

CAJ's submission no. S338

CAJ's submission to the Department of Justice's DNA Database consultation

June 2011

What is the CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Joseph Rowntree Charitable Trust and the Oak Foundation.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Consultation on proposals for the retention and destruction of fingerprints and DNA in Northern Ireland
Department of Justice
Police Powers and Custody Branch
Block A, Level 4
Castle Building
Stormont Estate
Belfast
BT4 3SG

7 June 2011

Dear Sir or Madam,

As you are aware, CAJ is an independent human rights organisation with cross-community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

Thank you for the opportunity to make a submission to the **Consultation on proposals for the retention and destruction of fingerprints and DNA in Northern Ireland**. We are encouraged by the straightforward and clear language used by the Department of Justice (DoJ) in this consultation and its commitment to complying with the European Court of Human Rights judgment in *S and Marper v UK* (2008).

INTRODUCTION

CAJ notes that the UK Government has taken over two years to engage appropriately with the judgment in *S and Marper v UK* (2008). The only concrete step taken thus far has been the removal of the DNA from the database of children under 10. CAJ considers this to be a considerable delay, especially as the Home Office consultation on proposals to implement the judgment was issued in May 2009 (*Keeping the Right People on the DNA Database*) while the original European Court of Human Rights judgment was issued in December 2008. The Court clearly stated, at para 125 that: "... 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" (emphasis added). The Government's delay seems to ignore the seriousness of the issues under consideration and the need for their prompt resolution.

CAJ hopes that the implementation of the results of the current consultation will be more promptly attended to by the Department of Justice, especially considering the large numbers of individuals, including children, who are affected by these changes.¹

Monitoring and safeguards

As noted by the European Court of Human Rights in the judgment referred to above, an interference by the State in an individual's right to respect for private life (*European Convention on Human Rights (ECHR) article 8*) must be proportionate, justified and necessary and subject to safeguards. The respect of these principles by the DoJ, and by association, the Police Service for Northern Ireland, is key to ensuring compliance with the judgment and, subsequently, in building confidence in the criminal justice system in Northern Ireland. As such, while we believe that these new measures indicate an acknowledgement of these principles, they do not go far enough.

It is important that any new measures should be subject to monitoring and oversight. CAJ acknowledges the provision of a Commissioner for the Retention and Use of Biometric Material in the Protection of Freedoms Bill. While this development is positive, it is not clear how this post will relate to Northern Ireland, for instance in monitoring equality implications (community and ethnic background of those whose DNA data is retained, for example) or in relation to reporting to the NI Assembly. Thus we advocate that there should be a separate Commissioner for Northern Ireland so as to ensure a local level of accountability. However, there should be ongoing dialogue between the two Commissioners so that lessons can be learnt from both jurisdictions.

The removal of samples from the database as the result of this proposed legislation should be carried out promptly, especially considering the delay since the *S and Marper v UK* (2008) judgment. This process should also be carried out smoothly. There have been complaints about the difficulties obtaining the removal of information from the database.² It is also important that these proposals apply not only on the National DNA Database, but to the fingerprint database and the Police National Database.

THE PROPOSED REGIME

There are a number of points in this consultation where the terms used are not clearly defined. It would have been helpful, to ensure a more useful consultation process, to provide clarity on these terms notably on the parameters of the definitions of "minor offence" and "serious offence".

¹ Police face DNA data wipeout, by Adrian Rutherford, *Belfast Telegraph*, 16 March 2011.

² See genewatch.org

Convicted adults

CAJ disagrees with the indefinite retention of fingerprints and DNA profiles for all adults convicted of a recordable offence. As the term recordable offence covers a wide selection of crime from murder to begging, we believe its application in this context is too broad. CAJ suggests that a differentiation between serious and non-serious recordable offences should be inserted into the proposals, so that DNA data and fingerprints are only retained for adults convicted of the most serious crimes. This would ensure that the retention of bio-metric data was proportionate to the crime for which the individual was convicted.

Non-convicted adults

CAJ agrees with the destruction of fingerprints and DNA profile of those arrested or charged with, but not convicted of, a minor offence. We also agree with the destruction of fingerprints and DNA for those arrested but not charged with a serious offence. We believe that this acknowledges the presumption of innocence, as set out at Article 11(1) of the *Universal Declaration of Human Rights*.

We are concerned however at the undefined phrase: “unless prescribed circumstances apply” (para 4.5). It would be helpful if the term “prescribed circumstances” could be explained fully (para 6.3).

With regard to the retention of DNA data and fingerprints of those charged but not convicted of a serious offence, CAJ considers these measures to be too restrictive. We believe that the measures do not take into account the fact that these individuals have not been convicted of an offence and are thus innocent.

CAJ would like further information on the evidence to be required by the Court for the granting of a two-year extension to the retention of the DNA/fingerprint profile. We also query how the evidence put forward by the Chief Constable in such an application would be tested; particularly if the evidence is not strong enough to lead to a prosecution. We would also like to know if the person, whose DNA and fingerprints are subject to the two-year extended retention period will be informed of the application and provided an opportunity to challenge the continued retention. CAJ advocates that the retention of DNA/fingerprint profile beyond the minimum proposed here must be subject to robust safeguards, in order to ensure that such retention is proportionate to the interference with an individual’s rights as guaranteed by the ECHR.

Convicted children

While we note that the proposal put forward by the Department of Justice with regard to DNA retention for children convicted of a minor offence is more generous than that proposed under the Protection of Freedoms Bill, we do not

believe that it goes far enough. We argue for the destruction of the fingerprints and DNA profiles of minors at the age of 18, or at the end of their sentence, whichever comes first. We have concerns that retaining this bio-metric data contributes to the criminalisation and stigmatisation of children. The UN Committee on the Rights of the Child expressed concern at the retention of the DNA of children in 2008, and recommended that children be protected from arbitrary or unlawful interference with their right to privacy.³

We encourage the Department of Justice to actively engage with the UK's obligations under the *UN Convention on the Rights of the Child*. We particularly highlight Article 40 (1), which emphasises that children should:

be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

We do not believe that the DoJ proposals fully engage with this commitment. In a similar manner, CAJ also highlights the principles outlined in the Committee of Ministers (Council of Europe) *Guidelines of child friendly justice*, which include participation, best interests of the child, dignity, non-discrimination and the rule of law. These principles are particularly pertinent when the low age of criminal responsibility in Northern Ireland is considered; an issue CAJ recently considered in our submission to the [Youth Justice Review](#).

DNA samples

We view as positive the DoJ commitment to destroy all DNA samples taken from individuals at arrest, regardless of conviction. However, it is unclear why these samples can be retained for up to 6 months, and do not follow the pattern set out in other proposals, which requires the "immediate" destruction of bio-metric information.

Grounds for early deletion

The power to enable the deletion of fingerprints and DNA by the Chief Constable, in cases of unlawful arrests or mistaken identity, is positive. We would welcome an indication of the time scheme that the Chief Constable will be subjected to regarding the destruction of these samples/profiles.

3 See para 36, Committee On The Rights Of The Child Forty-Ninth Session Consideration Of Reports Submitted By States Parties Under Article 44 Of The Convention Concluding Observations: United Kingdom Of Great Britain And Northern Ireland, 20 October 2008

Speculative searches

While we can see the benefit, from a crime prevention perspective, of carrying out speculative searches of the database these need to be subject to safeguards. For instance, it would not be appropriate to carry out such a search when the DNA/fingerprints are due for destruction as the result of mistaken identity or where the individual has not been convicted of an offence. Interlinked with this is our concern at the use of these DNA profiles for familial searching. We continue to support the conclusions of the report by the Nuffield Council on Bioethics, *Forensic use of bio-information: ethical issues*, particularly where familial searching may lead to the revelation of unknown or concealed genetic relationships. We point particularly to the implications this may have with regard to the *European Convention on Human Rights* (article 8).

Destruction of samples and profiles

We would like clarification on whether the destruction of samples and profiles outlined in the consultation, extends to samples collected by the security services or by the UK Border Agency. We support the idea that the data held by these agencies should also be destroyed. This process should be carried out promptly.

National security

CAJ has concerns at the fact that the Chief Constable will be able to retain material for the purposes of national security and that this can be extended by a period of two years. We would welcome information on how this process would work in practice. Would the Chief Constable be required to submit evidence or justification for the continued retention? What oversight would be available to prevent retention requests simply being rolled over, every two years? CAJ has previously drawn attention to our concerns at the overbroad and amorphous use of the term “national security” and the difficulties this causes in ensuring accountability in areas such as this. CAJ is concerned that the continued use of this term, especially in relation to sensitive issues such as DNA retention is undermining faith in the criminal justice system and hindering the normalisation process. As a result, CAJ encourages the DoJ to revisit this proposal.

Monitoring

Similarly, CAJ has concerns at the application, development and monitoring of DNA profile retention in that, as Minister notes in Foreword of the consultation document, ‘these proposals do not deal with retention issues associated with terrorism and national security, which are the responsibility of the Westminster Government’. As there will be different criteria applied and indeed different databases in use by different agencies, the mechanisms for monitoring and ensuring adequate safeguards appears to become convoluted. The need for monitoring and safeguards is connected to the devolution process, which has been concerned with building confidence in local institutions, such as the police. The provision of accountable and transparent services has been part of this confidence-building exercise. We advocate that the differentiation of the

application of the rules and issues at hand be made clear to both the police and the general public, including those organisations such as ourselves, which aim to contribute to the independent monitoring of the state's implementation of its human rights obligations.

Photographs

CAJ acknowledges the position taken by the Department of Justice on the issue of retaining photographic images of individuals, including the point that such photographs may contain more information about an individual than a textual description. It is positive that the Department has decided to open this issue to consultation. We believe that it would be best practice to follow a similar approach to that outlined above with regard to DNA. With regard to the case of *GC and C v Commissioner of Police of the Metropolis*, we hope that the Department of Justice will take into account the judgment in this case which held that the ACPO guidelines (which states that samples should only be destroyed in exceptional circumstances) are unlawful.

Equality

The prevalence of young men in the criminal justice system is a cause of concern, as it follows that their DNA and fingerprints will be most represented within the database. However, CAJ are concerned at the absence of an equality monitoring system within the proposals. Such a system is key to evaluating the effect these proposals will have after implementation. This also builds on the recommendation outlined in the Criminal Justice Review (2000), see para 3.36. The lack of data thus far produced for the DNA database means that evaluating its current impact on different groups within Northern Ireland.

The Equality Screening form indicates that the fact that the retention regime is less severe for children is sufficient to address any issues inequality issues arising. However, as noted above, CAJ believes that this regime is too severe and does not take into account the relevant domestic and international human rights standards for this group. A particular issue arises where the PSNI seeks to extend the retention of the DNA/fingerprint profile. What safeguards will be put in place to enable children and young people to challenge and participate in the process to extend the retention of their DNA/fingerprint profile?

With regard to those with disabilities, particularly mental health issues, it is important that information about the retention scheme is accessible to this group. CAJ notes that those with mental health are over-represented in the wider criminal justice system but not on the DNA database; it would be beneficial for the DoJ to explore this issue further.

CONCLUSION

CAJ appreciates the fact that the DoJ has sought to develop a scheme for DNA and fingerprint retention which addresses the requirements of the judgment in *S and Marper v United Kingdom* (2010). The scheme proposed here is undoubtedly more balanced than that previously put forward in the Home Office consultation *Keeping the Right People on the DNA Database* in 2009. Due account has been taken of the intrusive impact of ongoing retention of DNA and fingerprint. However, we believe that the DoJ could go further, particularly in relation to the protection of children from undue criminalisation and by strengthening the processes which allows an application for a two year extension to retention of the data. There needs to be a greater acknowledgement of the human rights implications of the retention of biological material and for this to be developed further within the proposals.

Again, CAJ advocates the need for a Northern Ireland-specific Commissioner for Bio-metric material, with close contact with the equivalent post in England and Wales. Finally, we continue to caution against the use of the vague term “national security” and the attendant implications this has for the ongoing retention of data.

Yours faithfully,

Caroline Parkes,
Criminal Justice Programme Officer.

Committee on the Administration of Justice
June 2011