

## **Kingsley Napley LLP's response to the Home Office DNA retention consultation**

Kingsley Napley LLP is one of the leading business crime and general crime solicitors firms in the UK. Established in 1937, we have throughout this time been involved in many of the leading cases, whether relating to serious fraud, business crime, general crime, public enquiries or extradition.

In May 2009, the Home Office published a paper titled 'Keeping the Right People on the DNA Database – Science and Public Protection'. At Annex A of that paper the Home Office invited responses on the topic of:

*“Secondary legislation proposed under the Policing and Crime Bill to amend section 64 of the Police and Criminal Evidence Act (PACE) 1984 and make more detailed provisions on the retention, use and destruction of DNA data and fingerprints.”*

The scope of the consultation was:

*“The regulation that will need to be put in place to implement the judgement of the European Court of Human Rights (“ECHR”) in the case of S and Marper; and other measures to raise the effectiveness of the use of biometric data to ensure we achieve the proper balance between protecting the public and safeguarding human rights.”*

Our response to this consultation will focus on four areas:

1. The Law;
2. The statistical basis of the Home Office's conclusions;
3. Particular areas of concern for our clients; and
4. Alternative proposals.

1. The Law

The law in relation to the retention of DNA, fingerprints and samples has developed significantly since its introduction. Section 64 of the Police and Criminal Evidence Act 1984 (PACE) currently allows the retention of fingerprints, impressions of footwear or

samples “after they have fulfilled the purpose for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence, the conduct of a prosecution or the identification of a deceased person or of the person from whom a body part came.” This is a sharp departure from the origins of this section which required the destruction of fingerprints or samples if a person were (a) cleared of an offence, (b) not prosecuted for an offence or (c) not suspected of having committed the offence. In our view this is a position which the Government should return to.

We welcome the Government’s proposal to destroy all DNA samples. However, we feel the need to stress the importance of ensuring the security and integrity of samples before their analysis and uploading onto the DNA database. Headlines and reports such as those in the BBC of West Yorkshire Police keeping samples in freezers with ice-cream (1 July 2009) and Cambridge Police keeping samples in a fridge alongside ‘unsealed foodstuffs’ (4 July 2009) do little to assure the legal profession or public of the integrity of the database. We are of the view that legacy samples should be destroyed at a quicker timeframe than the estimated two years.

The need for different treatment of those acquitted or never charged with an offence from those convicted of offences is supported by the European Court of Human Rights in the case of *S and Marper and the UK* and the Committee of Minister’s 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 Court having referred to this recommendation also stated, ‘of particular concern ... is the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who have not been convicted of any offence and are entitled to the presumption of innocence, are treated in the same way as convicted persons .... The right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding an accused’s innocence may be voiced after his acquittal.’ Whilst we welcome the proposal in the Consultation Document not to store the DNA profiles of volunteers this is a clear indication that those arrested and not proceeded against or those who are acquitted are tainted by suspicion.

The 'blanket and indiscriminate nature of the power of retention in England and Wales' is not remedied by the current proposals. The proposed retention periods fail to distinguish sufficiently between offence types with offences being included within the serious sexual or violent offences list at the back of the document, which may arguably not be sufficiently serious to justify extended retention. In addition, the retention of all profiles and fingerprints from those convicted regardless of offence fails to address the diverse nature of the criminal law in this country. Both policies fail to distinguish between offences where FDNA has no intrinsic value to either the offence or offender. No evidence has been provided by the Government or located by us which suggests that someone convicted of insider dealing or white collar fraud is more likely to commit rape or murder. In our view the seriousness and type of offence should be considered when determining the need to retain DNA profiles and fingerprints, we note that this is a view shared by the Police Foundation, Law Society and Justice. It is also a view clearly supported by the Scottish Parliament who voted to retain information from those not convicted solely in cases of violent or sexual offences. Offences in England and Wales have already been categorised in large part by the work done for the current ACPO step-down procedure which has offences listed in terms of seriousness.

The European Court were 'concerned by the lack of provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances' (para 119), factors which this consultation does not address. As will be discussed below the suggested plans for retention of DNA and fingerprints still fail to address the differing levels of offence seriousness or the usefulness of DNA and fingerprints in solving certain crimes. Neither do the Government's suggestion that the rules governing this be made by way of secondary legislation.

#### **Rehabilitation of Offenders Act 1974**

The continued retention of fingerprints and DNA profiles taken from those individuals acquitted or cautioned, given a final warning or reprimand or Penalty Notice for Disorder (PND) contradicts the position of these individuals under the Rehabilitation of Offenders Act 1974. It is important to note that a juvenile does not have to consent to a final warning or reprimand and the imposition of a PND does not require an admission of

guilt. All disposals other than a conviction in a court of law are deemed spent at the time they are given in the case of a simple caution or after a period of three months following the imposition of a conditional caution. In addition, the Rehabilitation of Offenders Act 1974 provides for persons to be rehabilitated after a specified period depending upon the length of their custodial sentence. It further provides that, 'a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction' (section 4 of the Act). Those individuals who fall to be rehabilitated under the Act are not afforded its protection by the indefinite retention of fingerprints and DNA profiles. The proposal to allow retrospective DNA sampling as well as being open to abuse must also fall foul of the Rehabilitation of Offenders Act 1974.

### **Recordable Offences**

The Consultation paper states at paragraph 4.6 'samples can be taken from an individual detained at a custody suite for a recordable offence i.e. not a minor offence. This is a clear misstating of the position as minor offences are clearly recordable. By way of example PND's are available for 18 offences, 11 of which are recordable. The PND Guidance for adults refers to these as low-level offences and the Guidance document for juveniles refers to these as 'minor straight-forward offences'. Where out-of-court disposals are used the police and/or the CPS are required to have determined that a prosecution is not in the public interest. Therefore, the public may wonder how when this decision has already been made it becomes in the public interest to retain fingerprints and DNA profiles.

In addition, we have concerns about the wide nature of the term 'recordable offence'. The National Police Records (Recordable Offences) Regulations 2000 allow for the recording of "convictions, cautions, reprimands and warnings in respect of any offence punishable with imprisonment" and for any offence specified within the Regulations. These specified offences include offences for which a fine of between £250 and £5000 is the maximum penalty. Additionally, a number of these offences are low-level offences for which DNA and fingerprints could not assist the police in establishing or locating an offender, examples of this type of offence are those falling under the Licensing Act 2003

and the false claiming of a professional qualification under the Nursing and Midwifery Order 2001.

## **ECHR**

We are of the opinion that the proposals fail to address the concerns of the European Court in relation to minimum safeguards, the European Court specifically identified the need for ‘clear, detailed rules governing the scope and application of measures ... as well as minimum safeguards concerning, *inter alia*, duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction, thus providing sufficient guarantees against the risk of abuse and arbitrariness’ (para 99). As detailed consideration of the proposed mechanisms for continued retention and the issues which it raises is clearly required, it cannot be sufficient for these proposals to be implemented by means of secondary legislation. These proposals should be subjected to the proper scrutiny of Parliament. We agree with the views of Justice, the Law Society and the Police Foundation that the retention of DNA profiles and fingerprints should be subject to the scrutiny of an independent body reporting to Parliament not the Executive or Ministers.

## 2. The Statistics

Section 6 of the Home Office Paper consultation paper is titled *‘Implementing the judgment: DNA profiles’*. There are a number of issues which arise from this section in relation to the evidential and statistical basis that is used to support the retention of DNA in relation to those person’s arrested but who subsequently have no further action taken against them or are not convicted of any crime. Indeed on 9 October 2006, Joan Ryan a former Home Office Minister told Parliament in response to a Parliamentary question ‘As far as we are aware, there is no definitive data available on whether persons arrested but not proceeded against are more likely to offend than the population at large’ (8 October 2006, HC Deb, Col 491W).

At paragraph 6.3 the paper says that “*in light of the judgment (in S and Marper) research has been undertaken to establish the latest evidence to help to consider that options available to inform a retention period for those arrested but not convicted or against whom no further action was taken*”. Reading on it appears that the main ‘research’ relied

on is some research (Kurlycheck, Brame and Bushway and Nakamura) conducted in the United States of America and a Jill Dando Institute (JDI) research paper. When referencing the US research there appears to be no separate research relied on which suggests that UK and US citizens have the same behavioural traits which calls into question of the validity of this research when applied to the UK.

We agree with Ben Goldacre's view that the research conducted by the JDI is unclear and poorly presented, based on too small a sample, and is generally incomprehensible (the Guardian, 18 July 2009, 'Home Office research so feeble someone ought to be locked up'). In addition we agree with the criticism of the proposals and the evidence on which they are based by Keith Soothill and Brian Francis (*New Law Journal*, 17th July 2009, 'Keeping the DNA link'.) Mr Justice Beatson in his Valedictory address as President of the British Academy of Forensic Science at Inner Temple on 16 June 2009 suggested that 'the issues is one on which, for most of the twentieth Century, advice would have been sought from a Royal Commission made up of the leading experts in all the relevant disciplines or a body such as the Law Commission.

When the JDI paper is examined it quickly becomes clear that although the paper may be recent, it in fact relies on figures relating to a period between 1994 and 1996. The Home Office paper relies on this old data to assert, at paragraph 6.10, that they believe that "*the risk of offending following an arrest which did not lead to a conviction is similar to the risk of reoffending following a conviction*". The Home Office recognise this as a 'controversial assertion' and go on to say at paragraph 6.11 that "*This work suggests that the risk of subsequent conviction is at least as high in the group who were subject to no further action to those who receive a caution or non-custodial sentence.*" In our opinion it seem strange that such a contentious conclusion is based on such a short time period a number of years ago.

Further to the fact that the data is considerably out of date it is also worrying that such a small sample size is relied on, specifically in 1994 it is only 99 individuals which, although acknowledged by the author, is not accounted for within the data. In addition by only studying one Metropolitan Police Area the data lacks any form of 'control' which makes the data statistically flawed as it does not take into account the economic and social make up of the area or whether people have moved in or out of the area. It seems

extraordinary that the Home Office is relying on data that is taken in one area on one day.

In fact when considering other figures for the period 1998 to 2008 in a table prepared by Genewatch from Government/Parliament figures (see attached) it is clear that although the number on the DNA database has risen from 517,000 to 4,748,227 the number of detected crimes in which a DNA match was available has in recent years gone down. In 2002/03 it peaked at 21,098 but is down to 17,614 in 2007/08. In addition the percentage of recorded crimes involving direct DNA detection has stayed at around the same point of 0.35 to 0.36 between 2002/03 and 2007/08. This would suggest that the detection capabilities of a DNA database is not in fact related to the number of people on the database.

It is interesting to note that at paragraph 2.5 of the Consultation Paper it is stated 'The majority of the active criminal population is now believed to have its DNA recorded and police forces use DNA profiles to solve thousands of cases every year. This does not appear to be supported by the available statistics, nor the author of the JDI report who himself has recognised the futility of trying to obtain the DNA of the active criminal population. In May 2006 as co-author of the paper 'DNA evidence and police investigations: a health warning' Ken Pease wrote, 'We worry greatly about strategic Objective 2 of the National DNA Database Board (NDNADB) which is to obtain DNA profiles from the active criminal population. A moment's thought reveals that to be impossible given the distributions of lengths of criminal careers, many short enough that, with current levels of detection, they will be over before the police are in a position to take a criminal justice sample.' Further in February 2002, Ken Pease and Dick Leary in the paper 'DNA and the active criminal population' concluded 'There is no increase in the proportion of crime scene samples matched over time. This is to be expected because of the churn rate of criminal careers is high (see for example Farrington 2002) so that the many of those on NDNADB no longer offend, and many of those who do offend have embarked on their career so recently as not yet to appear on NDNADB.' They continue that, 'it highlights the need to remain realistic over the shortness of time for which most of those contributing criminal justice samples will remain relevant for crime detection purposes.' The paper upon which this conclusion was reached analysed far more data than that in the JDI paper relied upon. They analysed information provided by West

Midlands Police for the period April 2000 to October 2001 and considered 6878 submissions of crime scene samples and 39982 matches with criminal justice samples on the NDNADB.

Further to this the fact that out of 4,950,671 recorded crimes in 2007/08 only 0.36 percent of them resulted in direct DNA detection seriously calls into question the proportionality of having a DNA database at all.

Finally as a further general point the Home Office paper acknowledges that the data relied on has not been independently peer reviewed and therefore it would be in our view that it should not be relied on when making a decision as to how DNA retention should be handled going forward.

### 3. Case Studies

Given the busy nature of our department we regularly come across examples where the existing legislation allows the taking of an individuals DNA and fingerprints on arrest and whatever the outcome retaining it for any amount of time. The examples below demonstrate that the retention of an innocent individuals DNA for any period is disproportionate and unduly onerous.

#### Example 1 – Mistaken Identity

A female complainant reports to the police that she has been the victim of indecent exposure and sexual assault. The incident was witnessed by a member of the public and a description of the suspect is circulated to police officers in the area.

Less than ½ a mile away our client, 'A', was walking from his home address to visit the shops. 'A' was stopped and arrested by a police officer on suspicion of "serious sexual offences", the basis of the arrest being that the officer considered that 'A' fitted the description of the suspect. 'A' was taken to the local police station, booked in and provided a sample of his DNA and fingerprints. Having been arrested 'A' explained that he had been at home all morning, including the period when the assault had taken place and had two witnesses, his mother and the housekeeper, who could support this. The

investigating officer checked this information and concluded that 'A' was indeed at home at the time of the assault so released him on bail. Two days later the police contacted us and informed us that 'A' was no longer a suspect and was no longer on bail.

The circumstances of 'A's arrest clearly demonstrate that it would disproportionate to retain his DNA and fingerprints as it was clearly a case of mistaken identity. To further demonstrate the unfairness the description circulated of the suspect was of a "chubby, 5ft 8 tall, shaved headed man with a fat face and moustache." 'A's actual appearance is of a slim built man, 6ft tall, long hair, no moustache and a thin face, almost exactly the opposite in every possible feature.

We would argue that this demonstrates the fallibility of the current proposals as clearly there is no reason for 'A' to have his DNA retained for any period of time simply because he was mistakenly identified by a Police Officer.

#### Example 2 – Complex Facts

'B' works in the regulated financial sector. At 6am one morning he is arrested by officers from HM Revenue and Customs for conspiracy to defraud the revenue of £60m. 'B' is taken to the police station where his detention is authorised as he is unable to contact a lawyer as the HMRC believe that he will notify other suspects and evidence could be destroyed. At this point his DNA and fingerprints are taken.

When a representative from this firm arrives, having taken instructions, 'B' is interviewed. During the interview it quickly becomes clear that the simple reason for his arrest is that the officers from HMRC do not understand 'B's job title and role at a stockbroker's firm. 'B' answers all questions clearly and fully and is subsequently bailed to return. HMRC subsequently inform us that 'B' is no longer a suspect and in fact may be asked to be a witness.

This example, where just because a police or customs officer misunderstood someone's job or role within the often complicated financial sector, again demonstrates circumstances where it is wholly inappropriate to retain an individuals DNA. In addition

allegations of 'White collar' crime will not be resolved by using DNA evidence and there is no justification or argument to support retaining DNA in these types of cases.

### Example 3 – False Allegation

'C' met a friend for a drink on a Friday evening. The friend suggested to 'C' that they go to a party which he agrees to. Whilst at the party 'C' meets a girl, 'V', and buys her a bottle of wine, at around 3am 'V' invites 'C' to her flat and they have consensual sex. Two weeks later 'C' is arrested on suspicion of rape, at the police station he provides a DNA sample and fingerprints and is interviewed under caution. During his interview he provides full answers to questions and clearly states that all times 'V' consented to having sex with him. 'C' was subsequently bailed.

We subsequently took witness statements from friends of 'V' who had been with them both at the party and had been the first person that 'V' had seen the next morning. At no point had 'v' alleged that 'C' had raped her but she had said was embarrassed as she had a boyfriend. Three weeks after the initial allegation the police contacted us to say that no further action would be taken and that 'C' was no longer on bail.

This example shows how a damaging false allegation should not mean that an individual is further stigmatised by having their DNA taken and retained. If there is insufficient evidence to charge under the Code for Crown Prosecutors which sets a relatively low bar of "a realistic prospect of conviction" then there is no reason to retain an individuals DNA for any period of time.

These examples are not exclusive as there are many varied circumstances in which the retention of an individuals DNA and fingerprints is disproportionate to the stated goal of protection of the public. These examples are though illustrative of the kind of cases which can result in wholly innocent people having their DNA and fingerprints retained.

Additionally one cannot fail to be aware of the over-representation of particular groups within the DNA database. The Police Foundation state, 'it is widely known that certain people in the population are more likely to be arrested than others – the young, the disadvantaged and those from BME communities – sometimes simply because they are

more likely to be targeted by police activity'. Black Mental Health UK in their briefing note on the consultation states, 'currently 77 percent of young black men between the age of 18 and 35 have their DNA on the database. Three out of four black men in the UK have their DNA on the database even though the Home Office's research (C Sharp and T Budd (2005) Minority Ethnic Groups and Crime: Findings from the Offending, Crime and Justice Survey 2003 Home Office online report 33/05) shows that this group have lower offending rates than their white counterparts.' They continue to state that 'statistics indicate that 27 per cent of the entire black population is on the database, compared with just 9 percent of the Asian Community and 6 percent of the white population'.

#### 4. Alternative Proposals

Should the Government disagree with our view that information related to those arrested but never convicted of an offence should be removed, we would suggest that the threshold criteria be amended either to ensure that DNA and fingerprints are taken at the time of charge rather than arrest, or alternatively to only retain those of individuals charged with offences. This would ensure the protection of individuals such as those cited above where there was never enough evidence to charge with an offence. We note that the validity of the current law was not an issue in the case determined by the European Court.

#### 5. Conclusion

We are concerned about the definition of 'convicted' which is used throughout the consultation. The continued assertions by the Government that out of court disposals are not convictions is not supported by the intended retention of the DNA profiles and fingerprints in the manner suggested.

Our view is that the current proposals for the retention of DNA profiles and fingerprints of convicted persons remain blanket and indiscriminate, we are of the view that the proposals fail to comply with the Rehabilitation of Offenders Act 1974 and that the retention of these samples should be determined in accordance with the offence type.

If DNA profiles and fingerprints are to be retained at all from those who are acquitted or not proceeded against this should be determined in accordance with the seriousness of the offence. We are of the view that the 6 and 12 year retention periods within the Consultation lack justification and are not supported by the evidence relied upon. If the Government is determined to retain this data we would advocate a system such as that in Scotland. This would bring us into line with Scotland and this was a system supported by the European Court in the case of *S and Marper*.

The proposals in connection with children do not go far enough and do not adequately meet the concerns of the European Court. We welcome the removal of information related to under 10s and would ask that their position is protected in any legislation going forward.

We welcome the proposal that the Exceptional Grounds Policy will be placed into Regulations and would welcome the opportunity for further consultation on these. Our experience of requesting the deletion under this policy is that the threshold is set at such a high level that it is virtually impossible to meet. Requests are almost always met with a standard rejection indicating that the information can be lawfully retained and no reasons for the rejection of the exceptional argument are given. A procedure allowing for representations to be made should be clearly defined and understandable to the general public.

The United Kingdom has held itself out as the leader in this field. We agree with the observations of the European Court, that any state claiming a pioneering role in the development of new technologies bears a special responsibility for striking the right balance between the extensive use of such techniques and interference with the right to private life of individuals. We are of the opinion that the current proposals do not go far enough to safeguard these rights.