensic Science Northern Ireland (FSNI), which operates Northern Ireland's DNA Database, states on its website that DNA profiles "*are removed from the database as soon as the individual is either acquitted or removed from suspicion*".¹ However, FSNI began routinely exporting DNA profiles from Northern Ireland to the National DNA Database (NDNAD) in England in October 2005.² Virtually all DNA profiles from England and Wales are now retained permanently on the NDNAD and it is unlikely that DNA profiles from Northern Ireland will be removed unless the Police Service Northern Ireland (PSNI) explicitly requires this.

DNA databases are important tools for criminal investigations. However, there are serious questions about whether DNA samples and profiles should be routinely taken on arrest and kept permanently. This briefing describes the role of DNA databases in tackling crime and the concerns about privacy and rights, including the process by which Northern Ireland's legislation was adopted.

Pending proper democratic debate and new legislation, the Northern Ireland Policing Board should adopt a policy which requires the removal of DNA profiles from all databases when an individual is acquitted or proceedings dropped. Individuals' DNA samples should also be destroyed.

The role of DNA databases in tackling crime

DNA databases rely on the fact that DNA can be taken from any sample of human tissue left at a crime scene. DNA profiles (a string of numbers based on part of the sequence of the DNA) can be obtained from both crime scene DNA and from individuals' DNA (usually collected at a police station using a mouth swab) and stored on a computer. In England a 'speculative search' of the NDNAD is run every night to look for new DNA profile matches. A match between an individual's DNA profile and a crime scene DNA profile indicates a high probability that the individual was at the crime scene.

A DNA *database* is not required to provide evidence of guilt or innocence when there is a known group of suspects for a specific crime: a DNA profile can be taken from each individual and compared directly with a crime scene profile. For the same reason, a database of individual DNA profiles is also unnecessary to exonerate an innocent person. The 'added value' of putting individuals on a database is only to introduce *new suspects* into an investigation.

The number of DNA *matches* between crime scenes and individuals on the National DNA Database often sounds impressive. However, these figures include many matches with victims and innocent passers-by. Only some matches (called DNA detections) involve sufficient evidence to charge someone for a crime, and not all DNA detections lead to prosecutions or convictions.

The value of *entering* increasing numbers of DNA profiles from *individuals* on the Database (unrelated to the reason for arrest) is that it may allow investigation of a *past* crime to be re-opened, by unexpectedly identifying a new suspect. The purpose of *retaining* an individual's DNA profile on a database is to treat them as a suspect for any *future* crime. This is arguably likely to be of most benefit when an individual has a criminal record and is considered likely to re-offend.

Re-examination of a number of 'cold' cases has highlighted the importance of keeping past crime scene DNA evidence. Occasionally, the DNA of someone arrested for a minor offence is matched with DNA from a serious past crime, arguably justifying taking their DNA. However, such cases do not justify keeping DNA profiles and samples from people whose DNA has not matched a past crime scene.

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Relationship between the Northern Ireland DNA Database and the National DNA Database

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.

Until October 2005, the FSNI had not completed the quality standards accreditation process required to export DNA profiles to the NDNAD in England, although it had 36,219 individuals' DNA profiles on its own database.¹³ On 7th September 2005, FSNI began loading the backlog of DNA profiles to the NDNAD, marked with a 'pre-accreditation' flag, and on the 20th October it began exporting post-accreditation DNA profiles.

A 2006/07 FSNI-PSNI agreement requires the routine export of individuals' DNA profiles from Northern Ireland to the NDNAD.³ It includes provisions for the removal of records from the Northern Ireland database, and destruction of the associated DNA samples, but only on the written direction of the PSNI.

The law on DNA collection and retention

"It remains wrong in principle that Parliament should lose its statutory rights of consultation over matters it has for the time being reserved to itself, simply because of a minor technical flaw in the Northern Ireland Act 2000. As a result of the suspension of the Assembly, and the Government's decision to use one marginally flawed procedure rather than another, legislation is being pushed through Westminster which, if it related to England or Scotland, would be subject to the full process of Parliamentary scrutiny; and on which, if the Assembly were not suspended, there would be no question about the Government's duty to consult". Northern Ireland Affairs Committee, January 2004.⁴

England and Wales are currently the only countries in the world which keep DNA profiles and samples from innocent people and people convicted of minor offences for life. The National DNA Database is now the largest in the world, containing over 4 million people. More than a million people have been added to the NDNAD on arrest in England and Wales but never been convicted or cautioned for a crime.⁵

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The legislation in England and Wales that allows the permanent retention of DNA from everyone arrested for a recordable offence was introduced in two separate Acts:

- The sections of the Criminal Justice and Police Act 2001 which allow the retention of DNA samples and data from persons not prosecuted or acquitted, were extended directly to Northern Ireland by that Act.⁶ The UK Government was criticised by MPs for introducing this legislation without allowing sufficient time for debate.⁷ There was no separate vote or debate on the part of the bill relating to the retention of DNA from innocent people.
- The section of the Criminal Justice Act 2003 which allows DNA to be taken on arrest, rather than on charge, were introduced via a late amendment submitted by the minister during the first week of the Iraq war. This section of the bill required a separate vote in the House of Commons: no Northern Ireland MP from any party voted in favour it.⁸ However, the provisions were later applied to Northern Ireland via the Criminal Justice (Northern Ireland) Order 2004.⁹

The Criminal Justice (Northern Ireland) Order 2004 was made while the Assembly was suspended in a process lasting only ten days. The Draft Order was made on 24th March 2004 and approved by both the Commons and the Lords on 3rd April.^{10,11} The approval of statutory instruments is a routine process which does not allow amendments to be made and results in rejection only on extremely rare occasions.

The use of this procedure during suspension of the Assembly is controversial. Provisions in the Northern Ireland Act 2000, which allow legislation to be adopted during suspension without any consultation, have been strongly criticised by the Northern Ireland Affairs Committee.¹³ The Committee includes MPs from the DUP, UUP and SDLP. They pointed out that under the Northern Ireland Act 1998 proposals for draft legislation on reserved matters (including criminal justice and policing) must, except in cases of emergency, be presented both to Parliament and to the Assembly for a statutory two-month consultation period prior to being formally laid. However, under the 2000 Act procedure there is no such requirement, allowing the Government to put Northern Ireland legislation through the UK Parliament without any consultation or opportunity to make amendments.

No Northern Ireland MP from any party voted in favour of the relevant section of the Criminal Justice Act 2003

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The use of this procedure during suspension of the Assembly is controversial

The Government's response to the Committee's criticism was published on 28th April 2004¹². Although it rejected the committee's recommendation to correct the legislative process, it accepted that there should generally be twelve weeks' consultation on draft Orders before they are laid before Parliament. It is hard to escape the conclusion that the Criminal Justice (Northern Ireland) Order 2004 – including its controversial provisions to take DNA and fingerprints on arrest for any recordable offence - was sped through the parliamentary process in the ten days between 24th March and 3rd April 2004 in order to avoid the promised consultation process.

It is hard to escape the conclusion that the controversial Order was sped through the parliamentary process in order to avoid the promised consultation process

A recent Home Office consultation in England and Wales proposed further extending police powers by allowing DNA to be taken on arrest for any offence (including dropping litter), either in the street or in short-term holding facilities, in shops or town centres, where people could be detained for up to 4 hours.¹³ If adopted, these proposals are also likely to be introduced using secondary legislation, and then extended into Northern Ireland by a similar process. A new proposal to introduce police stop and question powers in England and Wales, and potentially re-introduce this power in Northern Ireland, could use the same approach.¹⁴

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Concerns about privacy and rights

"My concern is this - we are in a society at the moment where the police have the power that if they arrest a 15-year-old for a recordable offence we can retain their DNA and their fingerprints. That information would be kept for life unless there were exceptional circumstances, such as it being proved that no crime was committed. My real worry is this. Fifteen years from now we are still holding that DNA and that arrest information - should we be doing that? Is it right that that may impede that person - who's never been arrested again - from getting a job? I'm not sure that sits comfortably with me". Ian Redhead, Deputy Chief Constable, Hampshire, England, 2007.¹⁵

Few people have problems with the idea of the police comparing the DNA of a suspect with DNA left at the scene of a serious crime. However, concerns arise when DNA profiles and other information are stored permanently on a database, especially when the database includes large numbers of innocent people.

The National DNA Database is a useful tool in criminal investigations, but the permanent retention on it of everyone who has been arrested raises important concerns about privacy and rights, including:

- the potential threat to ‘genetic privacy’ if information is revealed about health or family relationships, not just identity;
- the creation of a permanent ‘list of suspects’ that could be misused by governments or made available to a much wider range of organisations in the future;
- the potential for unauthorised access, abuses and/or misuses and mistakes;
- the exacerbation of discrimination in the criminal justice system.

Concerns about privacy have also recently been increased by plans to allow access to the National DNA Database by law enforcement agencies in other European Union countries.¹⁶

Particular concerns have arisen about the permanent retention of children’s records on the Database, its racial bias and its use for genetic research without consent. Some new forensic techniques could also make errors more likely.

Retention of children’s DNA

“I’m worried that it will scar my record for life. It might come up if I went for jobs, such as with children – not that I’ve been in trouble, but just that I’m known to the police.” Caitlin Bristow, aged 15, arrested in England following a counter-claim after reporting an assault.¹⁷ Never charged with any offence.

Over 100,000 young people (aged 10 to 17) who have never been convicted or cautioned are on the National DNA Database, following their arrest in England and Wales.^{18,19} Research has found that both parents and children also have reservations about DNA samples being taken for petty crime and feel that there are dangers in stigmatising young people for a one-off act.²⁰

Racial bias

More than a third of black men in the UK population – including three out of four black men between the ages of 15 and 34²¹ – are now on the National DNA Database, prompting the Black Police Association to call for an investigation.²²

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Potential for criminal infiltration

If criminals can infiltrate the system they may be able to use it to identify people whose identity is protected, including people in witness protection schemes. Although access to the NDNAD is supposedly restricted, five employees of the Forensic Science Service (FSS) have been suspended whilst allegations that they “copied, retained and/or adapted software and/or other confidential information” are investigated.²³ Emails supplied to GeneWatch also show that the commercial company LGC, which analyses some DNA samples for the police in England and Wales, has retained its own “mini-database” of DNA records.²⁴

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The new Home Office proposals for Short-term Holding Facilities significantly increase the risk of infiltration of the system, especially if they give staff who are not police officers powers to check identity using fingerprints and DNA. The risk is also increased by plans to share more information with EU countries and to check DNA or police records on the spot using hand-held devices.^{25,26}

Unnecessary retention of samples

As well as storing the computerised DNA profile obtained from analysis of the sample on the DNA database in Northern Ireland and on the NDNAD, part of the DNA sample is also stored indefinitely by the FSNI, linked to an individual’s record on the databases via a unique barcode reference number. The DNA *profiles* held on the Database can be used to investigate who a person is related to (including non-paternity), but are unlikely to contain personal genetic information about health or other characteristics. This is because they are based on ‘non-coding’ parts of DNA (not on genes), which are not thought to be important in influencing biological differences such as health or appearance. However, the DNA *samples* contain unlimited amounts of genetic information, increasing privacy concerns.

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Storing samples from crime scenes makes sense, so that the profile can be checked if necessary. However, the stored samples from individuals are not needed to prevent miscarriages of justice, because a fresh DNA sample can be taken from the defendant if a case comes to trial.

Individuals’ samples are destroyed in some other countries, such as Germany, once the DNA profiles used for identification purposes have been obtained.

The Home Office has recognised that retaining samples is “*one of the most sensitive issues to the wider public*”²⁷ and the Human Genetics Commission has concluded that the reasons given for retaining them are “*not compelling*”.^{28,29} Only temporary, not permanent, storage is necessary for quality assurance purposes and a new sample can always be taken from the suspect if a DNA profile requires checking or upgrading.

Controversial uses

Uses of the Northern Ireland DNA Database or the NDNAD may include any purpose related to the prevention or detection of crime. Uses now include: familial searching (using partial DNA matches to try to identify the relatives of a suspect); searching by name; and undertaking various types of genetic research.

Freedom of Information requests to the National DNA Database Board have shown that since the year 2000, 19 research projects have been allowed and 14 refused.³⁰ The requests also revealed that stored DNA samples in England and Wales have been used for genetic studies of the male Y-chromosome, without the consent of the people involved, as part of a controversial attempt to predict ethnicity from DNA.

Searches by name allow an individual’s DNA profile and access to their sample to be provided even when there is no match to a crime scene DNA profile. ‘Familial searches’ involve trying to trace a suspect through their relatives and may reveal private information such as non-paternity.³¹ The 2006/07 PSNI-FSNI agreement includes provision for up to 15 familial searches during the year.¹³

Potential for errors

DNA evidence is not foolproof: false matches can occur by chance, especially if the DNA profile from the crime scene is not complete. In addition, new techniques introduce new potential sources of error.

The increasing use of Low Copy Number (LCN) DNA analysis – which allows a DNA profile to be extracted from a single cell – has led the Director of the Forensic Institute in Edinburgh to warn that innocent people may be wrongly identified as suspects as a consequence of being on the National DNA Database³² and the judge in the Omagh trial to criticise specialist evidence on this technique as contradictory.³³

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LCN analysis and other new techniques such as “DNABoost”,³⁴ increase the sensitivity of DNA analysis (allowing very small or mixed samples to be analysed) but also increase the chance of a false match between a scene of crime DNA sample and an individual’s DNA profile. For example, the LCN technique reportedly identified a 14-year old English schoolboy as a suspect for having planted a Real IRA car bomb.³⁵

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Recently, an investigation has been launched into the analysis of some crime scene DNA samples by The Forensic Science Service (FSS) in England³⁶ and the Government has admitted there is a ‘regulatory gap’ in standard setting for forensic science.³⁷

The best use of police resources?

“It is arguable that the general retention of profiles from the un-convicted has not been shown to significantly enhance criminal intelligence or detection”. The Police Liaison Officer, Scottish DNA Database, 2005.³⁸

Keeping DNA from increasing numbers of individuals has not made a significant difference to the number of crimes solved in England and Wales

Analysis of Home Office data shows that collecting more DNA from *crime scenes* has made a significant difference to the number of crimes solved in England and Wales, but keeping DNA from increasing numbers of individuals has not.³⁹ Since April 2003, about 1.5 million extra people have been added to the NDNAD, but the chances of detecting a crime using DNA has remained roughly constant, at about 0.36%.⁴⁰ This is probably because most people now added to the NDNAD are very unlikely to commit a serious crime.

The cost-effectiveness of expanding the NDNAD has never been established.^{41,42} Costs of processing each sample have been made available⁴³ but do not include police time⁴⁴ or the costs of storing samples permanently⁴⁵ – a growing part of police budgets in England and Wales. The cost of exporting DNA profiles from Northern Ireland to the NDNAD is borne by PSNI.¹³

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The role of the Northern Ireland Policing Board

“It is important the Police maintain the support and consent of the public in order to effectively undertake their duty to investigate crime. Any proposed legislation to introduce blanket retention will serve to diminish this support”. The Police Liaison Officer, Scottish DNA Database, 2005.¹⁴

In January 2006, in response to the case of a child arrested due to mistaken identity, former Home Office Minister, Andy Burnham MP, stated that: "The decision whether to retain or remove a sample is an operational one for the chief constable of the police force which took it."⁴⁶ Essentially the law allows for an individual's DNA profile to be added to the database but does not make it compulsory to do so, or to keep their records and samples permanently. However, in practice both the collection and permanent retention of DNA is now routine for all people arrested and taken to a police station in England or Wales, from the age of ten, and removal is being restricted to 'exceptional' cases, using guidance adopted by the Association of Chief Police Officers (ACPO).⁴⁷

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However, there is nothing to prevent the Northern Ireland Policing Board from adopting its own policy on DNA collection and/or retention. The Policing Board is responsible for holding the Chief Constable to account on behalf of the people of Northern Ireland. As well as making sure local people get best value from their police, this means ensuring that trust in policing is maintained. Rapid and far-reaching changes in legislation on DNA have been made with no public consultation or debate in Northern Ireland.

It is unlikely that paying to store DNA samples permanently from everyone who is arrested for a recordable offence represents best value

Although lack of information makes a proper assessment of cost-effectiveness impossible, it is unlikely that paying to store DNA samples permanently from everyone who is arrested for a recordable offence represents best value. Nor is the permanent retention of DNA profiles and samples, particularly from children, likely to inspire public confidence in policing in Northern Ireland.

In Scotland there was a consultation on proposals to keep the DNA of innocent people permanently, and the plan was rejected by the Scottish Parliament (Box A). Brent Council in London recently voted unanimously to call on the police to adopt more restrictive practices on police collection and retention of DNA (Box B). These examples suggest that a more democratic process of decision-making would be likely to lead to greater restrictions on police collection and retention of DNA.

The Scottish Parliament rejected permanent retention of DNA from people who are not convicted of any offence, in 2006

Unlike Brent Council, the Northern Ireland Policing Board has the powers to adopt a policy on the collection and retention of DNA by the police that PSNI would be required to implement.

Box A: The Scottish Parliament

Although DNA is kept permanently in Scotland from some people convicted of relatively minor offences (such as Breach of the Peace), the Scottish Parliament rejected permanent retention of DNA from people who are not convicted of any offence, in May 2006.

Concerns expressed by Committee members included the lack of evidence that the policy had contributed to tackling crime in England and Wales; the privacy issues associated with keeping DNA samples; and the erosion of the presumption of innocence.⁴⁸ Members of all political parties expressed the view that permanent retention of innocent people's DNA was disproportionate to the needs of the criminal justice system.⁴⁹ Instead, police powers were expanded to allow temporary retention (for up to 5 years) from a much smaller number of people who had been charged but acquitted of a serious violent or sexual offence.⁵⁰

Although DNA samples can be taken on arrest in Scotland, this is only for imprisonable offences. The power is not used routinely by the police in Scotland, and DNA is rarely retained from juveniles.

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Box B: Brent Council

Brent Council in London has been particularly concerned about the evidence that more than a third of black male population are on the Database.⁵¹ A motion passed unanimously by Brent Council in January 2007 called for⁵²:

- Brent Police, and the Metropolitan Police, to end the practice of automatically taking DNA samples on arrest;
- an end to taking DNA samples for Fixed Penalty and Public Order offences – which has contributed to the heavily imbalanced racial profile of the register;
- regular statistics by area detailing the ethnic breakdown of people whose samples have been collected, for monitoring by Police Authorities and local partnerships;
- a national framework to govern collection of DNA samples, removing the discretion of local Borough Commanders to require these automatically;
- the destruction of DNA records held on innocent people who have not been charged with or found guilty of any offence, and measures to monitor this.

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Conclusions

GeneWatch UK believes that there are important changes that could be made that would improve safeguards for human rights and privacy without compromising the role of the National DNA Database in tackling crime. A better balance would be struck by:

- destroying individuals' DNA samples once an investigation is complete, after the DNA profiles used for identification have been obtained;
- an end to the practice of allowing genetic research using the Database or samples, so that research is limited to performance management and database improvements;
- better governance, including an independent regulator;
- democratic debate before new uses, such as familial searching, are introduced;
- a return to taking DNA on charge rather than arrest, except where it is needed to investigate a specific offence;
- reintroducing a system of time limits on how long people are kept on the Database – so that only DNA profiles from people convicted of serious violent or sexual offences have their records kept permanently.

The practice of taking DNA routinely on arrest and keeping innocent people and people convicted of minor offences permanently on the National DNA Database contravenes the principles adopted by the Council of Europe⁵³, which require time limits on DNA retention for all but the most serious offenders. The Scottish Parliament rejected similar proposals but new legislation has been introduced in Northern Ireland while the Assembly was suspended, without proper consultation or debate.

Pending proper democratic debate and new legislation, the Northern Ireland Policing Board should adopt a policy which requires the removal of DNA profiles from both the Northern Ireland DNA Database and the National DNA Database in England when an individual is acquitted or proceedings dropped. Individuals' DNA samples should also be destroyed once an investigation is complete.

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- ⁵ House of Commons Hansard. 11 Dec 2006 : Column 829W
- ⁶ Criminal Justice and Police Act 2001, Chapter 16, Part 3, Section 83. <http://www.opsi.gov.uk/acts/acts2001/10016--f.htm#83>
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