Under current legislation and guidelines, the police in England and Wales may indefinitely retain fingerprint and DNA data taken from individuals arrested for a recordable offence, irrespective of whether such individuals are actually convicted.

However, in December 2008 the European Court of Human Rights held that the indefinite retention of such data violated Article 8 of the European Convention on Human Rights (right to respect for private and family life) due to the “blanket and indiscriminate” nature of the police powers. Compliance with this decision will require changes to the existing retention arrangements. In May 2009, the Government therefore published a consultation paper, which included the following key proposals for a new retention framework:

- DNA profiles from adults convicted of a recordable offence, or under-18s convicted of a single serious offence or two or more lesser offences, would continue to be held indefinitely;
- profiles of under-18s convicted of a single lesser offence would be deleted when they turned 18; and
- profiles of adults arrested but not convicted would be retained but automatically deleted after either six or twelve years (depending on offence seriousness); and
- profiles of under-18s arrested but not convicted would be retained but automatically deleted after either twelve years (for arrests in respect of serious offences) or after six years or on the individual’s 18th birthday, whichever was soonest (for all other arrests).

The Conservatives and the Liberal Democrats criticised the proposals as not going far enough to implement the European Court of Human Rights decision; both parties instead support the introduction of a retention framework based on the Scottish system, under which the police can only retain data from individuals arrested but not convicted for a limited period of time.

The consultation closed on 7 August 2009 and a summary of responses was published on 11 November 2009. On the same date, the Home Secretary Alan Johnson announced a
revised set of proposals for the retention of fingerprint and DNA data. Key differences between the revised proposals and the original consultation proposals are:

- the twelve year retention period for profiles from adults arrested for a serious offence but not convicted would be shortened to six years;
- profiles of juveniles convicted of a single minor offence would be retained for five years before being deleted, rather than being deleted once the individual in question reached 18;
- profiles of 16 and 17 year-olds arrested for a serious offence but not convicted would be retained for six years, in line with the arrangements for adults; and
- profiles of all other juveniles arrested but not convicted would be deleted after three years, regardless of the offence for which they were arrested and the age at which they were arrested.

The Government had originally proposed to implement the new retention framework by way of secondary legislation. However, in October 2009, following criticism from both the Delegated Powers and Regulatory Reform Committee and the Joint Committee on Human Rights, the Government announced that any changes to the framework will now be implemented by way of primary legislation. The proposed changes now appear as clauses 2 to 20 of the Crime and Security Bill, which had its first reading on 19 November 2009.

Constituents whose fingerprints or DNA have been retained may find it useful to ask the police to confirm why (and under which legal provisions) they were retained. Constituents wishing to challenge such retention should seek professional advice from a solicitor.

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As originally enacted, section 64 of the Police and Criminal Evidence Act 1984 (PACE) required fingerprints or samples to be destroyed if the person they were taken from was subsequently cleared of the offence, or if the police decided not to prosecute. However, there have been a number of amendments to PACE that have extended the circumstances in which samples can be taken and retained. In 1994 some very limited exceptions to the requirement to destroy were made.\(^1\) A more substantial change to section 64 of PACE was made in 2001, when the obligation to destroy samples from people not charged or convicted was replaced with a rule that any such samples could be retained and used for purposes related to the prevention and detection of crime, investigating offences or conducting prosecutions.\(^2\) Since the implementation of this change, if a match is established between a sample from an individual who has been cleared of an offence and a sample taken at a subsequent crime scene, the police have been able to use this information in the investigation of the crime.

In 2003, the ability to take and retain fingerprints and samples was extended to include persons arrested for recordable offences, even where the arrest resulted in no further action being taken.\(^3\) This change was controversial; amendments made in the House of Lords but not accepted by the Commons would not only have rejected the new extension but would have reversed the 2001 changes. The Lords were concerned about the human rights implications, as was the Joint Committee on Human Rights:

> ...both the taking of samples and fingerprints, and the storage of, access to and use of the data derived from them, engage the right to respect for private life under ECHR Article 8. As interpreted by the European Court of Human Rights, Article 8 requires the State to show a justification for any collection or storage of personal data, and also for allowing any person to have access to those data or to use them for any purpose without the consent of the person to whom they relate. Because the fingerprints, samples and associated records would serve to identify the person to whom they relate, they constitute personal data for this purpose. They make sensitive personal information available to others. Information about a person's distinctive DNA pattern is particularly sensitive, in that people with access to it can use it to identify not just the individual subject but also aspects of that person's genetic susceptibilities and predispositions. If it fell into certain hands, the information could affect the data subject's ability to obtain various kinds of insurance cover and employment opportunities, and to form personal relationships. Any dealing with this kind of information requires particularly strong justification, and very strong safeguards for the accuracy and confidentiality of the data.\(^4\)

In a debate about the DNA database in March 2006, the then Home Office minister Andy Burnham defended the changes:

> In 2003, following representations from the police service, new powers were introduced enabling the police to take DNA and fingerprints from persons who have been arrested for a recordable offence and detained in a police station. The great majority of profiles on the database are from individuals who have been either convicted of or charged

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1. s57, Criminal Justice and Public Order Act 1994
2. s82, Criminal Justice and Police Act 2001
3. ss 9-10, Criminal Justice Act 2003
with an offence. As at early December 2005, only around 125,000 profiles related to persons who had been arrested but no further action had been taken in the case.

It is a fact that the police arrest more people than they charge, and we do of course accept that broadening police powers in that way has civil liberties implications. The Government appreciate that some people may be concerned about building a larger DNA database, particularly where it relates to arrested people who have not been proceeded against for an offence. Although we recognise all those concerns, we have nevertheless concluded that any intrusion on personal liberty is both necessary and proportionate to the benefits for victims of crime and society generally in terms of detecting crime and protecting the public against criminals.5

The Counter-Terrorism Act 2008 further extends PACE to enable the police to take and retain fingerprints and samples from individuals who are subject to control orders. Part 1 of Library Research Paper 08/20 provides a detailed background to the collection and retention of samples from such individuals.

In its report on the Government’s counter-terrorism policy and human rights, the Joint Committee on Human Rights did not comment substantially on DNA retention provision; however, a letter from the Committee to the Home Secretary commented:

In September, the Nuffield Council on Bioethics recommended that the police should only be allowed to store permanently bioinformation from people who are convicted of a crime, with the exception of people charged with serious violent or serious sexual offences. Indefinite retention of DNA samples from persons suspected of terrorism potentially raises even more acute concerns about proportionality, because the threshold for arresting a person on suspicion of terrorism is so much lower, and the proportion of those arrested who are subsequently released without charge is correspondingly higher.6

2 The National Fingerprint Database and the National DNA Database

Fingerprints and DNA samples taken and retained under PACE are stored on the National Fingerprint Database (IDENT1) and the National DNA Database (NDNAD) respectively. The National Policing Improvement Agency (NPIA) is responsible for both databases.

Gary Pugh, chair of the NDNAD Strategy Board, provides an overview of the NDNAD’s governance arrangements in its most recent annual report:

On taking over the Chair I inherited a governance structure that was based on the tripartite governance of policing in England and Wales, with core membership of The Association of Chief Police Officers (ACPO), the Association of Police Authorities (APA) and the Home Office representing the Secretary of State and lay membership. It is clear that the governance of the NDNAD needs to be more broadly based and recognise the individuals and organisations that can input and contribute to the effective operation of the NDNAD. I have proposed that membership of the Board should be extended to include the DNA Ethics Group, Human Genetics Commission (HGC), National Policing Improvement Agency (NPIA), Forensic Science Regulator and representation from Northern Ireland and Scotland and the Information Commissioner Office (ICO) as an observer. Whilst accepting the independent and separate reporting line to Ministers and Parliament of other members, I believe that a

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5 HC Deb 30 Mar 2006 c1129-30
collaborative approach by all the relevant agencies is the most effective way to provide oversight and direction for the NDNAD.\textsuperscript{7}

However, there is no statutory basis for either IDENT1 or the NDNAD, as highlighted by the Nuffield Council on Bioethics:

7.54 The current regulatory structure is not on a statutory footing and the legislative framework surrounding the forensic use of bioinformation is piecemeal and patchy. The regulatory architecture of forensic services is also currently in a state of flux in the United Kingdom. While different areas of the industry might require specific attention, such as the NDNAD, there is a need to think more holistically and prospectively about the future possibilities and challenges that might come with increased access to, and sharing of data, across forensic databases. An essential aspect of all governance arrangements must be a commitment to transparency and openness both as regards standard operating procedures (SOPs) and decision-making processes. This is in addition to the requirement that those procedures and processes be justifiable in the first place. Another crucial feature of the regulatory structure is the role of an independent oversight body or official.

7.55 We recommend that there should be a statutory basis for the regulation of forensic databases and retained biological samples. A regulatory framework should be established with a clear statement of purpose and specific powers of oversight delegated to an appropriate independent body or official. This should include oversight of research and other access requests, for example for further testing of samples or familial searching and inferring ethnicity. We are pleased to see the establishment of an Ethics Group by the Home Office, with a remit to oversee the running and uses of the NDNAD, but its specific functions and powers must be more clearly, and publicly, articulated. Moreover, we consider that a longer-term view is required that considers the future possibilities and challenges that may come with increased access and linkage involving a range of forensic databases.\textsuperscript{8}

These concerns have been echoed in reports by the Home Affairs Committee and the Constitution Committee.\textsuperscript{9}

3 ACPO guidelines for retention and removal

While section 64 of PACE permits the retention of samples, it does not specify any time limits for such retention or any procedure by which samples can be removed. Instead, time limits and removal procedures are set out in guidance issued by the Association of Chief Police Officers (ACPO):

Mr. Bailey: To ask the Secretary of State for the Home Department for how long the Government retains the DNA records of individuals who are not found guilty of committing an offence.\textsuperscript{[181946]}

Meg Hillier: Under the Police and Criminal Evidence Act (PACE) 1984, the police have the power to take and retain DNA from anyone arrested for a recordable offence and detained in a police station.

\textsuperscript{7} NDNAD, Annual Report 2007-09, p2
\textsuperscript{8} Nuffield Council on Bioethics, The forensic use of bioinformation: ethical issues, September 2007, paras 7.54-7.55
\textsuperscript{9} Home Affairs Committee, Surveillance Society, 8 June 2008, HC 58-I 2007-08, para 285; and Constitution Committee, Surveillance: Citizens and the State, 21 January 2009, HL 18-I 2008-09, para 212
PACE does not set a limit on retention. Instead, the police follow retention guidelines issued by the Association of Chief Police Officers (ACPO), which state that records will normally be retained for 100 years from the person’s date of birth, regardless of whether they are still alive.

ACPO also issued guidance to chief officers on the consideration of applications for removal at the end of January 2006. The ACPO guidelines envisage that DNA which has been taken lawfully will be removed only in exceptional cases, though discretion remains with the chief officer. The then Parliamentary Under-Secretary of State for the Home Department, my right hon. Friend the Member for Leigh (Andy Burnham), made a written ministerial statement announcing the issue of these ACPO guidelines, on 16 February 2006, *Official Report*, column 117WS.\(^{10}\)

The ACPO guidance on retention limits and the exceptional case procedure is set out in the *Retention Guidelines for Nominal Records on the Police National Computer*, which were published on 16 March 2006. Between 1 January 2008 and 31 December 2008, 272 subject profile records were deleted from the NDNAD under the exceptional case procedure set out in the Retention Guidelines (i.e. following a request to the chief officer of the responsible force from the person concerned).\(^{11}\)

During the Lords stages of the *Counter-Terrorism Act 2008* concerns were raised that the exceptional case procedure in the Retention Guidelines was being too narrowly interpreted; the Conservative peer Baroness Hanham therefore proposed an amendment that would have required the Government to publish new guidelines on removing a person's data from the NDNAD:

This amendment would require the Secretary of State to draft and lay before Parliament regulations governing the procedures by which people can discover what information is held about them and under what circumstances a request can be made by them to have samples taken during an investigation by the police destroyed. As we will see, there is no transparency in the current situation and the dice are severely loaded against innocent people being able to ensure that their most personal details are not kept indefinitely following their exclusion, either by a court or following a decision that there is no reason for them to be involved further in any inquiry.

(...) The guidelines are deeply worrying and make clear just how high a barrier the Government have imposed on DNA and fingerprint information ever being destroyed. The initial response to a request for destruction is an automatic refusal. The guidelines state:

“In the first instance applicants should be sent a letter informing them that the samples and the associated PNC record are lawfully held and that their request for deletion/destruction is refused”.

But the chief police officer is then recommended to check with the DNA and Fingerprint Retention Project if the applicant persists.

Appendix 2 makes it clear that, while the chief police officers have the discretion to authorise deletion of any specific data, it is,

“suggested that this discretion should only be exercised in exceptional cases”.

\(^{10}\) *HC Deb 21 Feb 2008 c824W*  
\(^{11}\) *HC Deb 3 Feb 2009 cc1048-1052W*
It then goes on to say:

“Exceptional cases will by definition be rare”.

Indeed they will be rare, for the case study given of when DNA information might be suitable for destruction is almost laughable. It is that if the police arrest every occupant of a building for murder following the discovery of a dead body and forcibly take DNA samples, but then discover that the dead body in fact died of natural causes and that no crime has been committed. That is then considered sufficiently a case where, possibly, DNA samples—taken from entirely innocent people—might be destroyed. The number of similar cases will not be enormous.12

The Lords accepted the amendment by 161 votes to 150, although it was subsequently rejected by the Commons by 277 votes to 209.13

4 The ECHR challenge in the courts

Article 8 of the European Convention on Human Rights provides:

Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14 provides:

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

In R v Chief Constable of South Yorkshire ex p S and Marper,14 the domestic courts considered whether the new provisions were compatible with the European Convention on Human Rights. Fingerprints and DNA samples had been taken from S, an 11 year old boy who was acquitted of robbery, and from Michael Marper, a man against whom proceedings for harassment of his partner had been discontinued. In both cases, the police proposed to retain the samples in accordance with their general policy that all samples should be retained, while the applicants argued that their samples should be destroyed. The case was heard in the Divisional Court in March 2002 – the court was not convinced that the retention of samples engaged Article 8 at all, but came to the conclusion that, if it did, it was in accordance with the law and necessary within Article 8(2). The applicants’ claim was therefore dismissed. On appeal, the Court of Appeal unanimously found that the retention of

12 HL Deb 4 November 2008 cc132-133
13 HL Deb 4 November 2008 c138 and HC Deb 19 November 2008 c266. See also “Government defeat on DNA database”, BBC News website, 5 November 2008
14 [2002] 1 WLR 3223, [2004] 1 WLR 2196
fingerprints and samples did engage Article 8(1). There was an interference with the right of privacy, which, though not substantial, was nevertheless real. But that interference was justified. Its purpose was obvious and lawful. It was also proportionate: the adverse consequences to the individual were not out of proportion to the benefit to the public. Delivering the leading judgment, Lord Woolf CJ said:

17. So far as the prevention and detection of crime is concerned, it is obvious the larger the databank of fingerprints and DNA samples available to the police, the greater the value of the databank will be in preventing crime and detecting those responsible for crime. There can be no doubt that if every member of the public was required to provide fingerprints and a DNA sample this would make a dramatic contribution to the prevention and detection of crime. To take but one example, the great majority of rapists who are not known already to their victim would be able to be identified. However, PACE does not contain blanket provisions either as to the taking, the retention, or the use of fingerprints or samples; Parliament has decided upon a balanced approach.

The claimants' further appeal to the House of Lords was also dismissed. The House of Lords agreed that any interference with rights under Article 8(1) by retention of fingerprints and DNA samples was modest, and was objectively justified under Article 8(2) as being necessary for the prevention of crime and the protection of the rights of others. They accepted that there was a difference in treatment between those who had had to provide fingerprints and samples pursuant to a criminal investigation compared with the rest of the public who had not. But the difference in treatment was not analogous to any of the expressly proscribed grounds such as sex, race, gender or religion. The holding of their lawfully taken fingerprints or samples did not give rise to a “status” within the meaning of Article 14. Even if it did, the difference was objectively justified. There was a legitimate aim and a proportionate response. Nor was the Chief Constable’s blanket policy of retaining all fingerprints and samples taken disproportionate. The alternative of case by case examination was unrealistic and impractical. It would involve examining thousands of cases, would probably not confer the benefits of a greatly extended database, would involve the police in interminable and invidious disputes, and would entitle those who were not eliminated as being without a taint of suspicion to complain that they had been deprived of the presumption of innocence.

Only Baroness Hale of Richmond disagreed with the majority view that the retention and storage of fingerprints, DNA profiles and samples (as opposed to the taking of them) did not amount to an interference with rights under Article 8(1).

S and Marper then lodged an application with the European Court of Human Rights. The application was declared admissible on 16 January 2007 and a public hearing before the Grand Chamber took place on 27 February 2008. A webcast of the hearing can be viewed on the Court’s website. Judgment was handed down on 4 December 2008. The Court accepted that the retention of fingerprint and DNA information pursued a legitimate purpose, namely the detection and prevention of crime, but held unanimously that the retention and storage of the applicants’ fingerprints and DNA samples was disproportionate and not “necessary” in a democratic society and therefore violated Article 8. In considering whether the indefinite retention of samples from all suspected but unconvicted persons was

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15 [2002] 1 WLR 3223
16 [2004] 1 WLR 2196
17 Case of S. And Marper v The United Kingdom, Applications nos. 30562/04 and 30566/04. Press release 880 issued by the Registrar on 4 December 2008 provides an overview of the case.
proportionate and struck a fair balance between competing private and public interests, the Court held:

119. In this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken – and retained – from a person of any age, arrested in connection with a recordable offence, which includes minor or non-imprisonable offences. The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed …; in particular, there is no 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.

(…)

121. The Government contend that the retention could not be considered as having any direct or significant effect on the applicants unless matches in the database were to implicate them in the commission of offences on a future occasion. The Court is unable to accept this argument and reiterates that the mere retention and storing of personal data by public authorities, however obtained, are to be regarded as having direct impact on the private-life interest of an individual concerned, irrespective of whether subsequent use is made of the data…

(…)

124. The Court further considers that the retention of the unconvicted persons’ data may be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society.

(…)

125. In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants’ right to respect for private life and cannot be regarded as necessary in a democratic society. This conclusion obviates the need for the Court to consider the applicants’ criticism regarding the adequacy of certain particular safeguards, such as too broad an access to the personal data concerned and insufficient protection against the misuse or abuse of such data.

126. Accordingly, there has been a violation of Article 8 of the Convention in the present case.

Jack Straw, the Justice Secretary, made the following comment on the judgment:

The judgment, which I have read in full today, is interesting. I recommend in particular paragraph 119, which draws out what the Court means by the

“indiscriminate nature of the power of retention in England and Wales”. 
It goes on to suggest that distinctions should be made between the nature of offences for which samples have been taken, and discusses whether they should be time-limited and whether there should be an independent review. Those matters will be considered by my right hon. Friend the Home Secretary in consultation across Government. We have an obligation to report initially to the Council of Ministers and the Council of Europe by March.\(^{18}\)

### 5 The Government's response

On 16 December 2008, the then Home Secretary Jacqui Smith delivered a speech to the Intellect Trade Association in which she set out the Government's preliminary response to S and Marper:

The DNA of children under 10 – the age of criminal responsibility – should no longer be held on the database. There are around 70 such cases, and we will take immediate steps to take them off.

For those under the age of 18, I think we need to strike the right balance between protecting the public and being fair to the individual.

There’s a big difference between a 12 year old having their DNA taken for a minor misdemeanour and a 17 year old convicted of a violent offence, and next year I will set out in a White Paper on Forensics how we ensure that that difference is captured in the arrangements for DNA retention.

We will consult on bringing greater flexibility and fairness into the system by stepping down some individuals over time – a differentiated approach, possibly based on age, or on risk, or on the nature of the offences involved.

(…)

We are also re-examining retention arrangements for samples. Physical samples of hair and saliva swabs that represent people’s actual DNA are much more sensitive than the DNA profile that is kept on the database – which only uses a small part of non-coding DNA.

This was a key point flagged up when we set up the Ethics Group under the National DNA Database Strategy Board, and we will pursue improvements to the safeguards around the handling of samples.\(^{19}\)

Following the Home Secretary’s speech, a total of 96 profiles belonging to children under 10 were deleted; as at 5 March 2009, none of the profiles on the NDNAD were of children under 10.\(^{20}\)

**The White Paper: Keeping the Right People on the DNA Database**

The White Paper referred to in Jacqui Smith’s speech was published on 7 May 2009.\(^{21}\) It invited views on the content of proposed regulations that would set out a new framework for the retention of fingerprints and DNA in England and Wales. Its key proposals were:\(^{22}\)

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\(^{18}\) HC Deb 4 Dec 2008 c226

\(^{19}\) Home Office press release, *Home Secretary’s speech: Protecting rights, protecting society*, 16 December 2008

\(^{20}\) HC Deb 30 March 2009 c954W

\(^{21}\) Home Office, *Keeping the right people on the DNA database*, May 2009
Any DNA samples taken from a person on arrest would be destroyed, whether that person went on to be convicted or not.\textsuperscript{23}

The blanket retention of DNA profiles\textsuperscript{24} under the current framework would be replaced with a differentiated approach based on factors such as age, offence type and conviction. In respect of the retention of profiles from individuals who have been convicted:

- the profile of an adult convicted of a recordable offence would continue to be retained indefinitely, as would the profile of a juvenile\textsuperscript{25} convicted of a serious violent, sexual or terrorism-related offence or two or more lesser recordable offences; and
- the profile of a juvenile convicted on only one occasion of a lesser recordable offence would be deleted when he or she turned 18.

Profiles from people arrested but not convicted would have to be deleted after either six or twelve years:\textsuperscript{26}

- the profile of anyone (adult or juvenile) arrested for a serious violent or sexual or terrorism-related offence would be automatically deleted after twelve years;
- the profile of an adult arrested for a lesser recordable offence would be automatically deleted after six years;
- the profile of a juvenile arrested for a lesser recordable offence on a single occasion would be deleted after six years or on his or her eighteenth birthday, whichever is the sooner; and
- the profile of a juvenile arrested for a lesser recordable offence on more than one occasion would be subject to the same six year retention period as an adult.

Profiles from individuals who volunteered to have their DNA taken, for example for elimination purposes, would no longer be entered or stored on the NDNAD, and existing volunteer samples on the NDNAD would be deleted.

Fingerprints would be deleted after twelve years in respect of adults or children arrested for but not convicted of violent, sexual or terrorism-related offences, and six years in respect of adults or children arrested for but not convicted of other offences.

\textsuperscript{22} Note that the Home Office is not contemplating any changes to the current threshold in PACE for taking (as opposed to retaining) DNA and fingerprints on arrest from a person detained at a police station for a recordable offence, on the grounds that this threshold was not called into question by the European Court of Human Rights (see para 2.4 of the White Paper).

\textsuperscript{23} “DNA samples” are the physical samples taken from an individual, such as a mouth swab, hair or blood. DNA samples are currently retained indefinitely and stored in secure sterile laboratories.

\textsuperscript{24} “DNA profiles” are the computerised records of the pattern of DNA characteristics taken from DNA samples. DNA profiles are currently retained indefinitely on the NDNAD and appear as numeric codes on the Police National Computer.

\textsuperscript{25} “Juvenile” here means a person aged between 10 and 18 years old; profiles of children under 10 will continue to be kept off the NDNAD in accordance with Jacqui Smith’s speech (see p10 of this note).

\textsuperscript{26} The six and twelve year retention periods would start running from the date of arrest, or (in the case of an individual subject to a control order) from the date on which that individual is no longer subject to the order. The Home Office arrived at the proposed six and twelve year retention periods partly on the basis of research conducted by the Jill Dando Institute of Crime Science (see Section 6 and Annex C of the White Paper for further details of the Jill Dando Institute’s research). The head of the Institute has subsequently said that the research was incomplete when it was used by the Home Office (see p15 of this note).
• The current “Exceptional Case Procedure”, by which an individual can apply to their chief constable for the removal of their data, would remain in place. However, the procedure would be renamed “application process for record deletion” and defined criteria for deletion would be set out in regulations. These criteria would include, for example, cases where the arrest or the taking of the sample was unlawful, or where no offence existed (e.g. where a suspected unlawful killing turns out to be a death by natural causes). Individuals would continue to have the right to challenge the decision of their chief constable by way of judicial review.

• The NDNAD Strategy Board would be restructured to give it a more external, independent membership. A new strategic and independent advisory panel would also be established to monitor the implementation and operation of the regulations and to provide advice and guidance to Ministers through an annual report.27

In addition to setting out proposals for a new framework for the retention of fingerprints and DNA taken in future, the White Paper also considered the treatment of “legacy” profiles that are already on the NDNAD:

**Legacy profiles of people arrested but not convicted or acquitted**

6.25 The Government has given effect to the S and Marper judgment by destroying the relevant samples of S and of Marper and by providing just satisfaction for costs and expenses. The judgement was made in respect of the case of the two applicants.

6.26 But we have to consider the position of people in similar circumstances to the two applicants. In other words, the profiles already on the database of people who have not been convicted.

6.27 There are approximately 850,000 legacy profiles of which approximately 500,000 have no linked PNC Record. This means it is not possible to tell whether the latter profiles relate to persons arrested and not convicted or subject to no further action, or to people who have been convicted.

6.28 It is possible that a proportion of the non-reconciled profiles relate to a conviction. At this stage it is difficult to estimate what percentage would be deleted because the information is not currently held by police forces in a format which can provide such an assessment. Dealing with this group represents the biggest challenge and has the greatest resource implication.

6.29 Therefore, there are two issues relating to legacy cases: first, those whose profile is linked to a PNC record. In those cases, we are proposing that the 6-year or the 12-year retention criteria is applied depending on the offence.

6.30 The second issue relates to profiles were there is no linked PNC record. There are two options. The least expensive and most efficient process would be to delete the 500,000 profiles. The second approach is for the police to match profiles against records and where a record is identified, apply the six-year rule, the 12-year rule or the conviction rule. The Home Secretary has made clear her intention that the DNA database should contain profiles of those who should be on it.

6.31 Deleting such a volume of profiles without better understanding of the associated risk is therefore potentially a high risk option. The Home Secretary has asked the

27  Note that the White Paper does not envisage this new panel acting as an appeal body: appeals against chief constables’ decisions regarding the deletion of individual profiles would continue to be conducted by way of judicial review (see para 10.4 of the White Paper).
Association of Chief Police Officers (ACPO) to carry out further work on this aspect and provide a detailed impact assessment which can be published as part of the Summary of Responses to the consultation exercise on this paper.\(^{28}\)

The consultation paper did not, therefore, set out any immediate plans to delete legacy profiles of individuals whose data was taken in similar circumstances to S and Marper.

In addition to the proposed regulations, the White Paper also indicated that the Government intended to bring forward primary legislation to expand the categories of person from whom fingerprints and DNA may be taken:

7.1 The proposed regulations relate only to the retention and use of DNA and fingerprints. We are proposing in future primary legislation to be introduced when Parliamentary time allows to provide additional provision for the taking of samples in three specific instances:

- **Post arrest** – where a person has provided a sample and it has proved to be insufficient for profiling purposes. We are proposing that the police should have a power to require a person to provide a further sample.

- **Post conviction** – currently a sample may be taken if a person is convicted and in prison custody and a sample was not taken during the investigative or court process. If a person is convicted or charged but not subject to a prison sentence, the police must request within one month of the conviction or charge, or within one month of the police being informed that the sample is not suitable for analysis, that the person attends the police station for a sample to be taken. We are proposing that the police may require a sample in these circumstances at any time post-conviction. The particular operational focus will be on ensuring that the profiles of those convicted of the more serious offending will be on the NDNAD.

- It is important to strengthen public protection by ensuring that the profiles of those UK residents and nationals convicted of sexual or violent or terrorism-related offences overseas are retained in the NDNAD in view of the risk they may pose here.\(^{29}\)

Announcing the White Paper in a written ministerial statement, Home Secretary Jacqui Smith said that the proposals:

> focus on achieving a proportionate balance between allowing the police to effectively detect, investigate and deal with offenders while ensuring that appropriate safeguards and protections are available to the individual.\(^{30}\)

The Conservatives and the Liberal Democrats criticised the White Paper’s proposals as not going far enough to respond to the decision in S and Marper. Both parties instead favour the introduction of a retention framework based on the Scottish system, which provides for more limited retention of data from unconvicted people (see section 6 of this note).\(^{31}\)

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\(^{28}\) Home Office, *Keeping the right people on the DNA database*, May 2009, paras 6.25 to 6.31

\(^{29}\) Ibid, para 7.1

\(^{30}\) HC Deb 7 May 2009 cc23-24WS

Reaction to the White Paper’s proposals

The consultation closed on 7 August 2009; 503 formal responses were received, a summary of which was published on 11 November 2009. The first part of the summary provided an overview of respondents’ views; the second part, considered in the next section of this note, set out the Government’s revised proposals for a new retention framework.

The summary stated that there had been general support for a number of the consultation’s proposals, such as those to destroy all DNA samples (as opposed to profiles), to retain the profiles of those convicted of an offence and to clarify the exceptional case procedure and place it on a statutory footing. However, it also outlined a number of criticisms. In relation to the retention of profiles from individuals arrested but not convicted:

…the significant majority [were] opposed to any form of retention of profiles and fingerprints for persons arrested and against [whom] no further action was taken or acquitted. Most of those opposed to any form of retention considered that the ‘state’ should not hold personal information on an individual when they are innocent in the eyes of the law. It was entirely inappropriate that a person should be treated the same as a person who had been found guilty and it went against the principle of ‘innocent until proven guilty’.

There was also “confusion on the proposed retention policy for young people and concern on the impact of stigmatisation of a young person and their ability to access future opportunities”.

The research that had formed the basis for the proposed six and twelve year retention periods was also criticised:

Whilst there was recognition at the intention to identify an evidence base and acknowledgement in the consultation paper itself of the status of the material, there was significant criticism from a range of respondents on the content of the research and the impact assessment.

There were three key criticisms: the sample size was too small; the linking of arrested and not convicted and arrested and convicted but not given a custodial sentence was considered flawed; and the material presented had not been peer reviewed. As a consequence, critics considered that the proposed retention periods were not based on a solid evidence base and required more detailed work to be carried out. Some respondents indicated that scientific certainty was required in order to determine a retention policy, if any, for arrested and not convicted and also for arrested and convicted.

In its response to the consultation, the human rights organisation Liberty described the Government’s response as “extremely disappointing”, going on to say:

The proposals in this consultation are inadequate, very poorly researched and fail to address the Court’s conclusion that the current retention regime is a disproportionate interference with the right to respect for private life. At the very least, an issue as important as the retention of intimate DNA profiles on a centralised database, must be properly debated and considered by Parliament and not left to secondary legislation. Further, no consideration has been given to deleting the DNA profiles of adults.

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32 Home Office, *Keeping the Right People on the DNA Database: Summary of Responses*, November 2009
33 Ibid, para 2.1
34 Ibid, para 2.12
convicted of minor offences. The approach taken towards children fails to fully appreciate the harmful effect on minors of being on the National DNA Database. Most problematically, the proposal to remove the profiles of those who have not been convicted of any offence, either because they have been acquitted or no charges were laid or were later dropped, is limited to six and twelve years according to the offence for which they were arrested. These figures are based on flimsy research, compare unfavourably with the position in other European countries and fail to have due regard for the presumption of innocence.\textsuperscript{36}

GeneWatch UK, a not-for-profit policy research group focused on genetic science and technologies, expressed similar views in its response to the consultation.\textsuperscript{37}

Commenting on the proposals from the police service’s perspective, ACPO recognised the need for balance and proportionality but said that “any outcome which reduces the ability of the service to protect the public and bring those guilty of serious crimes to justice is a cause for serious concern and careful consideration”.\textsuperscript{38}

Interviewed for the BBC’s Today programme in September 2009, Gloria Laycock, head of the Jill Dando Institute which conducted the research on which the proposed six and twelve year retention periods were based, said that the research had not been ready when it was published in May:

She said: "Their policy should be based on proper analysis and evidence and we did our best to try and produce some in a terribly tiny timeframe, using data we were not given direct access to.

"That was probably a mistake with hindsight, we should have just said 'you might as well just stick your finger in the air and think of a number'.

The government also recommended the DNA profiles of children aged 10 and over, arrested or convicted of a minor offence, should be deleted by their 18th birthday.

But Professor Laycock said this went against established criminological findings - which show offending peaks at the age of 17 or 18 and remains high until the mid-20s.

She said: "The idea of keeping adults' DNA on a database for longer and getting rid of, I'm going to call them young people rather than children's DNA, for less time makes no sense really on the basis of what we already know about crime."\textsuperscript{39}

The Government's revised proposals

On 11 November 2009, the Home Secretary Alan Johnson made a written ministerial statement outlining a revised set of proposals for the retention of fingerprint and DNA data.\textsuperscript{40} Accompanying the statement was a new “review of the evidence in relation to a policy of DNA record retention”.\textsuperscript{41} The revised proposals replicated the original consultation proposals in the following respects:

\begin{flushleft}
\textsuperscript{36} Liberty, \textit{Liberty’s response to the Home Office’s Consultation: Keeping the Right People on the DNA Database: Science and Public Protection}, August 2009, pp2-3
\textsuperscript{37} GeneWatch UK and the Open Rights Group, \textit{Submission to the Home Office consultation: ‘Keeping the right people on the DNA database’}, August 2009
\textsuperscript{38} ACPO press release 50/09, \textit{ACPO comment on consultation of DNA Database}, 7 May 2009
\textsuperscript{39} “DNA storage proposal ‘incomplete’”, \textit{BBC News website}, 25 September 2009. An audio clip of Professor Laycock’s comments can be accessed on the \textit{Today website}.
\textsuperscript{40} HC Deb 11 November 2009 cc25-28WS
\textsuperscript{41} Home Office, \textit{DNA Retention Policy: Re-Arrest Hazard Rate Analysis}, November 2009
\end{flushleft}
• All DNA samples (as opposed to profiles), including those from convicted offenders, would be destroyed.

• Profiles of all convicted adults, and any juveniles convicted of a serious offence or multiple lesser offences, would be retained indefinitely.

• Profiles of adults who are arrested for a lesser recordable offence but not convicted would be deleted automatically after six years.

However, the revised proposals made a number of changes in relation to the retention of data from adults arrested for serious offences but not convicted, unconvicted juveniles and juveniles convicted of lesser recordable offences. The changes are as follows:

• Profiles of adults arrested for a serious offence, but not convicted, would now be automatically deleted after six years rather than twelve. All profiles from unconvicted adults would therefore be subject to a six year retention period, regardless of the seriousness of the offence for which they were arrested:

  We propose a 6 year retention period for the profiles of unconvicted adults irrespective of the seriousness of the crime for which they were arrested. Although the ECtHR suggested that the seriousness of the alleged offence should be a factor in determining what length of retention was proportionate, the best available evidence indicates that the type of offence a person is first arrested for is not a good indicator of the seriousness of offence he might subsequently be arrested for or convicted of in future. As the retention of the DNA of innocent people is not punitive but rather a measure to facilitate the detection of future offences, the Government therefore concludes it is appropriate to have a single retention period.42

• Profiles of juveniles convicted of a single minor offence would be retained for five years before being deleted, rather than being deleted once the individual in question reached 18.

• Profiles of 16 and 17 year-olds arrested for a serious offence but not convicted would be retained for six years, in line with the arrangements for adults.

• Profiles of all other juveniles arrested but not convicted would be deleted after three years, regardless of the offence for which they were arrested and the age at which they were arrested:

  This corrects a possible anomaly with the original proposal, identified by consultation respondents, that an individual arrested at age 10 might have had their DNA retained for 8 years, whereas someone arrested at age 17 might have had their DNA retained for only 1 year. It also provides an appropriately more lenient approach to juveniles who are arrested but not convicted, compared with those who do receive a conviction.43

A table summarising the differences between the original consultation proposals and the revised proposals issued in November 2009 is set out in the summary of responses:44 it is reproduced in Appendix 1 to this note.

42 HC Deb 11 November 2009 cc26-27WS
43 HC Deb 11 November 2009 c27WS
44 Home Office, DNA Retention Policy: Re-Arrest Hazard Rate Analysis, November 2009, p14
Both the Conservatives and the Liberal Democrats, as well as the chairman of the Home Affairs Select Committee, have said the revised proposals do not go far enough:

The shadow home secretary, Chris Grayling, said the Tories would continue to fight the DNA proposals and that they wanted to see the Scottish model adopted under which DNA profiles are kept for up to five years in serious violent and sexual cases only. The profiles are destroyed immediately after someone is released after being held for a minor offence.

Chris Huhne for the Liberal Democrats said the proposals were little better than the previous package. Keith Vaz, Labour chairman of the Commons home affairs select committee, warned they did not go far enough to protect the innocent.45

**Implementing the new framework**

The Government had originally intended to implement the new framework by way of proposed order-making powers set out in the *Policing and Crime Bill*. Full details are set out in [Library Research Paper 09/39 Policing and Crime Bill: Committee Stage Report](http://www.parliament.uk/). Both the Conservatives and the Liberal Democrats were opposed to these clauses of the Bill, arguing that changes to the current retention arrangements should be made by way of primary rather than secondary legislation.46

The Government’s proposals to use secondary legislation were also criticised by the Joint Committee on Human Rights, the Constitution Committee and the Delegated Powers and Regulatory Reform Committee.47

On 20 October 2009, the Bill’s final day in committee before the Lords, the Government withdrew the relevant clauses from the Bill. Home Office minister Lord Brett said:

> The Government have always acknowledged that there is a case for saying that the detail of the retention periods should be set out in primary legislation. However, against that we have had to weigh the importance – we have just been chastised about it – of responding to the European Court of Human Rights judgment within a reasonable timeframe. We judged that the approach taken in the Bill provided a sensible opportunity for us to demonstrate our commitment to implementing the judgment, to consult swiftly but thoroughly on the detail of the policy and to give Parliament an opportunity to approve this through the affirmative resolution procedure.

> Over the summer, we have carefully considered the views expressed by the Delegated Powers and Regulatory Reform Committee, of which I am a former member and for which I have great regard, the Constitution Committee – another committee of importance – the Joint Committee on Human Rights and Members of both Houses of Parliament. Those and the responses to the Home Office consultation document have all held our attention. Although we remain committed to implementing the judgment of the European Court of Human Rights at the earliest opportunity, we accept the concerns raised by the committee and other stakeholders and we accept the strength of feeling in your Lordships’ House. Given that strength of feeling, we feel that it is important to move forward with consensus, if possible. We therefore accept the view that this issue is more appropriately dealt with in primary legislation and have decided to invite Parliament to remove Clauses 96 to 98. As soon as parliamentary time

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45 “Police to continue to hold DNA of innocent people”, *Guardian*, 12 November 2009
46 *Policing and Crime Bill Deb 26 February 2009 cc616-619*
allows, we will bring forward appropriate measures which will place the detail of the retention periods in primary legislation, allowing full debate and scrutiny of the issue in both Houses.  

The Government indicated that it would bring forward relevant primary legislation during the 2009-10 parliamentary session; the revised proposals have since been introduced as clauses 2 to 20 of the Crime and Security Bill, which had its first reading on 19 November 2009.

The Guardian reported that ACPO has advised police forces to continue applying the existing retention guidelines and exceptional case procedure until any changes have been fully implemented:

The advice to senior officers comes in a letter from the Association of Chief Police Officers criminal records office. The letter, seen by the Guardian, tells chief constables that new Home Office guidelines following the ruling in the case of S and Marper are not expected to take effect until 2010.

"Until that time, the current retention policy on fingerprints and DNA remains unchanged," it says. "Individuals who consider they fall within the ruling in the S and Marper case should await the full response to the ruling by the government prior to seeking advice and/or action from the police service in order to address their personal issue on the matter.

"Acpo strongly advise that decisions to remove records should not be based on [the government's] proposed changes. It is therefore vitally important that any applications for removals of records should be considered against current legislation."

6 The law in Scotland

Scotland has a different system for the retention of fingerprints and DNA data, to which the European Court of Human Rights drew specific attention in its judgment:

Scotland

36. Under the 1995 Criminal Procedure Act of Scotland, as subsequently amended, the DNA samples and resulting profiles must be destroyed if the individual is not convicted or is granted an absolute discharge. A recent qualification provides that biological samples and profiles may be retained for three years, if the arrestee is suspected of certain sexual or violent offences even if a person is not convicted (section 83 of the 2006 Act, adding section 18A to the 1995 Act.). Thereafter, samples and information are required to be destroyed unless a Chief Constable applies to a Sheriff for a two-year extension.

(...)  

109. The current position of Scotland, as a part of the United Kingdom itself, is of particular significance in this regard. As noted above (see paragraph 36), the Scottish Parliament voted to allow retention of the DNA of unconvicted persons only in the case of adults charged with violent or sexual offences and even then, for three years only, with the possibility of an extension to keep the DNA sample and data for a further two years with the consent of a sheriff.

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48 HL Deb 20 October 2009 c668
49 Home Office, Keeping the Right People on the DNA Database: Summary of Responses, November 2009, p3
50 "Police told to ignore human rights ruling over DNA database", Guardian, 7 August 2009
110. This position is notably consistent with Committee of Ministers' 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 (see paragraphs 43-44 above). Against this background, England, Wales and Northern Ireland appear to be the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence.\(^{51}\)

More detailed guidance on the Scottish system is available in a briefing note prepared by the Scottish Parliament Information Centre.\(^ {52}\)

7 **General guidance for individuals**

Briefings by Liberty on the use of photographs, fingerprints and DNA samples taken at police stations are available on the website [www.yourrights.org.uk](http://www.yourrights.org.uk), the Liberty guide to human rights.\(^ {53}\)

GeneWatch UK also has a website dedicated to the NDNAD, including the pages “DNA Database: what can I do?” and “Reclaim your DNA”.

[Reclaim Your DNA](http://www.reclaimyrdna.org.uk), a website launched in April 2009 by GeneWatch UK, NO2ID and the Open Rights Group, provides a variety of resources for individuals concerned about the retention of their fingerprints or DNA, including a pro forma letter for writing to a chief constable to request the deletion of such data.

An individual who wishes to make a legal challenge to the retention of their fingerprints or DNA should seek legal advice from an appropriately qualified person.\(^ {54}\)

8 **Statistics**

Several parliamentary questions have addressed the number and nature of the profiles held on the NDNAD. Recent examples have prompted the following responses:

- As at 24 April 2009, there were some 4.5 million persons on the NDNAD, of whom some 986,000 had no current conviction or caution record held on the PNC. This included those convicted but whose PNC record has been deleted, cases where proceedings were ongoing and those with no convictions.\(^ {55}\)

- Data obtained from the PNC on 31 March 2008 indicates that there were 2,324,879 persons with a record of a conviction, caution, reprimand or final warning on the PNC, but no record on the NDNAD.\(^ {56}\)

- As of October 2009, 77.7 per cent of those on the NDNAD were white, 7 per cent were black, 5.4 per cent were Asian and 3.2 per cent were from “other ethnic-appearance groups”.\(^ {57}\)

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51 *Case of S. And Marper v The United Kingdom*, Applications nos. 30562/04 and 30566/04, paragraphs 36 and 109-110

52 Scottish Parliament Information Centre Briefing 09/30, *Criminal Justice and Licensing (Scotland) Bill: Fingerprint and DNA Data*, 1 May 2009

53 [Use of photographs, fingerprints, DNA samples and other samples taken at police stations](http://www.yourrights.org.uk) [accessed on 23 October 2009]

54 See Library Standard Note SN/HAA/3207 “Legal Help: Where to Go and How to Pay”

55 [HL Deb 15 October 2009 c321](http://www.parliament.uk)

56 [HC Deb 5 November 2008 cc601-2W](http://www.parliament.uk)
Appendix 1: consultation proposals v. revised proposals

**SUMMARY OF PROPOSALS**

**DNA Profile Retention Proposals**

<table>
<thead>
<tr>
<th>Occurrence</th>
<th>May 09 Consultation Proposals</th>
<th>Revised Proposals</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADULT – Conviction – All Crimes</td>
<td>Indefinite</td>
<td>Indefinite</td>
</tr>
<tr>
<td>ADULT – Non Conviction – Serious Crime</td>
<td>12 Years</td>
<td>6 Years</td>
</tr>
<tr>
<td>ADULT – Non Conviction – Minor Crime</td>
<td>6 Years</td>
<td>6 Years</td>
</tr>
<tr>
<td>UNDER 18s – Conviction – Serious Crime</td>
<td>Indefinite</td>
<td>Indefinite</td>
</tr>
<tr>
<td>UNDER 18s – Conviction – Minor Crime</td>
<td>1st Conviction – Remove at 18; 2nd – Indefinite</td>
<td>1st Conviction – 5 Years; 2nd – Indefinite</td>
</tr>
<tr>
<td>UNDER 18s – Non Conviction – Serious Crime</td>
<td>12 Years</td>
<td>3 Years (6 Years for 16/17-year-olds)</td>
</tr>
<tr>
<td>UNDER 18s – Non Conviction – Minor Crime</td>
<td>6 Years or 18, whichever is sooner</td>
<td>3 Years</td>
</tr>
</tbody>
</table>

**DNA Sample Retention Proposals**

<table>
<thead>
<tr>
<th>Occurrence</th>
<th>Retention Period May 09 Consultation</th>
<th>Revised Proposals</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Cases</td>
<td>6 Months</td>
<td>6 Months</td>
</tr>
</tbody>
</table>

**Fingerprint Retention Proposals**

<table>
<thead>
<tr>
<th>Occurrence</th>
<th>May 09 Consultation Proposals</th>
<th>Revised Proposals</th>
</tr>
</thead>
<tbody>
<tr>
<td>ADULT – Conviction – All Crimes</td>
<td>Indefinite</td>
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<td>3 Years</td>
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Source: Home Office, *Keeping the Right People on the DNA Database: Summary of Responses*, November 2009, p14

[57] HL Deb 15 October 2009 c323