



House of Lords
House of Commons
Joint Committee on
Human Rights

Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill

Twelfth Report of Session 2009-10

Drawing special attention to:

Crime and Security Bill

Personal Care at Home Bill

Children, Schools and Families Bill



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*Report, together with formal minutes and
written evidence*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders made under Section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order No. 73 (Lords)/151 (Commons) (Statutory Instruments (Joint Committee)).

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Footnotes

In the footnotes of this Report, references to oral evidence are indicated by 'Q' followed by the question number. References to written evidence are indicated by the page number as in 'Ev 12'.

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Summary

Crime and Security Bill

We examined the human rights implications of three sets of provisions contained in this Bill.

The proposals relating to DNA and fingerprint retention are the Government's response to the decision of the Grand Chamber of the European Court of Human Rights in the *Marper* case—that the current blanket retention of DNA samples and profiles of innocent individuals and children on the National DNA Database is disproportionate and in breach of the right to respect for private life. We welcome the Government's decision to respond swiftly to the judgment in *Marper*. However, we have concerns about the Government's approach which is to “push the boundaries” of the Court's decision. In particular we are concerned that:

- the proposal for a six year blanket retention period of the DNA profiles of people who are arrested but not charged or convicted is disproportionate and potentially arbitrary;
- the stigmatising effect of the inclusion of the samples of innocent people on the National DNA Database has been discounted;
- the Government's approach to the assessment of proportionality fails to recognise that it must illustrate why the measures proposed are necessary in order to meet the legitimate aim of the prevention of crime and the protection of rights of others;
- the research that backs up the proposal for a blanket six year retention period does not illustrate that the Government's approach is a proportionate one;
- the Government has not provided justification for its proposal to take and retain DNA samples from children and has not published an analysis of the compatibility of the proposals with the UN Convention on the Rights of the Child;
- the Government has not drawn any distinction between arrest in connection with serious violent and sexual offences and less serious offences;
- the powers to retain DNA profiles and fingerprints for national security purposes, without independent oversight, are unnecessarily broad and should be circumscribed;
- the Bill should be amended to provide a statutory form of appeal;
- the Government should provide a timetable for compliance with the requirements to destroy legacy samples, profiles and fingerprints;
- the new powers to take DNA samples and profiles from individuals previously convicted are entirely open-ended.

The Bill also reduces the reporting requirement on stop and search forms in order to reduce police red tape. Given the growing concern about the inappropriate use of stop and search

powers in relation to children, we regret the opportunity has not been taken to require the officer conducting stop and search to record the person's age when it appears the person is under 18. We recommend that specific guidance be introduced about the use of stop and search powers in relation to children. We also recommend that the Government abandon the proposal to remove the requirement to record whether any injury or damage was caused as a result of a stop and search.

We have previously reported on the apparent abuse of power in s. 44 of the Terrorism Act 2000 to stop and search without reasonable suspicion. On 12 January 2010, the ECHR held that the powers of stop and search under s. 44 violate the right to respect for private life. We are disappointed that the Government intends to request that the case be referred to the Grand Chamber of the ECHR and we urge the Government accept that a successful challenge is unlikely. We therefore recommend that the opportunity be taken to amend s. 44 and 45 of the Terrorism Act 2000 to circumscribe the powers to stop and search.

The Bill provides for Domestic Violence Protection Notices (DVPNs) allowing police to bar a suspected perpetrator of domestic violence from their homes for up to 48 hours even if they are not charged. After 48 hours police may apply for a Domestic Violence Protection Order (DVPO) which may bar a suspect from their home for between 14 and 28 days. We commend the intention behind these proposals. Our two outstanding concerns are that more evidence is needed to make the case for DVPOs that could last for as long as a month, and that given the impact a DVPO will have on a suspect, it should be necessary for the violence or threat of violence to be proved beyond reasonable doubt to satisfy the right to a fair hearing.

Personal Care at Home Bill

This Bill permits the Secretary of State to require local authorities to provide personal care free of charge, at home, for an indefinite period. Overall we welcome the aim of this Bill as a human rights enhancing measure. The Government has confirmed that the duty would be enforceable as any other statutory duty on a local authority, both through individual complaints to the Local Government Ombudsman and by judicial review. We welcome this and consider that this approach of individual service entitlements is likely to improve the UK's compliance with human rights obligations.

Children, Schools and Families Bill

This is our second report on this Bill and we focus on the provisions dealing with home education and the new Government amendment on the teaching of sex and relationships education in faith schools. The Bill introduces a new registration and monitoring scheme for children who are electively home educated. Parents will have to apply for their children to be placed on a home education register kept by their local authority. Local authorities must monitor the education provided to children on the register and consult the child. Local authorities will have the power to revoke registration on certain grounds. Parents will have the right to appeal to an independent panel against a refusal or revocation of registration. We agree with the Government that the provisions will enhance a child's right not to be denied an education and the right of a child to have his or her views taken into account. We also agree with the Government that the Bill is compatible with the rights of the parent under the ECHR.

In our first report on this Bill we welcomed the Government's approach of making it an explicit statutory duty to secure that the teaching of PSHE, including sex and relationships education, complies with certain basic principles, including accuracy, balance, pluralism, equality and diversity. However, we expressed concern about the effect of the principle that PSHE be taught in a way that is appropriate to the religious and cultural backgrounds of the pupils. The Government has now tabled an amendment which provides that nothing in the Bill should "be read as preventing the governing body or head teacher ... from causing or allowing PSHE to be taught in a way that reflects the school's religious character." In our view, a provision which expressly subjects the important principles set out above, to the right of faith schools to teach sex and relationships education in a way that reflects the school's religious character, is incompatible with the ECHR. We recommend that the Government amendment be withdrawn.

Bills drawn to the attention of both Houses

1 Crime and Security Bill

Date introduced to first House	19 November 2009
Date introduced to second House	
Current Bill Number	Bill 3
Previous Reports	

1.1 This is a Government Bill which was introduced in the House of Commons on 19 November 2009. The Secretary of State for Home Affairs, Rt. Hon Alan Johnson MP, has made a statement of compatibility under s. 19(1)(a) of the Human Rights Act 1998. The Bill received its Second Reading on 18 January 2010 and began its Committee Stage on 26 January 2010.

Purpose of the Bill

1.2 The Crime and Security Bill covers reform of a number of areas of criminal and civil law and procedure relating to crime and security issues. It contains provisions to reduce reporting requirements in relation to police stop and search powers;¹ provisions to reform the way in which fingerprints and samples, including DNA samples and profiles, are taken and retained by the police;² and provisions to introduce new domestic violence protection notices and orders designed to remove a suspected perpetrator of domestic violence from contact with a suspected victim.³ Although we focus on these three issues in this report, applying a higher significance threshold in order to enable us to complete our work before the General Election, the Bill also includes provision in relation to gang related violence, anti-social behaviour orders, private security and wheel-clamping, prison security and air weapons which may have human rights implications.

Explanatory Notes and Human Rights Memorandum

1.3 The Explanatory Notes contain a basic explanation of the Government's view that the proposals in the Bill are compatible with the European Convention on Human Rights.⁴ We received a letter from the Minister of State, Rt Hon David Hanson MP, on the day the Bill was introduced. Although this letter contained some basic arguments justifying the Government's policy, it did not provide any further information on the Government's view on human rights compatibility.⁵ We wrote to the Minister on 18 January 2010 to ask a significant number of questions designed to clarify the Government position.⁶ We are very grateful to the Minister and his officials for his prompt reply, which we received on 1 February 2010.⁷ **It is unfortunate that the Home Office did not follow the positive**

1 Clause 1

2 Clauses 2–20

3 Clauses 21–30

4 EN, paras 217–270

5 Ev 10

6 Ev 11

7 Ev 20

example adopted by other departments during this legislative session, by providing us with a free-standing human rights memorandum designed to supplement the Explanatory Notes accompanying the Crime and Security Bill. In the future, we would encourage all Bill Teams to follow this practice, which we find reduces the need for further correspondence and enhances the transparency of the Government's approach to the Section 19 statement of the Bill's compatibility with the European Convention on Human Rights.

Significant human rights issues

1.4 We identified three issues in this Bill likely to raise significant human rights concerns:

- (a) Compatibility of the Government's proposals for the treatment of DNA and fingerprints with the right to respect for private and family life guaranteed by Article 8 ECHR;
- (b) Whether the proposal to reduce reporting requirements in relation to stop and search provide an adequate safeguard against the arbitrary use of those powers; and
- (c) Whether the Bill strikes the right balance between the State's positive obligation to protect women and children against violence (Articles 2, 3 and 8 ECHR), including within the home, and the rights of a person suspected of domestic violence to respect for their home (Article 8) and to a fair hearing in the determination of their civil rights (Article 6(1) ECHR).⁸

(a) DNA and fingerprint retention (Article 8 ECHR)

1.5 The provisions of the Bill deal with two separate issues: reform of existing statutory provisions on the retention, destruction and use fingerprints and samples, including DNA samples, and changes to police powers to take those samples. We consider these two issues in turn, below. While we focus on these issues, we note that a number of other human rights concerns have been raised in relation to the proposals in this Bill. We have chosen to focus on the compatibility of the Government's approach to the retention of samples taken from innocent people and children with the recent decision of the Grand Chamber of the European Court of Human Rights in the case of *S & Marper v UK* ("*Marper*") as well as new powers to take samples. Our focus on these issues should not be taken as implying any view about the validity or otherwise of other human rights concerns that have been raised.

Retention, use and destruction of samples (S & Marper v UK)

1.6 We have been involved in lengthy correspondence with the Government concerning its response to the decision of the Grand Chamber of the European Court of Human Rights in the *Marper* case, that the current blanket retention of DNA samples and profiles of innocent individuals and children on the National DNA Database (NDNAD) is disproportionate and in breach of the right to respect for private life guaranteed by Article 8 ECHR.⁹ In that well-publicised case, the Grand Chamber accepted that the extension of

⁸ Press Notice 6, Legislative Priorities for 2009-2010, 4 January 2010.

⁹ App No 30562/04, Judgment, 4 December 2008. See also Twenty-seventh Report of 2008-09, Retention, use and destruction of biometric data, HC 1113/HL 182.

the NDNAD had contributed to the detection and prevention of crime. It considered whether blanket retention was proportionate and struck a fair balance between the competing public and private interests and concluded:

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 any recordable offence, which includes minor and 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.¹⁰

1.7 We previously expressed our concern at the Government's proposal to deal with its response to this judgment by means of secondary legislation.¹¹ While we commend the Government's acceptance that the breach of the ECHR identified by the Grand Chamber in *Marper* must be removed speedily, we have expressed our view previously about the need for full parliamentary involvement in scrutinising and debating the Government's proposed response.¹² **The Government decision to provide for a full parliamentary debate on their reform of the regime for police retention, use and destruction of fingerprints and samples, including DNA samples is welcome. It is important that Government proposals designed to respond to adverse human rights judgments affecting Government policy are subject to proper parliamentary scrutiny, either through the introduction of a remedial order, where appropriate, or through a full debate on legislative proposals introduced promptly to remove the breach.**

1.8 In the Public Bill Committee, the Minister was asked whether the Government's provisions removed the breach identified by the Grand Chamber, so as to avoid the need for further litigation and subsequent reform. He said:

We have obviously considered the judgment and how far we can push the boundary of the judgment in relation to our wish to have protection for the public.¹³

1.9 We have, on numerous occasions, recognised that the Government has a responsibility and a positive human rights obligation, grounded in rights such as the right to life guaranteed by Article 2 ECHR and the right to physical integrity in Article 8 ECHR, to implement responsible and proportionate measures for public protection from serious crime.¹⁴ However, we are concerned at the Minister's statement that the Government's

¹⁰ *Marper*, Para 119

¹¹ Tenth Report of Session 2008-09, *Legislative Scrutiny: Policing and Crime Bill*, HL Paper 68, HC 395, paragraphs 1.111 to 1.119.

¹² *Ibid*

¹³ PBC Deb, 26 Jan 2010, Col 71

¹⁴ See for example, Fifth Report of 2008-09, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009*, HL Paper 37/HC 282, para 9

approach is designed to “push the boundary” of the *Marper* judgment in order to protect the public. The protection of the public from crime is a consideration of which the European Court of Human Rights has already taken full account in arriving at its view of the proportionality of the interference with Article 8 rights.

1.10 We continue to have significant concerns about the human rights compatibility of the Government’s approach, which we outline below. We consider that it would be irresponsible and potentially incompatible with the Government’s duty under Article 46 of the European Convention on Human Rights to implement the judgment in *Marper* in a way which removes the risk of future violations, if its proposals were purposefully designed in a manner which would risk further litigation and continuation of a violation identified by the Grand Chamber.¹⁵ This would not only lead to breaches of individuals’ rights, but would unnecessarily incur further public costs and increase the workload of the European Court of Human Rights. **We consider that it is unacceptable that the Government appears to have taken a very narrow approach to the judgment by purposely “pushing the boundaries” of the Court’s decision in order to maintain the main thrust of its original policy on the retention of DNA.**

1.11 We will return to the Government’s approach to the implementation of the judgment of the Grand Chamber in *Marper* in our next report monitoring the Government’s response to human rights judgments, which will be published shortly.

1.12 Clauses 14-20 of the Crime and Security Bill contain the Government’s proposed response to the judgment. Broadly:

- A new rule will be introduced to provide that all DNA samples (hair, saliva, blood etc) will be destroyed within 6 months, or as soon as a DNA profile has been obtained, whichever is sooner;¹⁶
- Any other samples taken should be destroyed within 6 months of having been taken;¹⁷
- Any data given voluntarily would need to be destroyed as soon as it had fulfilled the purpose for which it was given. Limited exceptions are where the volunteer is subsequently convicted an offence following the investigation for which he had voluntarily supplied a sample; had previously been convicted of another recordable offence or provided his consent to retention;¹⁸
- Any DNA profile provided by a person subject to a control order would be destroyed within two years after the date on which the control order ceases to have effect;¹⁹

15 For further details on the obligations of the United Kingdom under Article 46 ECHR, see Sixteenth Report of Session 2006-07, *Monitoring the Government’s Response to Court Judgments Finding Breaches of Human Rights*, HL Paper 128/HC 728, paras 5 – 8.

16 See Clause 14, New Section 64ZA, Police and Criminal Evidence Act 1984; Clause 15, New Section 64ZA Police and Criminal Evidence (Northern Ireland) Order 1989, Clause 16, New paragraph 14A, Schedule 8, Terrorism Act 2000, Clause 17, New paragraph 8 (2), Schedule 4, International Criminal Court Act 2001; Clause 18, New Section 18(3A), Counter-Terrorism Act 2008

17 Ibid

18 See Clause 14, New Section 64ZB, Police and Criminal Evidence Act 1984; Clause 15, New Section 64ZB Police and Criminal Evidence (Northern Ireland) Order 1989.

19 See Clause 14, New Section 64ZC, Police and Criminal Evidence Act 1984; Clause 15, New Section 64ZC Police and Criminal Evidence (Northern Ireland) Order 1989.

- DNA profiles of adults convicted of any recordable offence will be retained indefinitely;²⁰
- Children convicted of a single minor offence will have their DNA profile destroyed after 5 years; children convicted of two minor offences or one “qualifying offence” (from a list of serious offences, including assault, sexual offences and murder) will have their DNA profiles retained indefinitely;²¹
- DNA profiles of adults arrested in connection with any recordable offence will be retained for 6 years;²²
- DNA profiles of innocent children who have been arrested will be retained for three years,²³ unless they are aged 16 or 17 and have been arrested for a qualifying offence, when their DNA profile will be kept for 6 years;²⁴
- In all cases of DNA taken from innocent people, the clock will restart if the person is re-arrested;²⁵
- The Bill provides for a statutory “exceptional case” procedure. Chief Officers²⁶ may order the destruction of data if the arrest or the taking of the data was unlawful, the arrest was based on mistaken identity, or other circumstances relating to the arrest or the alleged offence which means that it would be appropriate to destroy the material;²⁷
- Chief Officers will retain a discretion to retain DNA profiles and fingerprints beyond the statutory destruction periods for the purposes of national security. It appears that this extends to any and all DNA profiles and samples, including samples given voluntarily and samples which would otherwise be destroyed subject to the “exceptional case” procedure because they have been gathered unlawfully. These determinations have effect for 2 years, subject to renewal for subsequent 2 year periods. The Bill does not provide for this renewal to be subject to any upper limit;²⁸

20 No provision is made for the destruction of DNA profiles of this category of persons by the Bill, so the Explanatory Notes explain, their retention will be indefinite.

21 See Clause 14, New Section 64ZH, Police and Criminal Evidence Act 1984; Clause 15, New Section 64ZH Police and Criminal Evidence (Northern Ireland) Order 1989.

22 See Clause 14, New Section 64ZD, Police and Criminal Evidence Act 1984; Clause 15, New Section 64ZD Police and Criminal Evidence (Northern Ireland) Order 1989. See also Clause 16, New Paragraph 14B, Schedule 8, Terrorism Act 2000. See also Clause 18, New Section 18(3C).

23 See Clause 14, New Section 64ZE-F, Police and Criminal Evidence Act 1984; Clause 15, New Section 64ZE-F Police and Criminal Evidence (Northern Ireland) Order 1989. See also Clause 16, New Paragraph 14C–E, Schedule 8, Terrorism Act 2000. See also Clause 18, New Section 18(3B).

24 See Clause 14, New Section 64ZG, Police and Criminal Evidence Act 1984; Clause 15, New Section 64ZG Police and Criminal Evidence (Northern Ireland) Order 1989. See also Clause 16, New Paragraph 14 D–E, Schedule 8, Terrorism Act 2000. See also Clause 18, New Section 18(3B–3C).

25 Clauses 14–15

26 The Bill defines responsible chief officers as the chief officer of police for the police area in which the relevant samples were taken (where a DNA profile is concerned, this will be the chief officer for the area where the DNA sample was taken). In Northern Ireland, this is always the Chief Constable for Northern Ireland.

27 See Clause 14, New Section 64ZI(5)–(6), Police and Criminal Evidence Act 1984; Clause 15, New Section 64ZI (5) Police and Criminal Evidence (Northern Ireland) Order 1989, Clause 16, New paragraph 14F(5), Schedule 8 Terrorism Act 2000

28 See Clause 14, New Section 64ZK, Police and Criminal Evidence Act 1984; Clause 15, New Section 64ZK Police and Criminal Evidence (Northern Ireland) Order 1989, Clause 16, New paragraph 14A, Schedule 8, Terrorism Act 2000; Clause 18, New Section 18(3A), Counter-Terrorism Act 2008

- The Secretary of State will be empowered to make regulations for the destruction of “legacy” data that has already been taken from innocent people, where their data would have been deleted under the proposals in the Bill;²⁹
- The Strategy Board for the National DNA Database will be placed on a statutory footing.³⁰

1.13 The Government proposes that the DNA of all individuals arrested on suspicion of any recordable offence should be retained for a period of six years, subject to particular arrangements for children and exceptional cases. The Committee of Ministers at the Council of Europe has responsibility for supervising the Government response to the breach of the ECHR found by the European Court of Human Rights in *Marper*. In December, it considered the Government’s approach set out in its consultation paper (which proposed retention of DNA profiles for 6 or 12 years) and concluded that:

a number of important questions remain as to how the revised proposals take into account certain factors held by the European Court to be of relevance for assessing the proportionality of the interference with private life here at issue, most importantly the gravity of the offence with which the individual was originally suspected, and the interests deriving from the presumption of innocence.³¹

1.14 Although the Committee of Ministers were considering the earlier proposals in the Government consultation, the Secretariat concluded that “it seems that the proposed measures and in particular the proposal to retain fingerprints and DNA profiles for 6 years following arrest for non-serious offences do not conform to the requirement of proportionality”.³²

1.15 A number of witnesses wrote to us to share their concerns that the Government’s approach—being based on the presumption that the DNA profiles of all adults arrested, should be kept for 6 years—would not be proportionate.³³ The Explanatory Notes accompanying the Bill explain the Government’s view that these proposals are compatible with the ECHR. In short, the Government considers that the removal of DNA samples from the database after six months (or as soon as a profile has been obtained) reduces the interference with the right to respect for private life by the retention of DNA profiles significantly.³⁴ Broadly, the Government considers that its proposals for retention will be proportionate to this “modest” interference, because:

29 Clause 19

30 Clause 20

31 1072nd (DH) Meeting, 1 -3 December 2009, Decisions adopted at the meeting, CM/Del/Dec (2009) 2072, 7 December 2009.

32 1072nd (DH) Meeting, 1 -3 December 2009, Annotated Agenda and Decisions, CM/Del/OJ/DH(2009)1072 Section 4.2 PUBLIC, 21 December 2009, Section 4.2

33 GeneWatch UK, Ev 39, Dr CNM Pounder, Amberhawk Training Ltd, Ev 49; Black Mental Health UK, Ev 34.

34 EN, paras 228–239

- Research produced by the Government suggests that a person who is arrested is at a higher risk of re-arrest for up to six years after the initial arrest than the general population;³⁵
- The Grand Chamber relied on a cross-Europe “consensus” which did not appear to permit retention of DNA samples and profiles for a significant period of time. The Government argues that these other States have not had access to the “best available evidence” about retention periods.³⁶
- This research supports a single retention period because it indicates that the type of offence which an individual is first arrested for is not a good indicator of the type of offence he may be arrested or convicted of in the future. The Explanatory Notes explain:

Although [a single retention period] runs counter to the steer in *Marper* that the seriousness of the offence is a material criterion in determining whether retention is proportionate, the Secretary of State submits that this approach is supported by the best available evidence.³⁷

1.16 We welcome the Government’s decision to respond swiftly to the judgment in *Marper*. The proposed statutory scheme for retention addresses some of the concerns of the Court and reduces the likelihood that DNA samples and profiles will be retained in a manner which is incompatible with individual rights. However, we are concerned that the proposal for retention of the DNA profiles of people who are arrested but not charged or convicted on the basis of a blanket retention period remains disproportionate and potentially arbitrary. We consider that there is a significant risk that these provisions will lead to a further breach of the right to respect for private life as guaranteed by Article 8 ECHR. We asked a number of questions about the Government’s approach in our correspondence with the Minister:³⁸ We consider our specific concerns in turn, below.

i) The Government’s approach to proportionality

1.17 The Government argues that the interference with the individual right to respect for private life caused by retention of DNA profiles, as opposed to DNA samples, is “modest”. The Explanatory Notes explain:

A person’s DNA profile can be accessed and used only for very limited statutory purposes...It does not stigmatise him as a past or future suspect in any public sense.

1.18 This approach appears to be somewhat in tension with the reasoning of the Court in *Marper*, which rejected very similar arguments made by the Government when attempting to persuade the Court that the retention of DNA profiles either does not fall within the ambit of the right to respect for private life in Article 8 ECHR or, if it does, does not constitute an interference with that right.³⁹ The Court considered the information held in

35 Ibid, para 234

36 Ibid, para 235

37 EN, para 236

38 Ev 11–20

39 *Marper*, paras 63–65.

DNA profiles to include “substantial amounts of unique personal data”. It expressed particular concern about the ability to ascertain genetic and familial information from profiles, including information in relation to ethnicity.⁴⁰ Although the Grand Chamber expressed particular concern about cellular samples, it did not indicate that the interference caused by retention of profiles was minor but treated the retention of both samples and profiles as an interference requiring justification.⁴¹ It stressed that information derived from DNA had an “intrinsically private character” which required the court to exercise “careful scrutiny” of any measure authorising its retention and use by the State without consent.⁴² In relation to the operation of the scheme as a whole, the Court considered that the individual’s perception that he was “not being treated as innocent” was increased because his or her data was retained in the same way as data from convicted persons.⁴³ The Government’s position also appears to be undermined by the results of its own public consultation on DNA retention, where it was indicated that a “significant majority” of respondents was opposed to any form of retention of DNA profiles taken on arrest from innocent persons.⁴⁴

1.19 The Minister told us that the interference is likely to be “modest” because:

- There are existing safeguards on the use of retained DNA which the Government considers will ensure that the practical implications for an individual will be limited. These include that access to the NDNAD is limited, DNA profiles stored can only be used for defined purposes and the fact of inclusion on the NDNAD is not publicly known.
- In the range of potential interferences with Article 8 ECHR (including deportation and forced treatment, etc), storage of a DNA profile is “relatively low in the spectrum”.
- Four out of five Law Lords would have rejected the inference that the retention of DNA samples and profiles was an interference at all, and the fifth thought that the interference was “very modest indeed”.⁴⁵ The Minister also noted that the Grand Chamber accepted that “the level of interference with the applicant’s right to private life might be different for each of the three different categories of personal data retained”.

1.20 We note that the safeguards identified by the Government were in place when the Grand Chamber reached its decision in *Marper*. The Court accepted that DNA profiles intrinsically include a “more limited” amount of personal information, and their retention may therefore require a lesser degree of justification, than is the case for biological material.⁴⁶ While the Court considered that the retention of cellular material was particularly intrusive, it does not necessarily follow that the interference caused by the retention of DNA profiles is “modest”. The Government accepts that the judgment of the House of Lords in *Marper* is superseded by the decision of the European Court of Human

40 Ibid

41 Paras 74 – 76. See also paragraph 120 and 123.

42 Para 104

43 Para 122.

44 Home Office, *Keeping the right people on the DNA database: Summary of Responses*, November 2009, para 2.1

45 Ev 20–34

46 *Marper*, para 120

Rights, but argues that it is still reasonable to consider the assessment of the House of Lords in support of its argument that the level of interference is at the lower end of the spectrum. We do not disagree that the reasoning of domestic courts may still be relevant even after a decision of the European Court of Human Rights, but we would sound a note of caution about the Government's continued reliance on the House of Lords judgment: the Grand Chamber's decision took account of the decision and reasoning of the House of Lords and came to a different conclusion about the ambit of the right to private life in Article 8 ECHR and what constitutes an interference with that right, and the Government cannot now rely on the House of Lords decision to the extent that it is inconsistent with the decision of the European Court of Human Rights.

1.21 The Grand Chamber stressed that a DNA profile included personal information from which sensitive genetic and ethnic information may be derived. Similarly, although the Court accepted that the presumption of innocence was not engaged by the storing of data, it did consider that the stigma attached to being included on a database on the same basis as convicted persons was relevant for the purposes of assessing the impact on the individual for the purposes of Article 8 ECHR.⁴⁷ The Government rejects the relevance of this impact in the Explanatory Notes, arguing that inclusion on the NDNAD does not stigmatise an individual nor place him on "a list of usual suspects". This neglects the conclusion of the Grand Chamber that the inclusion of an individual on a list which treated him in the same way as a convicted person, and differently from a person who has never been suspected of an offence, would affect his own understanding of how the State chose to perceive him and that this would be relevant to the assessment of proportionality for the purposes of Article 8 ECHR. The Court also concluded that weighty reasons would be needed before the Government could justify the need to treat a person who had been arrested differently from other unconvicted people whose fingerprints and samples must be destroyed at their request.⁴⁸ The Government still intends to treat arrested people in the same way as people who have been convicted for up to six years after their arrest. During this period they will be treated in the same way as convicted people and continue to be treated differently from other unconvicted people, and in our view the Grand Chamber's call for weighty reasons in justification of such differential treatment still stands.

1.22 This approach is in keeping with the Recommendation of the Council of Europe on the use of DNA in the criminal justice system R (92)1, which provides:

Measures should be taken to ensure that the results of DNA analysis are deleted when it is no longer necessary to keep it for the purposes for which it was used. The results of DNA analysis and the information so derived may, however, be retained where the individual concerned has been convicted of serious offences against the

47 *Marper*, para 122. We note that the Committee of Ministers Secretariat expressed similar concerns about the Government's failure to take on board the effect of stigmatisation recognised by the Court. In December 2009, it commented: "The approach of the [UK] authorities to the application of the academic studies is that "we ...believe that the risk of offending following an arrest which did not lead to a conviction is similar to the risk of re-offending following conviction." (§6.10 of the consultation). This strongly contrasts with the Court's concern about "the risk of stigmatisation", and the Court's observation that "the right of every person under the Convention to be presumed innocent includes the general rule that no suspicion regarding the innocence of an accused may be voiced after his acquittal." (§122 of the judgment). In addition, in *W. against the Netherlands* (application No. 20689/08, decision of 20/01/2009.) retention of DNA material (for convicted persons) was accepted where it was retained for a "prescribed period of time dependent on the length of the statutory maximum sentence that can be imposed for the offence committed." The approach of the authorities does not consider retention on the basis of any link with the maximum sentence but rather on possibility of future offending." See 1072nd (DH) Meeting, 1 -3 December 2009, Annotated Agenda and Decisions, CM/Del/OJ/DH(2009)1072 Section 4.2 PUBLIC, 21 December 2009, Section 4.2

48 *Marper*, para 123

life, integrity or security of persons. In such cases strict storage periods should be defined by domestic law. [...]

Where the security of the state is involved, the domestic law of the member state may permit retention of the samples, the results of DNA analysis and the information so derived even though the individual concerned has not been charged or convicted of any offence. In such cases strict storage periods should be defined by domestic law.⁴⁹

1.23 We welcome the Government's decision to require all biological samples to be destroyed within 6 months of their collection by the police. We agree with the Government that this measure reduces the impact of retention in relation to the category of personal information which the European Court of Human Rights indicated caused the most significant interference with the right to respect for private life. However, we are concerned by the Government's description of the remaining interference with private life caused by the retention of DNA profiles as 'modest'. There is inadequate support for the Government's assessment in the Grand Chamber decision in *Marper* and in the wider case law of the European Court of Human Rights. We are particularly concerned that the Government has discounted the stigmatising effect of the inclusion of the samples of innocent people on the National DNA Database, a factor which the Grand Chamber clearly considered relevant to the assessment of proportionality. The Council of Europe has made clear that the retention of DNA samples or information derived from those samples after a person is acquitted or no longer under suspicion of a criminal offence should only be permitted in truly exceptional cases. Our assessment of the proportionality of the Government's proposals begins with the Court's conclusion that the retention of DNA profiles – as opposed to DNA samples – involves an interference with the right to respect for private life which requires justification by being demonstrated to be "necessary in a democratic society" for the prevention of crime or for the protection of the rights of others..

1.24 We are concerned that the Government's approach to the assessment of proportionality in this case has been characterised by a degree of caution, which by underestimating the impact of its proposals on individual privacy, does not meet the standards required by the European Convention on Human Rights. In Committee in the House of Commons, the Minister consistently restated the Government position that the public protection offered by the retention of DNA profiles was key to the Government's analysis of the proportionality of the proposed measures. When pressed to provide further evidence of the contribution offered to criminal investigations by the retention of DNA profiles of innocent people, he said:

From my perspective, if the DNA database solved just one crime, I would be content with its operation...The decisions we have taken on the Bill are about making judgments about how we make it proportionate, transparent and give people an understanding of their rights and what we understand by that.⁵⁰

1.25 Giving the example of the involvement of DNA evidence in the conviction of the killer of Sally Anne Bowman, the Minister repeated a similar view:

49 Recommendation No R (92) 1 on the use of analysis of DNA within the framework of the criminal justice system, adopted 10 February 1992.

50 PBC Deb, 28 Jan 2010, Col 128

[U]ltimately, I want a system in place in which people such as the killer of Sally Anne Bowman...can be brought to justice and will spend a long time in prison so that families will have justice...Civil liberties are important...but civil liberties also include the right not to be murdered randomly on the street by an individual if it can be prevented.⁵¹

1.26 The Grand Chamber recognised the importance of DNA technologies for the purposes of criminal investigations but stressed that any interferences must be “necessary in a democratic society”. The Grand Chamber confirmed that this would require an assessment of the proportionality of retention and whether appropriate limits on retention were set in order to strike a fair balance between the competing public and private interests concerned. The Court recognised that, as a “pioneer” in DNA technology, the UK would have a special responsibility to strike a fair balance between these competing interests.⁵² We asked the Minister about the Government’s approach to the assessment of proportionality. He told us that the Government had recognised that the Court had placed a constraint on its discretion by referring to the need to exercise “special responsibility”, but, despite this constraint, the Government considered that the evidence which it had produced placed them in a particularly well informed position to reach a judgment on the appropriate balance between the competing interests in play.⁵³

1.27 We are concerned that the Government’s approach to the assessment of proportionality fails to recognise that it must illustrate why the measures proposed are necessary in order to meet the legitimate aim of the prevention of crime and the protection of the rights of others. The assessment of necessity must include an analysis of the contribution which the proposed retention of DNA profiles will make to meeting those legitimate aims. That contribution must be considered in the light of the proposed interference, in this case the proposal to retain the DNA profiles of innocent people for six years after most arrests. While it is understandable that the Government should seek to place a high value on the contribution of the DNA database to the effective functioning of the criminal justice system, the Government must provide specific evidence that the proposals in this Bill strike a proportionate balance between that contribution and the interference with individual rights. It must also consider the availability and effectiveness of alternative techniques for investigation and the potential for less intrusive means of reaching the same goal (including alternative models for retention, such as that adopted in Scotland). So far, the Government has not provided the evidence we require to be satisfied that the proposals in the Bill are proportionate to the interference with individual rights.

ii) Evidence on risk of re-arrest

1.28 The Government argues that the blanket application of a six year retention period for adults is based on “research which suggests that a person who has been arrested is for six years at a higher risk of re-arrest than the chance of arrest in the general population” and that some criminals would be likely to evade prosecution if DNA data from arrested persons were not retained. The Explanatory Notes explain:

51 PBC Deb, 4 Feb 2010, Col 244

52 *Marper*, para 112. See also 113 – 125.

53 Ev 24

In proposing a single retention period, irrespective of the seriousness of the offence for which an adult is arrested, the Secretary of State is acting on research which points strongly to the heterogeneity of criminality – in other words, the type of offence a person is first arrested for or convicted of is not a good indicator of the type of or seriousness of offence that he is likely to be arrested for or convicted of...Although this runs counter to the steer in *Marper*...the Secretary of State submits that this approach is supported by the best available evidence.

1.29 The Government's evidence base for a single retention period for all adults arrested but not convicted has already been widely criticised.⁵⁴ Evidence commissioned by the Home Office and prepared by the Jill Dando Institute for Crime Science, cited in the Government's initial consultation was later undermined by the authors of that research as having been ill-founded and based on figures which they were not independently permitted to examine.⁵⁵ We note that the Director of the Jill Dando Institute, commenting on the research produced to support the retention periods of 6 to 12 years proposed in the Government consultation, 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.'⁵⁶

1.30 The Government now relies upon Home Office research published together with the Government's response to the consultation, entitled *DNA Retention Policy, Re-Arrest Hazard Rate Analysis*. We asked the Minister for further information about this document. It was prepared by unnamed departmental officials working in the Economics and Resource Analysis Group of the Home Office, under the direction of the Home Office Chief Economist and the Chief Scientific Adviser. The Minister told us that it was informed by discussions with leading academics and that it was undergoing peer review, which had not yet been completed. The research was published by the Home Office on 11 November 2009, a week before the Bill was published.

1.31 We note a number of conclusions reached in the Home Office paper:

The research roughly estimates that at the end of a six year period, two-fifths of individuals retained on the database under these proposals will have been subsequently convicted of an offence (40%). This research includes no analysis of whether the subsequent conviction is likely to be related to the retention of the individual's DNA. Three-fifths of all of the profiles retained from people arrested but not convicted of an offence are likely to be "false-positives", that is, involving the retention of the DNA profiles of innocent people with no further connection with the criminal justice system.

54 See for example, Mr Justice Beatson, *Forensic Science and Human Rights: The Challenges*, June 2009, p19, 25.

55 BBC News, *DNA Storage Proposal Incomplete*, 25 September 2009. We note that the Committee of Ministers Secretariat considered this evidence and concluded that its basis, being based on the risk of future criminality, appeared inconsistent with the guidance of the court on the stigma attached to the retention of the DNA of individuals on a database where they are treated in the same way as convicted persons, rather than those who have never been under suspicion. See 1072nd (DH) Meeting, 1 -3 December 2009, Annotated Agenda and Decisions, CM/Del/OJ/DH(2009)1072 Section 4.2 PUBLIC, 21 December 2009, Section 4.2

56 BBC News, *DNA Storage Proposal Incomplete*, 25 September 2009.

The researchers compare this degree of risk against individuals in the general population which is lower, at one tenth (10%). Again, this figure is described as a rough estimate.

The principal research included in the Home Office paper is not related to risk of conviction, but risk of *re-arrest*. It places risk of re-arrest at 33.4% immediately following arrest, falling to 16.6% after 1 year, 10.3% after 2 years and 7.8% after 3 years. The risk of arrest applicable to the general population is calculated as around 5%. For the period between 4–6 years following arrest the risk that this category of people will be rearrested is estimated to be less than 2% higher than that posed by the general population.

The recommended retention period of six years is based on the point when the researchers estimate that the likelihood that an individual who has been arrested will be re-arrested matches the risk posed by the general population.

A number of other findings are reached in respect of the treatment of children and those suspected of minor offences. We consider these particular issues below at paragraphs 1.38–1.48.

1.32 We have a number of concerns about the value of this evidence:

(a) The research is based upon the risk of re-arrest, not the likelihood of subsequent conviction. We note that the Minister told members of the House of Commons Public Bill Committee that “our evidence shows that like it or not, people who have faced initial arrest and been charged, even if they are not convicted, have a propensity to return before the courts and be convicted within six years”. Although the research acknowledges that re-arrest is not an indicator of criminality, the research is presented on the basis that this is adequate to provide support for the Government’s argument that the DNA of all persons arrested should be retained for a set period.

(b) The data is based on three years of statistical information drawn from the Police National Computer. This data has been extrapolated into a “hazard curve” to provide an estimated 8 years worth of information about the likely risk of re-arrest after an initial arrest. We asked the Minister to respond to allegations that this extrapolation was effectively “guesswork”. He told us that “hazard rate curves” are a standard approach adopted in academic literature and that “sensitivity analysis” had been applied to the statistics in order to ensure that the results were a reliable basis to inform policy development.⁵⁷ We have no means by which to judge whether this is correct. We note that even if the models used are academically accepted and sufficiently reliable to inform policy, the statistics presented by the Government are not based on the analysis of actual data gathered from the operation of the NDNAD.

(c) The researchers have subjected their own research to a number of caveats, including that since they had no access to reliable data on conviction after arrest for

an earlier unrelated offence, they could only “roughly estimate” the relationship between arrest and conviction.

(d) This document is an internal document, prepared by Home Office officials, based on statistics which we understand have not been made publicly available. In our view, this is particularly important in the light of (a) the very limited independent research to compare the Government’s analysis against and (b) the Government’s earlier unsuccessful attempt to commission independent evidence to support its policy position from the Jill Dando Institute for Crime Science.

(e) When asked for further information on statistics relating to individual cases, the Government has been unable to provide it. For example, we asked the Government for more information about the ACPO research which it states illustrates that 36 rape, murder or manslaughter cases during 2008-09 involved matches to innocent persons’ DNA retained on the NDNAD which were of “direct and specific” value to the investigation. Unfortunately, the Government was unable to conduct this analysis within the time that we asked for a response. In the light of the fact that the Government has been relying on these statistics during debates on the Bill, this is precisely the kind of detailed information which the Government should be able to provide. **We recommend that the Government publish the details of these cases, if necessary in a suitably redacted format, or it should stop referring to them as support for its proposals.**

1.33 This research has also been subject to criticism by NGOs and others.⁵⁸ Liberty criticises the research on a number of grounds, including that it is based on only three years of data:

It is clear then that the data itself is incomplete and the estimated likelihood of further arrest [is] derived from simply guesswork...Disturbingly also the so-called statistical evidence and extrapolation on which the six year basis is based confuses the likelihood of future arrest with the likelihood of future criminality...The risk of arrest is not the same as a risk of future offending.⁵⁹

1.34 Justice highlights similar flaws and argues that the research does not support the Government’s argument that retention is necessary, because it does not address the risk of conviction after re-arrest:

Even the Government’s limited data does nothing to show that there is a continuing risk of offending posed by people who have been arrested. On the contrary, the only thing that it shows is that once you have been arrested by the police, the more likely you are in the future to be arrested by the police.

1.35 There is a significant number of legitimate concerns about the quality and substance of the research produced by the Government to support its proposals. In particular, we are concerned about the language used by the Minister which appears to equate risk of re-arrest with evidence of future criminality. This is particularly

⁵⁸ See for example, Ev 49–50

⁵⁹ Liberty, *Second Reading Briefing on the DNA provisions*, January 2010. Justice raise similar concerns see *Crime and Security Bill: Briefing on Second Reading House of Commons*, January 2010.

disturbing in the light of the attention paid by the Grand Chamber in *Marper* to the stigma which can be associated with inclusion on a database like the NDNAD and an individual's own perception of the way that he or she is viewed by the State.

1.36 In any event, we consider that the research in the Home Office paper, *DNA Retention Policy, Re-Arrest Hazard Rate Analysis*, lends little weight to the Government's arguments on proportionality. At most, it shows that the retention of the DNA profiles of persons arrested for six years following arrest will impact on the rights of a significant number of innocent people (up to two-thirds of the profiles retained will be "false positives" not connected to any further criminal activity) in order to address a potentially very small increase in the risk of re-arrest relative to the general population.

1.37 We are disappointed that the Government argues that it can rely on this evidence in order to depart entirely from the guidance of the Court in *Marper* and the Council of Europe in its Recommendation on the use of DNA in the criminal justice system. If cogent evidence were available to support the Government's position, we agree that this would be relevant to the analysis of the proportionality of the measures, in that it would lend weight to any Government argument that the measures were necessary and bore a rational connection to the legitimate aim of the prevention and detection of crime and the protection of the rights of others. However, it cannot be suggested that the Home Office research so completely undermines the analysis of the Grand Chamber as to suggest that it provides adequate justification for a single retention period without further scrutiny of the proportionality of the proposals. If the Government's reliance on the statistical value of the retention of DNA were carried to its logical conclusion, it would suggest that the retention of the DNA of all young men aged 16 – 24 (or any other group considered statistically more likely to be arrested) would be a proportionate interference with Article 8 ECHR.

iii) Retaining DNA and samples taken from children

1.38 The Bill proposes to treat the DNA of children convicted of qualifying offences in the same manner as if they had committed their offences as adults. Children convicted of a minor offence will have their DNA retained for five years. All children arrested in connection with a recordable offence will have their DNA profile retained for three years, children aged 16 – 17 arrested in connection with a qualifying offence will have their DNA profile retained for six years.

1.39 The Grand Chamber in *Marper* said:

The Court...considers that the retention of unconvicted persons' data may be especially harmful in the case of minors...given their special situation and the importance of their development and integration into society. The court has already emphasised, drawing on the provisions of Article 40 of the UN Convention on the Rights of the Child of 1980, the special position of minors in the criminal justice sphere.⁶⁰

The Explanatory Notes explain:

In proposing retention periods for children, the Secretary of state has again acted on the basis of evidence which shows that the earlier a criminal career starts, the longer it is likely to last, while paying regard to the Strasbourg ruling and results of the consultation exercise which supported a more liberal policy for people aged under 18. The retention period for children aged 16 or 17 who are arrested but not convicted for a serious offence will be the same as for adults, reflecting the fact that peak offending occurs at this age.

1.40 Article 40 of the UN Convention on the Rights of the Child provides:

State parties recognise the right of every child alleged as, accused of, or having infringed the penal law to 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 human rights and fundamental freedoms of others and which takes into account the child's age and desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

1.41 The retention of children's DNA on the NDNAD, irrespective of the child's guilt or innocence, was noted with concern by the UN Committee on the Rights of the Child in its last report on the United Kingdom.⁶¹

1.42 We asked the Minister for further information on the treatment of children's DNA. In particular, we asked for further evidence to support the Government's view that these proposals were proportionate and for details of the consideration that the Government had given to the compatibility of the proposals with the UN Convention on the Rights of the Child. The Minister told us that the Government's intention in adopting its proposed retention periods for children is to "balance the protection of the public from those who may commit crime in the future with the specific issues that arise from the special position of children in society, including (but not limited to) the provisions of the UN Convention on the Rights of the Child". The Minister told us that the Government has taken the provisions of the ECHR and the UN Convention into account in setting shorter periods of retention for most children except those children convicted of qualifying or multiple offences and for 16 and 17 year olds arrested but not convicted of qualifying offences. We regret that the Minister has not provided us with a more detailed analysis of the impact which the UN Convention has had on the Government's rationale in setting the retention periods for children in the Bill.

1.43 The Minister explains that the Government's view on the proportionality of the proposed retention periods is based on two strands of research. The first, relating to the increased likelihood of re-arrest, was considered above. The second, relates to research which illustrates that peak offending in children occurs at ages 16–17.⁶² While research that supports the view that the likelihood of offending peaks at a certain age is relevant to the likelihood that retention would enhance public protection, it is not clear why the notion

61 UN Committee on the Rights of the Child, 49th Session, Concluding Observations on the United Kingdom, 20 October 2008, para 36.

62 Ev 24–25; EN para 237

that an individual is statistically more likely to commit an offence justifies treating that person as an adult. As we outlined above, cogent statistical evidence may lend weight to the Government's argument that the proposals are more able to meet their aim, but this does not automatically render the proposals proportionate. While this research may lend some weight to the Government's argument that those young people suspected of serious offences should be treated differently from others, we are not persuaded that it is significant enough to justify the treatment of young people aged 16–17 as if they were adults. Nor does it explain why the Government has chosen to retain the DNA of all children arrested for all recordable offences for at least three years. Similarly, we are not persuaded that the Government has provided adequate evidence that children convicted of more than one minor offence should have their profiles retained indefinitely in the same way as adults. For example, this could mean that a child convicted of two offences of shoplifting or minor criminal damage at respectively, ages 11 and 12, could have his or her DNA profile retained indefinitely. We are concerned that this approach is inconsistent with the special position of children in the criminal justice system recognised by the UN Convention on the Rights of the Child.

1.44 The Government has a particular responsibility to justify the taking and retention of DNA samples and profiles from children. In the absence of further evidence to support the Government's position, we consider that the proposed retention periods for the DNA profiles of children may be disproportionate and inconsistent with the requirements of the UN Convention on the Rights of the Child. We recommend that the Government should provide further information on its justification for taking DNA samples from people convicted of offences committed when they were children and the retention of DNA profiles obtained from children arrested but not subsequently in contact with the criminal justice system. In particular, we recommend that the Government provide justification for its proposed retention periods and publish its analysis of the compatibility of the proposals with the UN Convention on the Rights of the Child.

iv) Retaining DNA and samples of innocent people arrested in connection with minor offences

1.45 The Government considers that it would be inappropriate to distinguish between arrest for minor and more serious offences, arguing that research points “strongly” to there being no appropriate link between the seriousness of an offence for which an individual is first arrested and any future criminality.⁶³ We wrote to the Minister to ask for further information on the Government's approach. We were referred back to the Home Office research and two supporting academic articles, including one Home Office published paper. The Minister told us:

There is little (to our knowledge) formal evidence of individuals offending in an intermittent or specialised way, suggesting no strong case for a longer retention period for more serious crimes.

1.46 We are concerned that the Government's approach departs both from the guidance in *Marper* and from the recommendations of the Council of Europe. The research produced

in the Home Office paper cites general research about a lack of distinction between types of crime conducted over a career of criminality, and concludes that there is “no evidence that a person [who has been arrested previously in connection with a serious offence] will have a noticeably higher risk of committing a similarly serious crime than any other ... individual”.⁶⁴ However, it then cites evidence produced in 2001–02 which showed a slightly elevated risk that individuals convicted of sexual and violent offences were more likely to be convicted again for a similar type of offence within a year.⁶⁵

1.47 Again, while this evidence provides relevant background information to the Government’s approach, we do not consider that it is sufficiently robust to justify the decision of the Government to ignore the guidance of the Court in *Marper* and the Council of Europe in its recommendation, that discrimination between serious and other offences would be relevant to the assessment of proportionality. We note in particular, that:

- the Council of Europe Recommendation indicates that retention of DNA samples and profiles will only be proportionate, even after conviction, in the case of more serious offences;⁶⁶
- the research cited by the Government relates to conviction data and not the likelihood that a person arrested in connection with a serious violent or sexual offence might subsequently be convicted of another offence of that type;⁶⁷
- while the Government’s research on the face of it supports the public protection argument for keeping more people on the database, it does not illustrate that the interference posed to individual rights is proportionate and necessary to the threat posed by individuals arrested in connection with an offence and subsequently released;⁶⁸
- the recent review of acquisition and retention of DNA and fingerprint data in Scotland concluded that the retention of the DNA profiles of those individuals charged with serious violent and sexual offences but not convicted for 3 years was considered fit for purpose.⁶⁹ We return to the Scottish model below.

1.48 It is disappointing that the Government has chosen not to draw any distinction between arrest in connection with serious violent and sexual offences and less serious offences. Under the proposals in the Bill, an individual arrested in connection with the investigation of a minor criminal damage or a public order offence will be treated in the same manner as an individual who is charged but not convicted in relation to a serious violent or sexual offence. We consider that this failure is likely to increase the likelihood that these proposals will be considered disproportionate and incompatible with the right to respect for private life as guaranteed by Article 8 ECHR.

64 DNA Retention Policy—Re-arrest Hazard Rate Analysis (Herein “Home Office Research Paper”)

65 Ibid, See Figure A4.

66 Recommendation R92(i), Section 8

67 Home Office Research Paper

68 Ibid

69 See Press Release, Scottish Government, *Strengthening Scotland’s Forensic Regime*, 24 February 2009. The Scottish Government, Acquisition and Retention of DNA in Scotland, Consultation Report, 2009

v) Retention of DNA and samples for 'national security' purposes

1.49 The Bill provides for Chief Officers to have the power to determine that particular DNA profiles or fingerprints should be retained beyond the retention periods that would otherwise apply where they determine that retention is “necessary” for the “the purposes of national security”. Further retention can be authorised on this basis for two year periods, which can be renewed on a rolling basis. The Bill makes no provision for any definition of “national security” for these purposes, nor does it provide for any judicial or other oversight of the decisions of the Chief Constable in these cases.

1.50 We asked the Minister for further information about how this power would operate in practice. In particular, we asked what “national security” grounds would justify additional retention and whether individuals would be notified that their profiles were being exceptionally retained. The Minister told us:

- The Government considers that “the nature and severity of the threat posed by terrorism and other threats to national security, justifies a longer retention period than in other cases”.
- “The retention of DNA material and fingerprints of persons of national security interest should be reviewed on a case-by-case basis rather than by the determination of a period of time based on criminal recidivism rates.”
- National security would include but not be limited to “counter-espionage, counter-proliferation as well as counter-terrorism cases”.
- The power to retain a profile for “national security” reasons will not be limited to those persons arrested in connection with terrorism related offences, as during the six-year period of retention after an arrest for an unconnected offence, that person may become of national security interest. In those circumstances, the Government consider that it would be proportionate to retain that person’s DNA profile;
- Retention for the purposes of national security could apply to individuals who have given their DNA profile voluntarily, but could not be applied where an individual’s DNA should be destroyed following the application of the exceptional cases procedure (for example, after an unlawful arrest).
- Individuals whose profiles have been retained will not be informed. The Minister explained that it would not be in the interests of national security to inform individuals that they were of national security interest.
- As individuals will not be aware their profile is retained, they will not be able to challenge the decision of the chief Constable. The Minister explained that such a challenge could “compromise methodology and in some circumstances place lives at risk”.

1.51 We asked the Minister whether it would be more appropriate for Chief Officers to be required to apply to a court for approval of the decision to retain any DNA profile which should otherwise be destroyed. The Minister told us that this would not be appropriate because Chief Officers have the “knowledge and expertise of the situation and will consult with stakeholders such as the security service where appropriate”.

1.52 The Council of Europe recognises that state security could justify exceptional retention of DNA samples and profiles. However, even in these circumstances, it is recommended that retention must be subject to strict storage periods defined by law.⁷⁰ Although the Bill defines exceptional storage by reference to necessity on the grounds of national security and by two year increments, we are concerned that the lack of independent, effective, judicial oversight of the discretion of Chief Officers reduces the value of even these limited safeguards. We are concerned that it is not clear what samples are included or excluded from this exceptional power, or what “national security” must mean in this context. We note that during debates in the House of Commons Public Bill Committee, the Minister committed to consider whether further safeguards could be added to this section of the Bill, including by requiring review of these powers by the Reviewer of Terrorism Legislation.⁷¹ However, the work of the Reviewer provides only a very limited safeguard against abuse of broad discretionary powers. Notably, the European Court of Human Rights has recently held that the discretionary powers of stop and search in Section 44 of the Terrorism Act 2000 are insufficiently defined to be prescribed by law and have been operating in a manner incompatible with Article 8 ECHR.⁷² The Reviewer had previously criticised the operation of these provisions, but to no avail.⁷³

1.53 We consider that the breadth of the power to retain DNA profiles and fingerprints for the purposes of national security proposed in the Bill, combined with the lack of any effective or independent oversight of the decision making process, will mean that it could be exercised in a manner which would contravene the right to respect for private life, without any real opportunity for effective challenge. We recommend that this power is overly broad and should be more closely circumscribed by defining more precisely the circumstances in which it can be used and providing for some form of independent oversight.

The following amendments to the Bill are suggested to give effect to this recommendation:

Page 36, Line 41, [Clause 14], at end insert-

“(4A) For the purposes of subsection (1), “for the purposes of national security” means for the purposes of investigating significant threats to the security of the United Kingdom arising from-

- (a) terrorist activities;
- (b) nuclear weapons and other weapons of mass destruction;
- (c) trans-national organised crime;
- (d) global instability and conflict;
- (e) civil emergencies; or
- (f) state-led threats to the United Kingdom.”

70 Recommendation R (92) 1, Section 8.

71 PBCDeb, 4 February 2910, Cols 261–262

72 *Gillan V UK*, App No 4158/05, Judgement, 12 January 2010

73 *Ibid*

1.54 This amendment would introduce a definition of “national security” based on the key threats to national security outlined in the UK national security strategy.⁷⁴ This is presented as an exhaustive list, and covers each of the threats outlined by the Minister in correspondence. It implements the recommendation in paragraph 1.53, that the Bill should more closely circumscribe the circumstances when retention for national security purposes will be possible. We also recommend that amendments with identical effects are tabled to Clause 15,⁷⁵ Clause 16,⁷⁶ and Clause 18⁷⁷

Page 36, Line 41, [Clause 14], at end insert-

“64ZKA Approval required for retention for the purposes of national security

(1) This section applies where a chief officer determines that retention for the purposes of national security is necessary.

(2) Subject to subsection (3), the determination shall not take effect until such time (if any) as—

(a) the determination has been approved by the Information Commissioner;
and

(b) written notice of the Commissioner's decision to approve the determination has been given, in accordance with subsection (3), to the chief officer who made the original determination.

(3) Where subsection (2) applies—

(a) the Information Commissioner shall give his approval under this section to the authorisation if, and only if, he is satisfied that there are reasonable grounds for believing that the requirements of section 64ZK(1) are satisfied in the case of the determination; and

(b) the Information Commissioner shall, as soon as reasonably practicable after making that decision, give written notice of his decision to the Chief Constable.

(4) Any determination under paragraph (1) includes a decision that a determination should be renewed pursuant to Section 64ZK(3).”

1.55 This amendment introduces a requirement for authorisation by the Information Commissioner of exceptional retention of DNA profiles and fingerprints for the purposes of national security. This follows the mechanism for approval by the Surveillance

74 Cm 7291, *The National Security Strategy of the United Kingdom*, Cabinet Office, March 2008.

75 Page 46, Line 36

76 Page 53, Line 27

77 Page 58, Line 3

Commissioners of authorisations for intrusive surveillance by police and other security agencies under the Regulation of Investigatory Powers Act 1998 (See Section 36).

1.56 This amendment implements our recommendation in paragraph 1.53 that the powers related to national security in the Bill are not currently subject to adequate independent oversight. This amendment is proposes oversight by the Information Commissioner for the purposes of debate, given the determination involves the exceptional retention of personal information. We also recommend that amendments with identical effects are tabled to Clause 15,⁷⁸ Clause 16,⁷⁹ and Clause 18⁸⁰.

National DNA Database Reviewer

To move the following new clause-

“(1) Within 12 months of the coming into force of this Part, the Secretary of State shall appoint a Reviewer to be known as the National DNA Database Reviewer.

(2) Subject to subsection (4), the National DNA Database Reviewer shall keep under review—

(a) the exercise and performance, of the powers and duties conferred or imposed by Section 64ZI(5) of the Police and Criminal Evidence Act 1984;

(b) the exercise and performance of the powers conferred by Section 64ZK of the Police and Criminal Evidence Act 1984;

(c) the exercise and performance, of the powers and duties conferred or imposed by Section 64ZI(5) of the Police and Criminal Evidence (Northern Ireland) Order 1989;

(d) the exercise and performance of the powers conferred by Section 64ZK of the Police and Criminal Evidence (Northern Ireland) Order 1989;

(e) the exercise and performance, of the powers and duties conferred or imposed by paragraph 14(F)(5), Schedule 8, Terrorism Act 2000;

(f) the exercise and performance, of the powers and duties conferred or imposed by paragraph 14(G), Schedule 8, Terrorism Act 2000; and

(g) the exercise and performance, of the powers and duties conferred or imposed by Section 18(3E) Counter-Terrorism Act 2008.

78 Page 46, Line 36

79 Page 53, Line 27

80 Page 58, Line 3

(3) Within 12 months of his appointment, and every 12 months thereafter, the National DNA Database Reviewer must lay a report of the findings of his review before both Houses of Parliament.

(4) Each report of the National DNA Database Reviewer must include consideration of:

- (a) the number of decisions taken during the preceding 12 month period under each of the powers in subsection (2);
- (b) the grounds for any decisions taken during any preceding 12 month period under each of the powers in subsection (2);
- (c) an equality impact assessment of the exercise of the powers in subsection (2) over the preceding 12 month period; and
- (d) an assessment of the operation of each of the powers in subsection (2)."

This amendment is based on the role played by the Reviewer of Terrorism Legislation. It provides that the exceptional powers granted to chief officers by the Bill – in relation to immediate destruction of material in individual cases and exceptional retention on the grounds of national security – will be subject to review. It requires annual statistics to be provided to Parliament, with an assessment of the operation of each of the relevant powers. This amendment relates to our recommendations in paragraphs 1.53 and 1.56, which recommend respectively that each of the exceptional powers be subject to more independent oversight.

vi) Oversight of retention decisions

1.57 In December, the Committee of Ministers highlighted the lack of provision for independent oversight of individual retention decisions. The Bill does not provide for any independent right of appeal in respect of retention decisions in individual cases. In addition to our concern about the lack of independent oversight in cases involving retention on 'national security' grounds, the Bill makes no provision for statutory appeal in respect of the decisions of Chief Officers under the exceptional cases procedure. This procedure provides that if it "appears" to the Chief Constable that certain criteria are fulfilled, then any material gathered (including DNA samples and profiles) must be destroyed. These criteria include: (a) that the arrest was unlawful; (b) that the taking of the samples was unlawful; (c) that the arrest was based on mistaken identity; or (d) any other circumstances relating to the arrest or the alleged offence which mean that it is appropriate to destroy the material.⁸¹ The Nuffield Council on Bioethics have recommended that "an independent body, along the lines of an administrative tribunal, should oversee requests from individuals to have their profiles removed from bio-information databases".⁸²

81 New Section 64ZL (5) Police and Criminal Evidence Act 1984, inserted by Clause 14(2).

82 Ev 48

1.58 The Explanatory Notes do not deal in any detail with the Court’s concern that there should be independent review and oversight of individual retention decisions. We noted that the Committee of Ministers had expressed concern about the lack of provision for independent oversight and asked the Minister for more information. He explained that the Government considered that judicial review would be a sufficient measure of review of the decisions of Chief Officers. The Government relies on case-law of the European Court of Human Rights which supports the view that in some cases involving allegations of a breach of the right to a fair hearing by an independent and impartial tribunal, judicial review can remedy a lack of independence on the part of an initial decision maker (Article 6 ECHR).⁸³ We note that the Government does not refer to the decision of the Court in *Tsfayo v United Kingdom* which held that judicial review could not resolve a lack of independence in those cases where decisions were fact sensitive, as judicial review would not guarantee a merits review of the original decision on the facts.⁸⁴ We consider that each of the decisions of the Chief Constable under the exceptional procedure are likely to be highly fact sensitive and that this means that judicial review alone cannot be adequate as a form of independent oversight.

1.59 The Minister also told us that the Government considered that the Court’s reference to a lack of “independent” review was in the context of a blanket and indefinite retention policy, where there were no defined statutory criteria. While we agree that the Court’s analysis stopped short of requiring independent oversight as a prerequisite for any retention regime, we disagree with the Government’s analysis of the importance of independent oversight. As we explain above, the Government’s proposals include the treatment of the DNA profiles of innocent people and children, in the same way as convicted people for up to six years. The only way that a person arrested, but subject to no further action, can have their DNA profile removed from the database before the presumed retention period has expired is through the operation of the exceptional procedure. We consider that the fairness of this procedure will play a significant part in the assessment of the proportionality of the overall package of Government proposals and its compatibility with Article 8 ECHR. At present, it is proposed that a significant degree of discretion remains with individual Chief Officers who may be perceived to have a vested interest in the continued retention of the relevant DNA profiles. **We recommend that the Bill is amended to provide a statutory form of appeal from decisions of Chief Officers under the exceptional procedure to an independent tribunal. Given that the determination involves the retention of personal information by the State, we suggest that the Bill could provide for an appeal to the Information Commissioner with a further appeal to the Information Tribunal.**

Right of appeal

To move the following new clause-

“(1) Any person from whom relevant material has been taken may request that the chief officer order the immediate destruction of that material for the following reasons:

83 *Crompton v UK*, App No 42509/05.

84 *Tsfayo v UK*, App No 60800/00, Judgement, 14 November 2006. In *Crompton v UK*, the court specifically recognised the limitations of judicial review in fact-sensitive cases, see paras 78–79

- (a) the arrest was unlawful;
- (b) the taking of the fingerprints, impressions of footwear, or DNA sample concerned was unlawful,
- (c) the arrest was based on mistaken identity, or
- (d) other circumstances relating to the arrest or the alleged offence mean that it is appropriate to destroy the material.

(2) Following a relevant determination by a chief officer that relevant material should not be destroyed, that decision must be communicated to the person from whom the relevant material has been taken (“P”).

(3) P may appeal to the Information Commissioner against the decision of the chief officer.

(4) If on appeal the Information Commissioner considers that there are reasonable grounds for immediate destruction of the material, the Information Commissioner shall allow the appeal.

(5) On such an appeal, the Commissioner may review any determination of fact on which the chief officer’s decision was based.

(6) Following a decision of the Information Commissioner under subsection (3), either the chief officer or P may appeal to the Information Tribunal in relation to any error of fact or law.

(7) Any party to an appeal to the Tribunal under section 48 may appeal from the decision of the Tribunal on a point of law to the appropriate court; and that court shall be—

- (a) the High Court of Justice in England,
- (b) the Court of Session in Scotland, and
- (c) the High Court of Justice in Northern Ireland.

(8) For the purposes of this section “relevant material” includes material falling within-

- (a) Sections 64ZD – 64ZH of the Police and Criminal Evidence Act 1984;
- (b) Section 64ZD – 64ZH of the Police and Criminal Evidence (Northern Ireland) Order 1989; and
- (c) paragraph 14(B)-(E), Schedule 8, Terrorism Act 2000.

(9) For the purposes of this section “relevant determinations” are determinations within-

- (a) Section 64ZI(5) of the Police and Criminal Evidence Act 1984;
- (b) Section 64ZI(5) of the Police and Criminal Evidence (Northern Ireland) Order 1989;
- (c) paragraph 14(F)(5), Schedule 8, Terrorism Act 2000.”.

This purpose of this amendment is to provide a statutory route of appeal to the Information Commissioner against decisions of the relevant chief officer not to exercise his power to destroy material which would otherwise be retained under the Government's proposals for the retention. It makes clear that individuals will be able to request that chief officers consider immediate destruction, followed by a right of appeal against any refusal. It gives effect to our recommendation in paragraph 1.56.

vii) Legacy samples retained on the NDNAD

1.60 Clause 19 of the Bill requires the Secretary of State to make regulations for the destruction of samples and profiles held under the previous scheme which would have been destroyed had the new rules been in force at the time the sample had been taken. The Explanatory Notes explain:

This will enable the Secretary of State to ensure that the retention and destruction regime set out in this Bill is applied to existing material, while recognising that this exercise may take some time to complete; there are some 850,000 profiles of unconvicted persons on the National DNA Database.

1.61 Under the existing regime, samples and profiles may be destroyed at the discretion of Chief Officers, following ACPO Guidance (Guidelines for Nominal Records on the Police National Computer). Between January 2008 and December 2008, 272 records were destroyed following this procedure.⁸⁵ The figures for 2009 show that 377 records were removed.⁸⁶ ACPO has written to Chief Officers to indicate that they should not change their practice in light of the judgment in *Marper* until domestic law is revised.⁸⁷

1.62 The Bill does not indicate an appropriate time-scale for the Secretary of State to make an Order to deal with legacy profiles and fingerprints. We wrote to the Minister to ask for an indication of the Government's approach to legacy samples. He told us that the Government considered that "DNA profiles that would fall to be deleted under the Bill would be deleted within a few months of the provisions coming into force, while the task of destroying the 5 million plus biological samples currently held is likely to take somewhat longer – the forensic science suppliers advise that this task should be completed within two years." While this is a helpful indication of the timescale likely after the Secretary of State exercises his duty under Clause 19, we have seen no indication of the likely timeframe for that Order to be laid. We are concerned by the Government's earlier explanation, in its consultation paper, that the reluctance to provide a time-frame for treatment of legacy samples and profiles may be due to existing administrative difficulties. Not least, the Government is concerned that there appear to be almost 500,000 profiles on the NDNAD which are not linked to any record on the Police National Computer. The Government has said that the cheapest way to deal with these profiles would be to delete them all, but that it is concerned that this would be a "high risk option".⁸⁸ The likelihood of significant delay is disappointing when it is clear that some samples and profiles are being retained in breach

85 HC Deb, 3 Feb 2009, cc 1048 – 1052W

86 *The Independent*, *DNA profiles removed at rate of one a day*, 14 January 2009

87 See letter from Ian Readhead to Chief Constables, July 2009. Twenty-seventh Report of 2008–09, *Retention, use and distribution of biometric data: Correspondence with Government*, HL Paper 182/HC 1113.

88 Home Office, *Keeping the right people on the DNA database*, May 2009, paras 6.25 – 6.31

of the ECHR following *Marper*. We asked for the Government's view on the fact that delay in dealing with legacy profiles could lead to further human rights challenges and associated litigation costs. The Minister told us that the Government wished to give effect to the decision in *Marper* as soon as "practically possible". He noted that the decision did not require the deletion of all profiles previously retained and that the Government thought it would be inappropriate to prejudge the decisions of Parliament on its proposals by beginning to delete profiles which could not be retained pursuant to the provisions in the Bill.⁸⁹

1.63 While we agree that the Government should be careful not to pre-empt Parliament's decision on its proposals, we are concerned that administrative difficulties may lead to some significant delay in dealing with the legacy profiles of innocent people and children on the National DNA Database. The Government should provide more details on how it intends to approach the duty in Clause 19 to require the destruction of legacy samples, profiles and fingerprints. In particular, a timetable for compliance with those requirements should be provided. We propose an amendment to the Bill to require an Order to be laid within 1 year of Royal Assent, for the purposes of securing a fuller debate on this issue.

Page 60, Line 19, [Clause 19], at end insert-

"(6) A statutory instrument containing an order under this section must be laid before Parliament within 12 months of Royal Assent to this Act."

This amendment is recommended for the purposes of debate and gives effect to our recommendation in paragraph 1.60 on the treatment of legacy samples on the National DNA Database. Although the Minister has explained that the Government expects all legacy samples which it intends to delete to be deleted within 2 years of an order pursuant to Clause 19, we recommend that the Government explain when it expects to lay such an order. This amendment would require an order to be laid within one year of Royal Assent.

viii) Alternatives: the Scottish Approach

1.64 The Grand Chamber specifically drew attention to the model adopted in Scotland. This provides that, in general, DNA samples and profiles should be destroyed if individuals are not convicted or if they are granted an absolute discharge. Exception is made for samples of individuals charged in relation to certain sexual or violent offences, which may be retained for three years. This period may be extended for a further two years if authorised by a judge.⁹⁰ The Court noted that this approach appeared consistent with the Council of Europe Recommendation on the use of DNA in the criminal justice system (R (92) 1).

1.65 This model was proposed by Baroness Neville-Jones in an amendment to the Policing and Crime Bill in the 2008-09 session. Although support was expressed by both the opposition parties, the Government resisted this approach and Baroness Neville-Jones

⁸⁹ Ev 27

⁹⁰ See Section 18A, Criminal Procedure (Scotland) Act 1995, as inserted by Section 83, Police, Public Order and Criminal Justice (Scotland) Act 2006.

withdrew her amendment.⁹¹ We asked the Minister to explain the Government's objection to the Scottish approach. He said:

- The model was not based on any evidence of the “likely impact of lost detections” or on the nature of criminality.
- The Scottish approach does not “recognise that people who commit minor offences also commit more serious offences”
- The Scottish model does not provide sufficient protection to the wider public from the increased risk of offending from those arrested for more minor offences who would not have their DNA retained under the Scottish model.

1.66 During evidence to the Public Bill Committee, Sir Hugh Orde, on behalf of ACPO indicated that the Scottish model was administratively more complex and that the operation of the Scottish part of the NDNAD could not be appropriately compared to its operation in England and Wales because it formed a very small part of the overall database:

Although the judgment refers to the Scottish system as one that would fulfil the criteria that they were looking for, the big complexity that concerns us is that the Scottish legislation is 4.5 per cent of the total database and it is a bureaucratic system.⁹²

1.67 An amendment based on the Scottish model was narrowly defeated during Committee stage in the House of Commons (5 votes to 7).⁹³ During this debate, the Minister referred to the difference between the number of matches to DNA samples that the Government considered would be retained under the Scottish model and the approach in this Bill.

1.68 We are concerned that the Government's reasons for rejecting the Scottish approach appear to be based on the desire to maintain as large a number of people on the NDNAD as possible. Its principal criticism is that the model fails to adopt a broader approach which would afford greater benefits of public protection from crime. The Minister argues that this broader approach is appropriate and legitimately supported by evidence. Unfortunately, as we explain above, we have serious concerns about the strength of the evidence produced by the Government to justify its approach. As to the administrative difficulties which ACPO considers are associated with the Scottish model, we do not consider that any such difficulties would be enough to warrant a broader and more indiscriminate approach through the introduction of a single retention period. After a recent review of the Scottish model conducted by Professor Fraser, Director of the University of Strathclyde Centre for Forensic Science and Chair of the European Academy of Forensic Science, the Scottish Government concluded that there was no need for reform.

1.69 In our correspondence with the Minister, he told us that there had been only 8 matches in Scotland, but none of these offences related to a subsequent serious offence. He confirmed that the Government considers that 23 matches in serious cases would have been lost over the past year if the Scottish model were preferred over the proposals in the

91 HL Deb, 20 Oct 2009, Cols 664–669.

92 PBC Deb, 26 Jan 2010, Col 55

93 Amendment 26, PBC Deb, 4 February 2010, Cols 226–254.

Bill. We asked for further information about these 23 cases, including the relevance of the DNA match in the case, but no further information was provided to us.⁹⁴ Again, the Government's approach to these statistics has been to argue for the "best possible" case from a public protection argument, not the most proportionate given the corresponding interference with the rights of individuals' to respect for the personal information contained in the DNA profile. While cogent statistical and other evidence of the benefit of retention to public protection could, in principle, support the Government's case on proportionality, we reiterate that the statistical evidence in this case has been provided by the Government, is untested and the Government has so far been unable to provide further details about the relevance of the DNA match in each of these cases.

1.70 In his review, Professor Fraser accepted that forensic data to support the three year retention period is limited, but he did consider data on cases where individuals were charged with a sexual or violent offence but not convicted, then later convicted of a subsequent unrelated offence. These figures show that within one year, just under half of the individuals were convicted of a separate offence and within three years 60% of the individuals were convicted of an offence. After five years, this figure rose only slightly to 65%. Professor Fraser argues that although this data would include individuals who had been previously convicted of other entirely unrelated offences (and so, their data would already be on the NDNAD), the figures support the conclusion that the highest risk of "re-offending behaviour (regardless of conviction) is likely to arise within a comparatively short period".⁹⁵ Despite our doubts about the new Government research, based on risk of re-arrest, we note that the most significant risk of re-arrest falls within the first three years following an initial arrest and that, thereafter, the additional risk is low in comparison with the general population.

1.71 We note that, taking into account the conclusions of the Fraser Review, the Scottish Government concluded in 2009 that there was no need for reform. It based this conclusion on the "need to strike a balance between protecting the public from the risk of sexual and violent offending behaviour and protecting the rights of the individual".⁹⁶

1.72 In the light of each of our conclusions above, we remain concerned that the Government's proposals risk being indiscriminate and disproportionate. Without further concrete evidence to support the Government's argument for a blanket six year single retention period, there is a real risk that these provisions will lead to further judgments finding the United Kingdom in violation of the right to respect for private life. While the Government waits for a new case where the Court can consider whether it has "pushed" the boundaries in the *Marper* judgment or whether it has broken them, further violations of individual rights will accrue and further litigation will follow, with an associated cost to the taxpayer.

1.73 In our view, various approaches could comply with the *Marper* judgment – from no retention of DNA of those not ultimately convicted to the Scottish model, where DNA is retained for those charged but not convicted of serious offences. The Bill could be amended to adopt the Scottish model, which complies with the guidance of the Grand Chamber in *Marper* and the Council of Europe in its Recommendation on the

94 Ev 14–15

95 *Acquisition and Retention of DNA and Fingerprinting Data in Scotland*, Professor Fraser, June 2008, p 14.

96 See Fn 90, above

use of DNA in the criminal justice system (R (92) 1). The Scottish Government does not consider that this approach has undermined the ability of Scottish police to investigate criminal offences. While the Government argues that its approach has greater value for the purposes of the investigation and prevention of crime, the Scottish model is more likely to strike a proportionate balance between this important public interest and the right to respect for private life of those individuals whose samples are taken on arrest but who are subsequently not charged or convicted.

1.74 Amendment 26, moved in the Commons Public Bill Committee would replace the Government's proposals with provisions based upon the Scottish model for retention of DNA samples, and provides that DNA profiles may be retained from people who have been charged with serious violent or sexual offences but not convicted, for three years. This period can be extended by two years following judicial authorisation. **We recommend that an amendment in the same terms is tabled at Report stage. This should be accompanied equivalent amendments to Clause 15 and consequential amendments to Clauses 14, 15, 16 and 18.** The purpose of this group of amendments would be to remove each of the sections of the Bill which provide for the retention of samples taken from people arrested but not convicted of an offence, including children arrested but not convicted of any offence.

New powers to take samples from convicted persons (Article 8 ECHR)

1.75 The Bill extends the power of the police to take and retain DNA samples and profiles of individuals previously convicted, including where their DNA could not lawfully have been taken at the time of their arrest and conviction. For qualifying offences, there is no time-limit proposed for the time frame in which DNA samples can be taken. The Explanatory Notes explain that the Government considers that it is necessary to extend the existing provisions (which currently limit police powers to a short time after conviction and do not permit the police to take DNA which could not have been gathered at the time of arrest) because “these people may still pose a significant risk to the public”.⁹⁷ The Notes go on to state:

The police may only become aware of the continued risk posed by the offender some time after their conviction, for example, once they exhibit behaviour following their release from prison but not sufficient to merit arrest.⁹⁸

1.76 There are no such limitations on this power in the Bill. DNA samples may be sought when an officer of the rank of inspector is satisfied that it is necessary to take samples in order to “assist in the prevention and detection of crime”. The Explanatory Notes explain the Government's view that this is adequate to ensure that these powers will only be applied to those individuals who “continue to represent a risk to the public”.

1.77 The decision in *Marper* did not address the retention of the DNA samples and profiles of people with previous convictions. However, the Council of Europe Recommendation R (92)1 recommends that where DNA is retained beyond conviction, the storage period should be strictly limited and defined and regulated by law. The Recommendation provides little guidance on the proportionality of post-conviction collection of DNA

97 EN, para 223

98 *Ibid*

samples. Its only guidance on DNA sampling is that it should take place in circumstances determined by domestic law. We consider that, in the light of the reasoning in *Marper* (which considered the innocent status of the applicants and the stigma attached to their inclusion on the NDNAD), it is likely to be easier for the Government to justify the taking and retention of the samples of people already convicted of crimes. However, it remains for the Government to illustrate that its proposals are proportionate in the circumstances. In *W v Netherlands*, the European Court of Human Rights considered the proportionality of the Dutch law governing the taking and retention of DNA samples from children who have been convicted of an offence. The Dutch law makes distinctions on periods of retention based on the seriousness of the offences committed and it provides a route of independent review. The Court held that as there were adequate safeguards provided in the law on taking and retention of convicted persons' DNA samples and profiles, that the applicant had no grounds for challenge:

The Court notes however that, contrary to the *S and Marper* case, the present case deals with the issue of storing and retaining DNA records of persons who have been convicted of a criminal offence. Furthermore the Court considers that, pursuant to the provisions of [the Dutch DNA law], DNA material can only be taken from persons convicted of an offence of a certain gravity, and that the DNA records can only be retained for a prescribed period of time that is dependent on the length of the statutory maximum sentence that can be imposed for the offence that has been committed. The Court is therefore satisfied that the provisions of the Act contain appropriate safeguards against blanket and indiscriminate retention of DNA records.⁹⁹

1.78 We asked the Minister to provide a fuller explanation of the Government's position. The Minister told us that

- The extended powers to sample DNA from individuals previously convicted of qualifying and other offences would extend to offences committed when the person was a child;
- The provisions would apply regardless of whether an offender had served his sentence or his conviction was spent;
- “Any potential unfairness of the retrospective nature of the provisions applying to people whose DNA could not lawfully be gathered at the time of conviction is outweighed by the competing public interest in preventing past, and possibly serious, offences from continuing to go undetected and unpunished and future crimes to be committed without detection, in cases where the person has already shown themselves to be capable of committing very serious crime”.
- “It must be borne in mind that offenders are not always rehabilitated for all purposes, such as vetting...The law already recognises that some preventative measures should apply to people, even after their convictions are spent, in order to protect the public from the future harm they may cause, the sex offenders register being one such example”.

- The police will only be able to take DNA (and/or fingerprints) from such individuals where an officer of at least the rank of inspector is satisfied that taking the sample is necessary. Necessity is a high test in law and in the Government's view that provides a valuable safeguard.
- The Minister explained that it is unlikely that this test will not be satisfied when a person does not pose a risk to the public. He added that it would be clear that the inspector considering whether to take a sample would "need to consider the individual case and the specific risk posed by the individual rather than simply asserting that it is necessary to fulfil the general aim of preventing or detecting crime".
- There may be circumstances where the police suspect that a person "may have committed similar offences in the past even though they do not consider him a suspect in any specific case".
- PACE Codes will make it clear to the police that where there are reasonable grounds to suspect a person of committing a specific past offence, police should use their power of arrest in connection with that investigation, rather than relying on these new powers.¹⁰⁰

1.79 Justice raise concerns over the breadth of these proposals:

Although we consider that it may sometimes be justified for police to seek to take DNA samples of those convicted of serious crimes, even where convictions are very old, we are concerned that such a substantial power lacks any safeguard against misuse. For example, a 60 year old man who was convicted of an offence of serious violence when he was 18 may have been fully rehabilitated in subsequent decades. In such a case, it would be irresponsible to require the man to attend a police station for the taking of a DNA sample unless they had reasonable grounds for believing that it would assist in the investigation of a particular offence.¹⁰¹

1.80 We consider that there is stronger evidence to support the Government's case that new powers to take DNA samples are proportionate to the risk posed to the right to private life of previously convicted people. However, we are concerned that the power to take DNA samples from people previously convicted of a qualifying offence is entirely open-ended. The greater the period of time which has passed since the relevant conviction took place, the more significant the justification for returning to the convicted person for a DNA sample. Equally, we consider that the risk of disproportionality increases if this power is applicable to offences committed by children. We recognise that DNA may only be sampled in cases where it is necessary to assist in the prevention and detection of crime. However, we note that this important safeguard is not limited to circumstances where the sample is necessary for the prevention and detection of crime, but only where the relevant Inspector considers it necessary to *assist* in such prevention and detection.

100 Ev 29

101 Justice, *Briefing on the Crime and Security Bill, Second Reading*, January 2010, para 25.

1.81 We welcome the Government's acceptance that this test will require the assessment of individual risk in each case and that DNA cannot be sampled for the purposes of meeting the general aim of preventing and detecting crime. However, we are concerned by the Minister's explanation that this power might be exercised in circumstances where police "suspect" an individual of having committed similar offences, but have inadequate evidence to suspect him in an individual case. The police already have powers to arrest an individual suspected of a specific offence and then to take a sample of his DNA in connection with that arrest. We are concerned about the blurring of the degree of suspicion warranted in relation to offending behaviour, particularly in relation to individuals whose sentences have been served and any relevant prior convictions spent, and the implications which this may have for the presumption of innocence in these cases. We welcome the Government's acceptance that there will be guidance in the PACE Codes to make clear that these provisions should not be used in order to gather DNA in cases where the police suspects an individual in connection with a specific offence. However, we are concerned that guidance must also be given about the circumstances when it will be appropriate to seek a sample without such specific suspicion that an individual has committed an offence. We recommend that the Government also explain whether guidance will address the treatment of very old convictions and the treatment of convictions in relation to childhood offences, and, if so, how.

(b) Stop and search

(i) Reporting requirements

1.82 The Bill reduces the reporting requirements on stop and search forms in order to reduce police red tape, whilst retaining important ethnicity monitoring oversight.¹⁰² The human rights issue this raises is whether the reduced reporting requirements provide an adequate safeguard against the arbitrary or disproportionate use of powers to stop and search which are extremely widely drafted. As we recently stated when welcoming the introduction of recording and reporting requirements in relation to the use of force in schools,¹⁰³ **the requirement to record and report, and the data which such requirements make available, are important safeguards against the arbitrary use of widely worded powers to interfere with the right to respect for private life and physical integrity (Article 8 ECHR), because they facilitate independent monitoring of the use of that power. The removal of such requirements therefore requires very careful scrutiny.**

1.83 The requirement on the police to record the ethnicity of a person stopped and searched, already required by the PACE Code of Practice A, is made into a statutory duty by the Bill.¹⁰⁴

1.84 The Children's Rights Alliance for England ("CRAE") pointed out in evidence to us that in 2008 2,331 stop and searches were carried out by the Metropolitan Police on under-15s under s. 44 of the Terrorism Act 2000, and 58 of those involved children under the age

¹⁰² Clause 1, amending s. 3 Police and Criminal Evidence Act 1984 ("PACE").

¹⁰³ Fourteenth Report of Session 2008-09, *Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill*, HL 78/HC 414 at paras 2.31-2.35.

¹⁰⁴ Clause 1(x). The provision was welcomed by the Equality and Human Rights Commission in its memorandum submitted in response to our call for evidence on our legislative scrutiny programme for 2009-10: XX Report, Ev 53.

of nine.¹⁰⁵ There have recently been some high profile cases concerning the stop and search of children by police, including one in which a child as young as 6 was stopped and searched.¹⁰⁶

1.85 We asked the Government why, given the growing public concern about the use of police stop and search powers on children, it is not a statutory requirement that the officer conducting the stop and search record whether or not the subject of the stop and search was a child and, if so, their age. The Government's response is that the people most likely to be present on the street at such a place and time where stop and search powers are most likely to be used, are predominantly between the ages of 14 and 25, and that it is therefore unclear that recording whether the person was a child, and if so, their age in all cases would tell us anything particularly new about the use of stop and search powers, or at least, anything which could not be discovered from focused field research into stop and search. The Government's view is that recording the stopped person's age will increase the bureaucracy around stop and search without adding significantly to the confidence of communities in how the power is exercised.¹⁰⁷

1.86 We also asked the Government whether it has any plans to update the guidance to police officers on the use of stop and search powers in relation to children and whether it will undertake to ensure that such guidance makes full reference to the relevant human rights framework, including the UN Convention on the Rights of the Child. The current guidance to police officers on stop and search under the Terrorism Act 2000 makes no reference to children.¹⁰⁸ The Government replied that it does not have any plans to update the guidance to police officers on the specific use of stop and search powers in relation to children. CRAE has argued that clear and specific guidelines are needed on the stopping and searching of young children.¹⁰⁹

1.87 We welcome the Bill's strengthening of the reporting requirement in relation to ethnicity which will help to ensure proper monitoring of, and accountability for, the exercise of a power which has historically been exercised in a way which has a disproportionate impact on ethnic minorities. We regret, however, that the opportunity has not been taken at the same time to make it a statutory requirement that the officer conducting a stop and search of a person also record that person's age where it appears to the officer that the person is under the age of 18. In our view there is sufficient public concern about the inappropriate use of the power to stop and search in relation to children to justify the introduction of such a requirement, which would facilitate independent monitoring of the use of the power on children. We recommend that the Bill be amended to introduce such a requirement.

1.88 We also recommend that specific guidance be introduced on the use of stop and search powers in relation to children, after consulting children and their representatives on a draft, and making full reference to relevant human rights standards, including the UN Convention on the Rights of the Child.

¹⁰⁵ CRAE, 8th report of 2009-10, HL Paper 57/HC 369, Ev 41-42, para 11.

¹⁰⁶ See e.g. Independent Police Complaints Commission press release, 10 September 2009.

¹⁰⁷ Ev 31

¹⁰⁸ *Practical Advice on Stop and Search in relation to the Terrorism Act*, National Policing Improvement Agency, (November 2008).

¹⁰⁹ CRAE, above n.105, para. 12, Ev 44.

1.89 A number of other reporting requirements are removed by the Bill. One of the requirements which the Bill would remove is the requirement to record whether anything was found during the search and whether any injury or damage was caused. We asked the Government for its justification for removing these requirements. It said that where items are found as a result of a stop and search, such as drugs or offensive weapons, the Government would expect officers to record this information as part of the custody record (as finding such items is almost always going to result in arrest). Similarly, a person who is arrested is likely to have any injury or damage to property noted on the custody record. There is also nothing preventing an officer noting additional information where applicable.

1.90 We accept the Government's explanation in relation to items found during a search. However, **we consider that the requirement to record whether any injury or damage was caused during the search is a valuable safeguard, both for the person being searched and for the officer conducting the search.** We recall during a visit to Paddington Green police station being told by officers that rigorous requirements to record the results of a detainee's medical examinations were an important safeguard for officers against subsequent ill-founded allegations of mistreatment. Although clearly less serious, we consider that the same reasoning applies to the requirement to record whether any injury or damage was suffered during a stop and search. We regard it as a valuable safeguard for all concerned **and recommend that it be retained.**

(ii) Counter-terrorism power to stop and search without reasonable suspicion

1.91 In our work both on Policing and Protest and on Counter-Terrorism Policy and Human Rights, we have often commented adversely on the apparent abuse of the power in s. 44 of the Terrorism Act 2000 ("TA 2000") to stop and search without reasonable suspicion. In our report *Demonstrating Respect for Rights?* we expressed concern about the inappropriate police use of s. 44 TA 2000 on peaceful protestors and we recommended that new guidance on the use of the s. 44 stop and search powers should make clear that counter-terrorism powers should not be used against peaceful protestors.¹¹⁰ In our follow-up report on policing and protest, we noted the dramatic increase in the number of s. 44 stops and searches and deplored the obvious over-use of that power in recent years.¹¹¹ We noted the statements of both the police and the Government that counter-terrorism powers such as s. 44 should not be used on peaceful protestors, but in the light of continuing accounts of this happening, such as on environmental protestors sitting in a café during the G20 protests, we pointed out the discrepancy between those statements of intention and the reality on the ground. In our work on counter-terrorism policy we also noted concerns about the disproportionate use of the s. 44 power to stop and search against members of ethnic minority communities and we commented on the risk of thereby alienating the very communities whose co-operation the authorities require to help counter or prevent resort to terrorism.

1.92 On 12 January 2010 the European Court of Human Rights held, in a unanimous Chamber judgment, that the powers of stop and search under s. 44 TA 2000 violate the right to respect for private life in Article 8 ECHR because they are neither sufficiently

¹¹⁰ Seventh Report of 2008-09, *Demonstrating Respect for Rights? A Human Rights Approach to Policing and Protest*, HL 47-I/HC 320-I, paras 86-93.

¹¹¹ Twenty-Second Report of 2008-09, *Demonstrating Respect for Rights? Follow up*, HL 141/HC 522, paras 46-49.

circumscribed nor subject to adequate legal safeguards against abuse.¹¹² The Court held that searches under s. 44 TA 2000 constitute interferences with the right to respect for private life under Article 8 ECHR.¹¹³ To be justified in a democratic society, such interferences must be “in accordance with the law”, as well as necessary in pursuit of a legitimate aim. For a measure to be “in accordance with the law”, the Court held:

it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion to be granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.¹¹⁴

1.93 The Court considered the various constraints on the possible abuse of the power to stop and search under s. 44 TA 2000, but concluded that “the safeguards provided by domestic law have not been demonstrated to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference.”¹¹⁵ In coming to this view the Court was influenced by a number of considerations, including:

- The lack of any requirement at the authorisation stage that the stop and search power be considered “necessary”, or any requirement of an assessment of the proportionality of the measure;¹¹⁶
- The ineffectiveness of judicial review as a check on the exercise of the powers of authorisation and confirmation due to the width of the statutory powers;¹¹⁷
- The failure of the temporal and geographical restrictions provided by Parliament to act as any real check on the issuing of authorisations by the executive;¹¹⁸
- The limited powers of the statutory reviewer, who is confined to reporting on the general operation of the statutory provisions;¹¹⁹
- The breadth of the discretion conferred on the individual police officer.¹²⁰

1.94 The Court was particularly concerned by the clear risk of arbitrariness in the grant of such a broad discretion to the individual police officer.¹²¹ It observed that not only is it unnecessary for the police officer to demonstrate the existence of any reasonable suspicion, but he is not even required subjectively to suspect anything about the person stopped and searched. Although the purpose of the search must be to look for articles which could be

112 *Gillan and Quinton v UK* (App. No. 4158/05, 12 January 2010) at para. 87.

113 *Ibid* at para. 65.

114 *Ibid.* at para. 77.

115 *Ibid.* at para. 79.

116 *Ibid.* at para. 80.

117 *Ibid.*

118 *Ibid.* at para. 81.

119 *Ibid.* at para. 82

120 *Ibid.* at para. 83.

121 *Ibid.* at paras 83-86.

