The Foundation for Information Policy Research

Consultation response on

Keeping the right people on the DNA database: science and public protection

The Foundation for Information Policy Research (FIPR) is an independent body that studies the interaction between information technology and society. Its goal is to identify technical developments with significant social impact, commission and undertake research into public policy alternatives, and promote public understanding and dialogue between technologists and policy-makers in the UK and Europe. It has carried out a number of studies on the use of large-scale databases in the criminal justice sector, including for the Information Commissioner's Office and the Joseph Rowntree Reform Trust, and welcomes the opportunity to respond to this Home Office consultation.

In its unanimous 2008 *S & Marper* decision finding against the UK, the European Court of Human Rights made a number of complaints about the indefinite retention of DNA samples from individuals that had not been convicted of an offence. While recognising the utility of DNA profiles in the fight against crime, it stressed that "[t]he question is not whether the retention of fingerprints, cellular samples and DNA profiles may in general be regarded as justified under the Convention. The only issue to be considered by the Court is whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was justified... Weighty reasons would have to be put forward by the Government before the Court could regard as justified such a difference in treatment of the applicants' private data compared to that of other unconvicted people." Finding that the UK had not provided such weighty reasons, the decision concluded: "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."

FIPR welcomes the fact that the UK government has accepted the validity of many of these criticisms. The Home Office proposals will solve some of the problems identified, especially in proposing to destroy samples once they have been converted to digital profiles for storage. As the Court noted: "The retention of cellular samples is particularly intrusive given the wealth of genetic and health information contained therein."

However, on the key issue – retention of profiles from unconvicted individuals – the proposals are an entirely inadequate response to the judgement. By retaining profiles of unconvicted individuals for 6 or 12 years, they would leave England, Wales and Northern Ireland greatly out of step with the vast majority of other Council of Europe members. The Court noted approvingly that Scotland retains profiles only of those suspected of violent or sexual offences, for a period of 3-5

years, and that "the strong consensus existing among the Contracting States in this respect is of considerable importance and narrows the margin of appreciation left to the respondent State." The proposals would continue to treat innocent individuals as suspects by retaining their DNA profile for much longer than those, for example, who voluntarily provide samples to rule themselves out of enquiries.

The consultation document attempts to provide some justification for this continued stigmatisation, arguing on the basis of a study by the Jill Dando Institute that "the risk of offending following an arrest which did not lead to a conviction is similar to the risk of reoffending following conviction." Unfortunately, the study is less than persuasive. Cambridge statistician Prof Sheila Bird called it "a travesty of both statistical science and logical thinking."[1] In particular, the study makes 25-year extrapolations from only six years of reconviction data, and fails to take into account both the high percentage of crimes committed by a small number of persistent offenders and the possibility that the rate of arrest could be related to an individual being already present on a police database. It will not build public trust in the criminal justice system to see policy designed around work that the Guardian's science columnist, Dr Ben Goldacre, thought "possibly the most unclear and badly presented piece of research I have ever seen in a professional environment."[2]

Attempts by government to provide a stronger evidence base for their policies are in general to be applauded. However, it is worth recalling the 2006 finding of the House of Commons Science and Technology Committee that:

> *If evidence-based policy making is to retain credibility, it is essential that it is not abused: ministers should only use the phrase when appropriate and need not be too chary about acknowledging that certain policies are not based on evidence. They should certainly not seek selectively to pick pieces of evidence which support an already agreed policy, or even commission research in order to produce a justification for policy: so-called "policy-based evidence making"*[3]

Regrettably the Home Office consultation seems to fall into precisely that trap. Their evidence certainly does not provide the "weighty reasons" required by the European Court for retaining DNA profiles of innocent individuals for long periods. This is particularly problematic given that the Home Office proposes to implement this retention scheme as secondary legislation under the Policing and Crime Bill, preventing detailed parliamentary scrutiny or amendment and raising issues of the quality of this law.

FIPR therefore strongly urges that the Home Office should use this consultation only as a preliminary exercise. A revised retention policy should be drawn up based on responses received and higher quality, peer-reviewed evidence. The public and Parliament should then be consulted on a Green Paper describing primary legislation that would properly control the National DNA Database and associated procedures for the retention, use and governance of profiles. This would ensure that the UK meets the "special responsibility for striking the right

balance" found by the European Court where there is such a strong potential for damage to citizens' human rights.

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[1] Nigel Hawkes, The DNA database: innocent or guilty, what's the difference? *Straight Statistics*, 15 June 2009.
[2] Ben Goldacre, Home Office research so feeble someone ought to be locked up, *The Guardian*, 18 July 2009.
[3] House of Commons Select Committee on Science and Technology, Scientific Advice, Risk and Evidence Based Policy Making, *HC 900-I*, 8 November 2006.