

## GeneWatch UK response to the Department of Justice's consultation on proposals to amend the legislation governing the retention of DNA and fingerprints in Northern Ireland

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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 subsequently received many queries from people who were 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 others to develop and implement best practice human rights safeguards for DNA databases worldwide as part of the Forensic Genetics Policy Initiative (FGPI). The FGPI's report notes that best practice requires legislation to review the need for retention of DNA profiles and to limit the timeframes for retention, particularly in less serious cases and/or if the offence was committed by a child.<sup>1</sup>

GeneWatch UK welcomes the opportunity to respond to this consultation.

The focus of our response is the implementation of the recent judgment by the European Court of Human Rights (ECtHR) in the case of *Gaughran v UK* on 13<sup>th</sup> February 2020<sup>2</sup>, in which the Court ruled that the current policy and practice of the indefinite retention of DNA profiles, fingerprints and photographs of individuals convicted of a criminal offence was a violation of Article 8 of the European Convention on Human Rights (ECHR). As the consultation notes, the Court found that *"the indiscriminate nature of the powers of retention of DNA profiles, fingerprints and photograph of the applicant as a person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention, and in the absence of any real possibility of review, failed to strike a fair balance between the competing public and private interests"*.

GeneWatch UK has repeatedly highlighted the lack of time limits for the retention of DNA profiles from persons convicted of, or cautioned for, less serious offences, and warned of a likely breach of Article 8 of the ECHR, including in our 2012 response to Northern Ireland's

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<sup>1</sup>Establishing Best Practice for Forensic DNA Databases. Forensic Genetics Policy Initiative. September 2017. <http://dnapolicyinitiative.org/wp-content/uploads/2017/08/BestPractice-Report-plus-cover-final.pdf>

<sup>2</sup> CASE OF GAUGHRAN v. THE UNITED KINGDOM (Application no. 45245/15). JUDGMENT. STRASBOURG. 13 February 2020. <http://hudoc.echr.coe.int/eng?i=001-200817>

Criminal Justice Bill.<sup>3</sup> We therefore welcome proposals to amend the provisions within the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE NI)<sup>4</sup> relating to the retention of DNA and fingerprints in Northern Ireland. However, the proposals in the consultation are inadequate, particularly in relation to persons convicted of less serious offences, as they do not take sufficient account of requirements for the rehabilitation of offenders.

### ***The consultation proposals***

Paragraph 3.5 of the consultation states that the Department is proposing to amend the biometric provisions set out in Schedule 2 of the Criminal Justice Act (Northern Ireland) 2013 (the CJA) to apply the following maximum periods of retention to biometric material taken from individuals who have been convicted of an offence:

- 75 years retention period for DNA and fingerprints for all convictions associated with serious violent, sexual and terrorism offences (otherwise known as a qualifying offence, as set out in Section 53A of PACE NI);
- 50 years retention period for adult convictions for recordable offences that do not fall within the serious category; and
- 25 years retention for 2 or more juvenile non-serious convictions which do not involve a custodial sentence of more than 5 years (an under 18 conviction for a non-serious offence involving a custodial sentence of more than 5 years will attract a 50 years retention period).

Paragraph 5.5 proposes a maximum retention period of 50 years for adult convictions and 25 years for under 18 convictions for offences committed outside the UK.

### ***The importance of rehabilitation***

We note that paragraph 51 of the ECtHR judgment cites Recommendation No. R (87) 15 of the Committee of Ministers regulating the use of personal data in the police sector (adopted on 17 September 1987), which states, *inter alia*:

*“7 – Length of storage and updating of data*

*7.1. Measures should be taken so that personal data kept for police purposes are deleted if they are no longer necessary for the purposes for which they were stored. For this purpose, consideration shall in particular be given to the following criteria: the need to retain data in the light of the conclusion of an inquiry into a particular case; a final judicial decision, in particular an acquittal; rehabilitation; spent convictions; amnesties; the age of the data subject, particular categories of data.”*

We further note that paragraph 52 of the ECtHR judgment cites Recommendation No. R (92) 1 of the Committee of Ministers on the use of analysis of deoxyribonucleic acid (DNA) within

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<sup>3</sup> GeneWatch UK comments on the Northern Ireland Criminal Justice Bill. August 2012.

[http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/NICriminal\\_Justice\\_Bill\\_GWcomments.pdf](http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/NICriminal_Justice_Bill_GWcomments.pdf)

<sup>4</sup> The Police and Criminal Evidence (Northern Ireland) Order 1989.

<http://www.legislation.gov.uk/nisi/1989/1341/contents>

the framework of the criminal justice system (adopted on 10 February 1992), which states, *inter alia*:

*“8. Storage of samples and data*

*...Measures should be taken to ensure that the results of DNA analysis are deleted when it is no longer necessary to keep it for the purposes for which it was used. The results of DNA analysis and the information so derived may, however, be retained where the individual concerned has been convicted of serious offences against the life, integrity or security of persons. In such cases strict storage periods should be defined by domestic law...”*

The rehabilitation of offenders in Northern Ireland is governed by the Rehabilitation of Offences (Northern Ireland) Order 1978 (SI 1978 No. 1908 (NI 27)).<sup>5</sup> As noted by the ECtHR in paragraph 43 of the judgment, in general terms, the consequences of a person being treated as rehabilitated and a conviction being treated as spent are that evidence may not be admitted in any proceedings to prove that the person was charged with prosecuted for, convicted of, or sentenced for the relevant offence. Rehabilitation periods range from six months or less to ten years, depending on the sentence and whether the offender is under 18, whilst persons sentenced to more than 30 months in prison do not have a rehabilitation period.<sup>6</sup>

Rehabilitation periods are based on the likelihood of reoffending and the likely impact on society of such reoffending. Thus, they already take account of whether it is necessary and proportionate to continue to treat convicted persons as offenders or whether their past offences should be considered to be spent. In paragraph 89 of the judgment, the ECtHR observes that the Government highlighted that those who had been convicted were in fact most likely to be convicted again after a relatively short period of two years. Thus, most repeat offenders will not reach the end of the rehabilitation period before being reconvicted, whilst persons who do not commit any further offences will do so. Recent statistics report only on the one-year reoffending rate, but confirm a significant decline in reoffending over time, declining with the age of the offender.<sup>7</sup>

Further, we note that DNA is collected on arrest for all recordable offences. It is incorrect to state (as the Government is cited as doing in the judgment, para 62) that a recordable offence is always an offence which is punishable by a term of imprisonment. In England and Wales, a list of recordable offences has been published by the charity Unlock, however it is unclear whether or not all these offences are recordable in Northern Ireland.<sup>8</sup> Recordable offences in Northern Ireland were established by the Northern Ireland Criminal Records (Recordable Offences) Regulations 1989.<sup>9</sup> However, there may have been many subsequent

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<sup>5</sup> Rehabilitation of Offenders (Northern Ireland) Order 1978.

<http://www.legislation.gov.uk/nisi/1978/1908/article/6>

<sup>6</sup> AccessNI. Information disclosed in a criminal record check. <https://www.nidirect.gov.uk/articles/information-disclosed-in-a-criminal-record-check>

<sup>7</sup> Department of Justice. Adult youth and reoffending in Northern Ireland 2016-2017. Date published: 14 November 2019. <https://www.justice-ni.gov.uk/publications/adult-youth-and-reoffending-northern-ireland-2016-2017>

<sup>8</sup> The Information Hub. Recordable Offences. <https://hub.unlock.org.uk/knowledgebase/recordable-offences-2/>

<sup>9</sup> The Northern Ireland Criminal Records (Recordable Offences) Regulations 1989. <https://www.legislation.gov.uk/nisr/1989/442/resources>

amendments (as there have been in England and Wales) and it is difficult to find a definitive list of recordable offences in Northern Ireland today. The Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) Order (Northern Ireland) 2014 lists those offences which may be disclosed on a criminal record disclosure certificate (by definition these offences are all recordable, as they would not otherwise be disclosable).<sup>10</sup> Based on this list, recordable offences include a very wide range of offences, including breach of the peace.

It is important to note that since DNA is collected routinely on arrest for any recordable offence, in most cases the DNA will not be relevant to solving the crime in question. For the UK National DNA database (NDNAD), the proportion of recorded crimes involving DNA detections remained roughly constant at 0.36% between April 2003 and 2012.<sup>11</sup> Thus DNA retention is relevant to only a very small proportion of recorded crimes. DNA detections are no longer reported, so more up-to-date figures are not available. Matches are still reported for the NDNAD: in 2017/18 there were 31,081 subject to crime scene matches, which implies around 0.5% of subject records (of which there were 6,196,278) matched a crime scene DNA profile that year.<sup>12</sup> In Northern Ireland, limited statistical information is available, but the Northern Ireland DNA Database Governance Board Report 2012-14 notes that the majority of cases involving 'hits' on the Northern Ireland DNA database have been burglaries and auto crime, although 'hits' have been obtained in cases of murder, rape, assault, arson, robbery, and criminal damage amongst other offences.<sup>13</sup> Thus, retention of a person's DNA profile will not be necessary for the investigation of most offences.

Finally, as GeneWatch has previously noted, retention of individuals' DNA records also plays no role in exonerating innocent people: only the crime scene DNA needs to be retained for this purpose as an accused or wrongly convicted person carries their DNA with them at all times. Similarly, known suspects (identified through other means) do not need a record on the DNA database in order to have their DNA sample taken and their profile compared with any crime scene evidence.<sup>14</sup> Further support for restricting the size of the database is provided by the evidence which shows that the number of crimes detected using DNA is driven by the number of crime scene DNA profiles loaded to the database, not by the number of individuals' DNA profiles retained.<sup>15</sup>

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<sup>10</sup> The Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) Order (Northern Ireland) 2014. [http://www.legislation.gov.uk/nisr/2014/100/pdfs/nisr\\_20140100\\_en.pdf](http://www.legislation.gov.uk/nisr/2014/100/pdfs/nisr_20140100_en.pdf)

<sup>11</sup> Wallace, H. M., Jackson, A. R., Gruber, J., & Thibedeau, A. D. (2014). Forensic DNA databases—Ethical and legal standards: A global review. *Egyptian Journal of Forensic Sciences*, 4(3), 57–63. <https://doi.org/10.1016/j.ejfs.2014.04.002>

<sup>12</sup> Home Office. National DNA Database: annual report, 2017 to 2018. 12<sup>th</sup> February 2019. [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/778064/National\\_DNA\\_database\\_annual\\_report\\_2017-18\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778064/National_DNA_database_annual_report_2017-18_web.pdf)

<sup>13</sup> Northern Ireland DNA Database Governance Board Report 2012-14. <http://www.niassembly.gov.uk/globalassets/documents/raise/deposited-papers/2015/dp1372.pdf>

<sup>14</sup> GeneWatch UK comments on the Northern Ireland Criminal Justice Bill. August 2012. [http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/NICriminal\\_Justice\\_Bill\\_GWcomments.pdf](http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/NICriminal_Justice_Bill_GWcomments.pdf)

<sup>15</sup> Wallace, H. M., Jackson, A. R., Gruber, J., & Thibedeau, A. D. (2014). Forensic DNA databases—Ethical and legal standards: A global review. *Egyptian Journal of Forensic Sciences*, 4(3), 57–63. <https://doi.org/10.1016/j.ejfs.2014.04.002>

## **Recommendations**

GeneWatch UK welcomes the proposal to set an upper limit to the retention of DNA profiles, in line with the judgment of the ECtHR. In view of the plausible timescale over which a given offender might reoffend, and the importance of only retaining data that is necessary, we regard the maximum retention period of 50 years for adult convictions and 25 years for under 18 convictions (proposed for offences committed outside the UK) as more defensible than the longer upper limits of 75 and 50 years respectively (proposed for offences committed in the UK). We suggest the same upper limits are set wherever the offence is committed.

For less serious offences, we disagree with the proposed approach which allows for retention periods of up to 50 years for DNA profiles collected in connection with non-serious offences. This approach pays inadequate regard to the importance of rehabilitation and the lack of any evidence that retaining DNA profiles collected routinely on arrest for all recordable offences is necessary or proportionate to the need to tackle crime. We therefore propose that, for all offences where a rehabilitation period is specified, DNA profiles are deleted at the time at which the offence becomes spent.

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