



**Standing Committee for Youth Justice**

**Keeping the right people on the DNA database  
Response on behalf of the Standing Committee for Youth Justice (SCYJ)**

**Executive summary**

**The *S & Marper* judgment**

1. SCYJ welcomed the judgment of the European Court of Human Rights in December 2008 in the case of *S & Marper*, which found that current practice in England and Wales regarding the retention of DNA data on the National DNA Database (NDNAD) violated article 8 of the European Convention on Human Rights (ECHR).<sup>1</sup> The Court severely criticised the ‘*blanket*’ and ‘*indiscriminate*’ holding of data and singled out the damaging impact of such data retention on children and young people.

**The Government’s response**

2. We welcomed the Government’s announcement in December 2008 of the removal of the DNA profiles of all under-10s from the database, and its subsequent work to develop a set of reforms to implement the judgment, including through this consultation. We also welcome the Government’s proposal to destroy DNA samples after six months. However, we believe the bulk of the measures proposed by the Government do not adequately address the concerns set out by the European Court nor the wider requirements of international law, including the United Nations Convention on the Rights of the Child (UNCRC). Nor do they comply with the principles of the juvenile justice system in England

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<sup>1</sup> The Grand Chamber’s judgment of 4 December 2008 in the case of *S and Marper v The United Kingdom* (Applications nos. 30562/04 and 30566/04).

and Wales. We are further concerned that the proposals fail to take sufficient account of equality law obligations.

3. This consultation must also be seen in the wider context of the repeated and severe criticism to which the United Kingdom's juvenile justice system has been subject by international human rights bodies and domestic NGOs, as well as public concern about the treatment of children and young people in the criminal justice system. This includes the very low age of criminal responsibility in England and Wales, which means that children as young as 10 may have their personal information recorded on the database. The United Kingdom was particularly criticised by the United Nations Committee on the Rights of the Child in last year's examination, in relation to its failure to respect the privacy rights of children in the juvenile justice system. The United Kingdom has also been criticised for the over-criminalisation of children and young people, including through the use of anti-social behaviour orders.
4. It is disappointing that the Government has failed to use this opportunity to start to redress the balance. What is required is a comprehensive, evidence-based review of the NDNAD and surrounding procedures, in order to ensure the use of the database for children's data complies with human rights and equality requirements. The evidence presented by the Government in support of the White Paper is unclear; it is far from robust and does not even attempt to address children and young people's distinct needs and status.
5. The judgment established that the retention of DNA data on the NDNAD *per se* engages article 8 of the ECHR. As such, in order to avoid violating privacy rights, any retention of data without consent must be a lawful, necessary and proportionate measure in pursuit of a legitimate aim. This requires law, policy and practice on DNA sampling and the retention of DNA data to be based on sound evidence as to the purpose and effectiveness of such sampling and retention. The taking of samples and retention of data from children further entails consideration of their rights under the UNCRC, including the principle of the best interests of the child. Policy in this area must also be seen to reflect the principles of the juvenile justice system, including rehabilitation, the reduction of re-

offending and the consideration of children and young people's welfare. We believe the Government's proposals fall far short of these requirements.

## **Conclusions**

6. In order to meet its obligations to children and to serve the overarching principles governing the juvenile justice system in England and Wales, SCYJ believes the Government should establish a general presumption that:
  - 6.1 DNA samples will not be taken from children following arrest, charge or conviction, unless this is required for the purposes of investigating the offence for which the child was arrested.
  - 6.2 Children's DNA profiles will be retained for no longer than is required for the purposes of investigating the offence for which the child was arrested.
7. Robust evidence should be sought as to the usefulness of taking DNA samples and retaining DNA profiles other than for the purposes of investigating the offence for which a child has been arrested. This evidence should form the basis for establishing whether any exceptions should be made to the general presumption not to take or retain such data (e.g. in relation to convictions for certain serious offences) and the grounds on which it may be possible to rebut the presumption in individual cases.
8. In any event, the retention of children and young people's DNA profiles should never be indefinite and should always be subject to regular review, including automatic review when any child whose DNA profile has been retained reaches the age of 18.
9. A consistent, transparent and independent appeals process must be established to enable individuals to apply for the removal of their DNA profiles from the database.
10. We welcome the establishment of the independent advisory panel and the

proposal for the panel to produce annual reports. These should explicitly address the retention of children and young people's profiles on the NDNAD, and outline measures being taken to address the over-representation of children and young people and other groups (such as black and ethnic minority groups) on the database.

## **Response to consultation**

### **The legislative framework**

11. SCYJ is concerned by the intention to implement the judgment of the European Court of Human Rights through secondary rather than primary legislation. While this may facilitate a quicker entry into law of the reform measures, safeguards introduced via regulations will not provide the same level of protection for children's privacy rights as would primary legislation, nor will they attract the same level of parliamentary and public debate. The measures should be introduced through primary legislation.

### **Public confidence**

12. The Government has rightly recognised the importance of instilling public confidence in the NDNAD. However, we do not believe this is likely to be achieved under the proposals as they stand. The Government has approached the problem of public confidence as one of ensuring that the public believes in the ability of the NDNAD to enable the detection and resolution of crime. Yet the reasons for a lack of confidence in and public support for the NDNAD are in reality much more complex, involving lack of trust in sampling and retention procedures, concerns about how this highly personal data may be used, and the public recognition of the lack of tangible evidence informing how decisions around the NDNAD are made. Evidence of the disproportionate use of the database to record information about certain groups in the population, such as individuals from black and ethnic minority backgrounds, is also of serious concern. The failure of the Government to effectively address within its proposals

concerns raised by the public, NGOs and the media about the taking and retaining children's DNA can only serve to undermine public confidence in the NDNAD in the future.

### **Taking DNA samples**

13. The Government has proposed that the police should be given a power to take data post-conviction of persons who were not sampled or fingerprinted during the investigation or court process. We oppose this measure in relation to children and young people and further believe the Government should review existing police powers to take DNA samples from children without consent.
  
14. Taking a DNA sample from a child or young person, especially where this is done without consent, can be upsetting and bewildering, and the Government must pay particular attention to protecting the best interests of children and young people in this regard. The Canadian Supreme Court referred to DNA sampling as constituting a '*grave intrusion*' on an individual's right to '*personal and informational privacy*'.<sup>2</sup> The Nuffield Council on Bioethics has suggested that taking bioinformation from those arrested for the most minor offences may be disproportionate in its effect on the legitimate privacy interests of such individuals, especially where there is no doubt about their identity. The particular considerations for children and young people have been explicitly recognised by the Portuguese National Council of Ethics for the Life Sciences, which recommended that DNA should only be obtained from children in '*exceptional circumstances*' and destroyed as soon as identity is established or an investigation concluded.
  
15. Recent changes to the law allowing the collection of DNA samples from children on arrest and without their consent<sup>3</sup> have significantly reduced the protection given to children's privacy within the criminal justice system; at the same time the expanded definition of recordable offences (particularly in relation to relatively

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<sup>2</sup> Canada Supreme Court, R. v. Plant, [1993] 3 S.C.R. 281

<sup>3</sup> Criminal Justice Act 2003

minor offences) may have a disproportionate effect on the number of children and young people that end up on the database.

16. There is considerable public concern about the reasons for which DNA samples are currently taken from children and young people. A freedom of information request by parliamentary candidate Jo Shaw found that 386 children in Camden had had their DNA taken and stored by police in 2008, with a further 139 arrested and “sampled” in 2009. This, along with media articles reporting claims from a senior Metropolitan Police officer that young people are targeted for DNA collection as part of a *‘long-term crime prevention strategy’*, has led to stringent criticism from civil liberties campaigners about the potential for the abuse of police powers and the unnecessary sampling of DNA for purposes other than a police investigation.<sup>4</sup> It is likely that this, at least in part, contributes to the over-representation of children on the NDNAD.
17. The Government should review the guidelines for taking DNA samples from children and young people under the Police and Criminal Evidence Act 1984 (as amended), and put in place robust procedures to monitor the sampling of DNA from children and young people, in order to ensure that arrests cannot be and are not being made for the purpose of obtaining bioinformation. This review must include careful consideration of whether samples should **ever** be taken from children and young people without their consent in the absence of a court order, as well as the role of parental consent.

## Conclusion

18. The proposed new police power for post-conviction DNA sampling and taking of fingerprints should not include children. In order to meet its obligations to children and to serve the overarching principles governing the juvenile justice system in England and Wales, the Government should establish a general presumption that DNA samples will not be taken from children following arrest, charge or conviction unless this is required for the purposes of investigating the offence for

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<sup>4</sup> *Daily Telegraph* (4 June 2009), ‘Police “arrest innocent youths for their DNA”, officer claims’; *Daily Mail* (4 June 2009), ‘Police target “innocent” youths for arrest in bid to increase DNA samples on database’

which the child was arrested.

### **Destruction of DNA samples**

19. The Government proposes to destroy all DNA samples taken from individuals on arrest, whether or not those individuals are later charged or convicted. This is a welcome development that reflects the European Court judgment and will address practical as well as principled concerns about the storage and use of DNA samples.

### **Conclusion**

20. SCYJ urges the Government to move quickly to ensure the destruction of all legacy samples in a timely fashion. The Government must also ensure that robust accountability measures are in place to ensure that all new samples taken from individuals are destroyed within an agreed timeframe.

### **Retention of DNA profiles**

21. The Government has made the following proposals for the retention of children's DNA profiles:

#### **Children under 10**

- 21.1 The DNA of all children under 10 held on the database has already been removed and will not be retained in future.

#### **Non-convicted children**

- 21.2 Children who are arrested but not convicted of a lesser offence on one occasion will have their DNA profile deleted after six years or on their 18<sup>th</sup> birthday, whichever is the sooner. If the individual is arrested again for a second recordable offence, the DNA profile will be retained for six years.

21.3 Children who are arrested but not convicted of a serious violent or sexual or terrorism-related offence will have their DNA profile retained for 12 years, along the lines of adults.

**“Convicted” children (including Final Warning Scheme disposals)**

21.4 Children who are convicted on only one occasion of a lesser offence will have the profile removed from the database when they reach the age of 18.

21.5 Children committing a serious offence or two minor offences will have their profiles retained indefinitely, along the lines of adults.

21.6 Children who are convicted of serious violent, sexual or terrorism-related offences will have their profiles retained indefinitely, along the lines of adults.

22. SCYJ welcomes the Government's announcement in relation to children under 10. However, we oppose the remainder of the proposed measures on the basis that there is no robust body of evidence to support such data retention as a necessary and proportionate means of pursuing a legitimate aim.

23. In its consultation paper, the Government expresses a wish to develop a proportionate, evidence-based retention policy for the NDNAD. We believe that the current proposals do not achieve this. The European Court of Human Rights observed in *S & Marper* that:

*...the protection afforded by article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private life interests.<sup>5</sup>*

The current proposals do not strike the right balance between the rights of the individual and the protection of the public. There is no indication in the White

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<sup>5</sup> The Grand Chamber's judgment of 4 December 2008 in the case of *S and Marper v The United Kingdom* (Applications nos. 30562/04 and 30566/04).

Paper that children's distinct characteristics and human rights have been taken into account.

24. Children and young people are developing individuals. They are in need of support and protection to enable them to develop to their full potential. The right to private and family life and to equal treatment under the European Convention on Human Rights, and the right to privacy and protection of physical integrity under the UNCRC (including in the criminal justice sphere), are fundamental rights for children and young people in a democratic society that values their freedoms and civil liberties. In order to ensure that any limitation of those privacy rights for individual children is necessary, proportionate and lawful, children's distinct requirements must be taken into account.
25. In 2007, the Nuffield Council on Bioethics recommended that there should be a presumption of removal of all records, fingerprints and profiles from the database, and of the destruction of all samples, upon requests from children and young people. The Government's proposals fall far short of this. Simply applying blanket retention periods to children and young people on largely the same lines as adults is inappropriate in relation to both convicted and non-convicted individuals. The indefinite retention of children and young people's profiles fails both the necessity and proportionality test.
26. No evidence has been presented to support the retention of children's DNA profiles. Little space has been given in the consultation document to the impact of such data retention on children and young people, particularly those who are not convicted, nor to the potential conflict with the principles of the juvenile justice system (including rehabilitation and welfare) and the requirements of the UNCRC.

#### **Non-convicted children**

27. The European Court of Human Rights recognised in *S & Marper* that the '*retention of the unconvicted persons' data may be especially harmful in the case of minors...given their special situation and the importance of their development and integration in society*'. The proposed reforms to the NDNAD fail to consider

this properly. The European Court of Human Rights noted that the applicants' *'perception that they are not being treated as innocent is heightened by the fact that their data are retained indefinitely in the same way as the data of convicted persons...'* The Court also considered that *'particular attention should be paid to the protection of juveniles from any detriment that may result from the retention by the authorities of their private data following acquittals of a criminal offence'*.

28. There is no robust evidence to justify the retention of children's DNA profiles after individuals have been found not guilty either by the investigatory or judicial process or by the decision not to proceed in a prosecution. The research used by the Government to justify periods of retention was not carried out in relation to children and young people; its validity in terms of the extrapolation of likely re-offending rates from incomplete statistics has also been called into question.<sup>6</sup> A report on the forensic use of bioinformation by the Nuffield Council on Bioethics in 2007 also found a *'lack of convincing evidence'* that the retention of DNA profiles from those not charged with or convicted of an offence had any significant impact on crime detection rates.<sup>7</sup> This is particularly important when considering the obligation of the Government to actively protect the human rights and best interests of children and young people.
29. Insufficient consideration has been given to the above matters and to the risk of stereotyping children as future offenders by retaining their DNA on the NDNAD once they have been found innocent of any crime by judicial or investigatory process, or by the decision not to proceed in a prosecution.
30. In its consultation paper, the Government notes the commendation of European Court of Human Rights for the procedures for DNA retention of non-convicted individuals in Scotland.<sup>8</sup> However, the Government has given no clear reasons for not adopting a similar model, save for a bald assertion that *'any change to the existing policy is likely to reduce the number of detections that DNA delivers and will therefore have some adverse impact on public protection'*.

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<sup>6</sup> <http://www.straightstatistics.org> (June 2009), *The DNA database: innocent or guilty, what's the difference?*

<sup>7</sup> Nuffield Council on Bioethics (2007), *The forensic use of bioinformation: ethical issues*

<sup>8</sup> Home Office (2009), *Keeping the right people on the DNA database: Science and public protection*, paragraph 2.6

### **“Convicted” children (including Final Warning Scheme disposals)**

31. We are also concerned at the proposals in relation to “convicted” children. We note that this definition includes children subject to Final Warning Scheme disposals (reprimands and warnings). There are already concerns about such disposals, which can be regarded by children and their parents as little more than a formality, without understanding their very serious implications.
  
32. It has not been made clear how the retention of data from children convicted of a “lesser” offence contributes to the protection of the public and the retention periods that have been set appear arbitrary and unfair. Under these proposals, the DNA profile of a child convicted of a lesser offence at age 10 will be retained for eight years – a measure we feel is both disproportionate and discriminatory. The Government also proposes that a child convicted of more than one recordable lesser offence should have his or her DNA profile retained on the NDNAD indefinitely – a response disproportionate in the extreme. The Government has also not made clear in the consultation paper whether children and young people that have completed a Referral Order and thus have no resulting criminal record (the conviction being ‘spent’ on completion of the order) will have their DNA profiles retained for this same period of time.

### **Conclusions**

33. In order to meet its obligations to children and to serve the overarching principles governing the juvenile justice system in England and Wales, SCYJ believes:
  - 33.1 The Government should establish a general presumption that the DNA profiles of children – whether convicted or non-convicted of any offence – will be retained for no longer than is required for the purposes of investigating the offence for which the child was arrested.
  - 33.2 Robust evidence should be sought as to the usefulness of taking DNA samples and retaining DNA profiles other than for the purposes of investigating the offence for which a child has been arrested. This evidence should form the basis

for establishing whether any exceptions should be made to the general presumption not to take or retain such data (e.g. in relation to convictions for certain serious offences) and the grounds on which it may be possible to rebut the presumption in individual cases. These may include the seriousness of the offence, the likelihood of re-offending and the danger posed by the individual to the public.

- 33.3 In any event, the retention of children and young people's DNA profiles should never be indefinite and should always be subject to regular review, including automatic review when any child whose DNA profile has been retained reaches the age of 18. Provision could be made for the police to apply to renew the retention period if necessary.

## Appeals

34. There is a need for a formal independent appeal procedure, administered through a tribunal, to allow individuals to appeal the retention of their DNA profile on the NDNAD. Explicit criteria must be drawn up, through regulations, to inform decisions about whether DNA profiles should be deleted following an appeal. Information about the right to appeal the retention of a DNA profile should be made available in a format accessible to children and young people.
35. Retaining the system of appealing the retention of a DNA profile on a case-by-case basis, where a request is granted only on narrow exceptional grounds, gives individual children and young people little recourse to successfully appeal the retention of their DNA profile and appears to leave the Government open to further legal challenge. The onus should be on the **state** to provide the justification for any retention rather than on the individual to prove the need for deletion. The grounds outlined by the Government for which children's DNA profiles may be deleted before the age of 18 – unlawful arrest, unlawful procurement of DNA sample, or where no offence exists – are woefully inadequate.

## Conclusion

36. A consistent, transparent and independent appeals process must be established to enable individuals to apply for the removal of their DNA profiles from the database. Matters to be considered on appeal could include whether the DNA is still required for the purposes of the investigation; the seriousness of the offence; the likelihood of re-offending; and the danger posed to the public by the individual.

## Review, governance and accountability – conclusions

37. Whatever retention policy is decided upon should be subject to regular review by an independent body. SCYJ welcomes the proposal for an independent advisory

panel, which could perform this function. Expertise from the children's sector (whether through direct membership or another means) should be incorporated on the National DNA Strategy Board and within the panel in order to ensure children's human rights and distinct needs are taken into account in relation to the monitoring and development of policy around DNA sampling, profiling and retention. This must include consideration of children's best interests and evolving capacities, as well as requirements under equality law.

38. We welcome the proposal for the independent advisory panel to publish annual reports. These should explicitly address the retention of children and young people's profiles on the NDNAD. Disaggregated data should also be published quarterly in order to easily enable the identification of any over-representation of a particular group on the database, and details should be regularly published of remedial measures being taken to address such over-representation. This data should include disaggregated statistics concerning the outcomes of appeals and applications by the police for the extension of retention periods.

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The **Standing Committee for Youth Justice (SCYJ)** is a membership body which:

- Provides a forum for organisations, primarily in the non-statutory sector, working to promote the welfare of children who become engaged in the youth justice system; and
- Advocates a child-focused youth justice system that promotes the integration of such children into society and thus serves the best interests of the children themselves and the community at large.

*Members are: Action for Children, Association of YOT Managers, Barnardo's, Catch22, The Children's Society, Children's Rights Alliance for England, Council for Disabled Children, The Howard League for Penal Reform, Just for Kids Law, JUSTICE, Nacro, National Youth Agency (NYA), National Association for Youth Justice (NAYJ), NCB, NSPCC, The Prince's Trust, Prison Reform Trust, Sainsbury Centre for Mental Health, Secure Accommodation Network, SOVA, TACT and VOICE.*

*The contents of this document do not necessarily reflect the views of all member organisations.*