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7 August 2009

Dear Mr Brown

### **Keeping the Right People on the DNA Database**

The Human Genetics Commission (HGC) is grateful for the opportunity to respond to this consultation and, as the UK Government's advisory body on developments in human genetics and their ethical, legal, social and economic implications, is able to bring an important perspective to the issues raised. The Commission is especially grateful to have had the opportunity to discuss the Government's proposals for the National DNA Database (NDNAD) in more detail at a meeting with officials from the Home Office during the consultation period.

### **Summary**

- The Commission is grateful for the opportunity to contribute to this consultation and is well placed to do so in view of its long interest in the NDNAD and remit to advise government. The Commission will shortly report on the NDNAD following its 2008 Citizens' Inquiry and consultation.



- The Commission is pleased that the Home Office is consulting widely on these proposals although it is unfortunate, given the need to comply in a timely way with the *S and Marper* judgement, that the focus of the consultation has had to be limited to measures intended to achieve this objective.
- Consultation and public debate need to be based on evidence and reasoned argument and the Government has a special responsibility to provide accurate, complete and balanced information. It is unfortunate that the debate has, at times, been clouded by rhetoric and skewed by anecdote, and that no discernible systematic attempt has been made to evaluate the utility of the database on the basis of robust and complete evidence.
- Future retention of the DNA profiles of those not convicted of an offence should be justified by evidence of the utility of doing so. Evaluation of the utility of the NDNAD as a contribution to public protection requires a robust and complete evidence base. Claims that are not founded on evidence should be avoided as they detract from reasoned consideration. The evidence set out in the Annexes does not assist with the evaluation of the utility of the NDNAD and urgent attention should be given to compiling an evidence base that would allow a proper evaluation.
- As a step towards this, the Commission does, however, welcome the proposal to publish key statistics relating to the NDNAD and would hope that the NDNAD Custodian will take advice from a range of sources on the nature of the information to be published.
- The Commission welcomes the proposal to destroy biological samples once a subject's DNA profile has been obtained. Such action could reduce costs significantly and allay some privacy concerns: in any case sample retention represents a disproportionate measure for criminal justice purposes. Samples should be destroyed in a planned and systematic way. Any need to improve or standardise markers in the future can be given effect prospectively on all newly-obtained samples.
- The Commission views the proposal to introduce time-limited retention periods for DNA profiles that have been lawfully obtained from those who have not been convicted of an offence, or given a warning or reprimand, as an improvement over the existing approach of indefinite



retention. However, the retention by the State of DNA profiles obtained from any (or from some but not all) individuals who have not been convicted of an offence raises significant issues in relation to privacy and other human rights, and should be subjected to extensive public debate. If risk of committing an offence in the future is accepted as a cogent reason to retain DNA profiles in these circumstances, the length of the retention period should be based on the best available evidence, and such evidence should be actively sought and regularly reviewed.

- The Commission recognises that there may be arguments for a difference in retention periods for profiles obtained from individuals suspected but not subsequently convicted in connection with certain more serious crimes that are difficult to investigate (*e.g.* serious sexual, violent and terrorism offences). However, these arguments need to be made clearly and extensively debated, including by Parliament, particularly as the evidence from the Jill Dando Institute raises doubts over them.
- The Commission welcomes the recognition that different considerations may apply to the retention of DNA profiles from children and young people, particularly those convicted only once of a minor offence. However, the approach of automatically deleting a retained DNA profile when a person reaches the age of 18 requires explicit justification since a different retention period will apply depending on the age at which the offence is committed; thus the proposal may favour older children and teenagers disproportionately over younger children. Further and continuing consultation with relevant stakeholders is required.
- The Commission welcomes, as an improvement over the current approach, the proposal to set out in Regulations the criteria for deletion of a DNA profile on application and would welcome further consultation on these criteria. The Commission continues to believe that there should be an independent appeals process to review decisions on applications for the deletion of DNA profiles.
- The Commission welcomes the proposal to remove ‘volunteer’ profiles from the NDNAD given concerns about both the circumstances in which consent may have been obtained and the fact that withdrawal of consent by the subject does not at present lead to the automatic destruction of the subject’s DNA profile. However, given the variety of



different kinds of ‘volunteer’ profiles, the different circumstances require further, specific consideration.

- The Commission welcomes the trend towards independent and accountable oversight indicated in the proposal, specifically that there should be a body tasked with monitoring the implementation and functioning of proposed Regulations to set out criteria for consideration of applications for the removal of fingerprint records and DNA profiles. However, we believe that such a strategic direction should be explored more fully than currently proposed.
- Finally, in the Commission’s view (to be expanded in our forthcoming report) there is a strong case for the NDNAD to be established on a dedicated statutory basis. Whilst it is recognised that the proposed Regulations may allow timely compliance with the *S and Marper* judgement, the use of secondary legislation does not provide the opportunity to address as a whole the broad range of concerns and opportunities that relate to the NDNAD. This statutory framework should also provide for the governance of the NDNAD involving strengthened independent oversight.

## **The Human Genetics Commission**

1. The Human Genetics Commission is the UK Government’s advisory body on developments in human genetics and their ethical, legal, social and economic implications.<sup>1</sup> The Commission is sponsored by the Department of Health, the Department for Business, Innovation and Skills and the devolved administrations of Scotland, Wales and Northern Ireland. The HGC’s terms of reference are annexed to this submission.
2. Since its establishment in 1999, the HGC has had a close involvement with policy issues relating to the collection, retention and use of genetic information for forensic purposes. In 2001, HGC Commissioners visited the Forensic Science Service to learn about the governance of the database. Following the publication of *Inside Information*<sup>2</sup> (2002), which contained recommendations relating to the oversight of the database,

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<sup>1</sup> The Commission’s terms of reference (revised in 2008) are appended to this response.

<sup>2</sup> *Inside Information, balancing interests in the use of personal genetic information* (London: HGC, 2002), available at: [www.hgc.gov.uk/Client/document.asp?DocId=131&CAtegorYId=10](http://www.hgc.gov.uk/Client/document.asp?DocId=131&CAtegorYId=10) See especially chapter nine (‘Forensic uses of personal genetic information’).



first one, and later two, HGC Commissioners were invited to sit as lay members of the National DNA Database Strategy Board. When the NDNAD Ethics Group was established, an HGC Commissioner was invited to sit on this body. As well as regular contact through our members on the Strategy Board, the HGC has also held several meetings with representatives from the Strategy Board, the Home Office and the Ethics Group, and has kept the NDNAD on its agenda through its Identity Testing Monitoring Group.

3. The Commission has contributed advice to Government in its published reports, notably *Inside Information*, and given evidence and provided responses to a number of parliamentary inquiries<sup>3</sup> and consultations on proposals to revise legislation both in England and Wales, and in Scotland.<sup>4</sup> All of these documents may be found on the HGC's website. In line with its remit, the Commission has sought to encourage public debate about issues connected with the NDNAD and improve public understanding in this area. An example of this is the HGC's Citizens' Inquiry that was carried out in 2008 in order to identify and examine issues of public concern relating to the NDNAD in the light of the NDNAD expansion programme.<sup>5</sup>
4. Following the publication of the Citizens' Inquiry findings the Commission held a wider public consultation on key issues identified by the Inquiry participants. This concluded in November 2008. The Commission is shortly to publish its own report taking into account the findings of its various public engagement activities and in the light of the European Court of Human Rights' judgement in the case of *S and Marper v. The United Kingdom*<sup>6</sup>. In view of the imminent publication of this report, which we expect to be available in the Autumn, and without

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<sup>3</sup> For example, the House of Commons Science & Technology Select Committee Inquiry 'Forensic Science on Trial' (2005), and Home Affairs Select Committee Inquiry 'A Surveillance Society?' (2007).

<sup>4</sup> For example, the Scottish Executive's proposals on the collection and retention of DNA samples and fingerprints in Scotland (2005), Home Office Consultation on 'Standard setting and quality regulation in forensic science', (2006), Home Office consultation on "Modernising Police Powers" ('PACE Review': 2007), The (Scottish) Forensic Legislation Review ('Fraser review': 2007), and The Scottish Government's consultation on 'Retention of DNA and Fingerprint Data in Scotland' (2008).

<sup>5</sup> The citizens' findings were published in July 2008 and are available from: [www.hgc.gov.uk/Client/Content.asp?ContentId=755](http://www.hgc.gov.uk/Client/Content.asp?ContentId=755)

<sup>6</sup> *S and Marper v. The United Kingdom*, (Applications nos. 30562/04 and 30566/04) December 4, 2008 (ECtHR).



prejudice to its findings, which are still to be agreed by the Commission, in drafting this response we draw on and draw together the substantial record of the Commission's deliberations and advice already in the public domain, and the more recent reflections of the Commission and NDNAD Working Group where these clearly indicate the HGC's direction of travel.

### **The Home Office consultation exercise**

5. The HGC has consistently argued for an open, inclusive and wide-ranging debate on the National DNA Database both among the public and in Parliament. We believe that the existence and operation of the database raise significant issues of balancing public and private interests that affect all citizens, since they engage questions about the kind of society in which we wish to live, and the relationships between the individual, Society and the State. However, we have been concerned about the limited public awareness and understating of these issues, and the unevenness of the information about the NDNAD and its use in criminal justice that is available in the public domain.
6. We therefore congratulate the Home Office on publishing this consultation and for the efforts that have been made to seek a broad range of views on the issues it covers. We applaud the stated objective of the exercise "to develop a DNA framework that has the support and confidence of the public..." (para.1.3) and the implicit recognition that public acceptance of the approach, and confidence in the operation and governance of the database, are of central importance. We regard it as unfortunate that this debate could not have been initiated before the initiative was taken away from the UK Government by the Strasbourg court, particularly as the UK is otherwise widely respected among Council of Europe Member States and in the wider world as a leader in the development and application of the biological sciences, and equally as a forward-thinking and reasonable international voice in discussions about the social and ethical implications of these developments.
7. It is unfortunate, too, that the timescale for the UK to give effect to the Strasbourg judgement has meant that the consultation has had to be so narrowly focussed on this objective and has not permitted a broader debate that would allow discussion of the underlying purpose and principles of the NDNAD. In our previous advice we have alluded consistently to the unsatisfactory consequences of the way in which the



database has developed to date in a piecemeal fashion, through a series of legislative amendments, a process that has so far deferred an earnest and important engagement with more fundamental questions of civil liberties, and public and national security.

8. We note, furthermore, the value of different strategies, especially deliberative strategies involving public dialogue, to engage with the public on the issues raised by the NDNAD and note that, in their report *Surveillance: Citizens and the State*, the House of Lords Constitution Committee was “impressed by the use of this [Citizens’ Inquiry] technique for eliciting informed opinions by citizens and thus helping to shape policies” and recommended that “the Government... should explore opportunities for applying versions of the Citizens’ Inquiry technique to surveillance and data processing initiatives involving databases.”<sup>7</sup> We express the hope that when the Home Office develop the debate around the more general issues relating to the NDNAD it will make use of appropriate and inclusive public engagement strategies to ensure that views from all sections of society can be taken into account.

### **The consultation document**

9. Noting the exigency that has determined the timescale of this consultation exercise, we congratulate the Home Office for producing a concise, readable and intelligible document that recognises the existence of a spectrum of views on the issues it raises. We recognise that this is not the context that the Government might have chosen in which to address these issues.
10. A consistent concern that the HGC has expressed in relation to public discussions about the NDNAD has been the widespread use of exaggerated rhetoric, which replaces or obscures reasoned argument and the careful examination of evidence. This is perhaps not surprising given the potentially emotive nature of crime, particularly crimes against persons. Despite the fact that the vast majority of cases successfully investigated using the NDNAD have been for so-called ‘volume crime’ (domestic burglary, vehicle crime and robbery as well as less serious violence and criminal damage), media coverage attends disproportionately to crimes that provoke public revulsion, which

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<sup>7</sup> The report is available at: [www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/18/1802.htm](http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/18/1802.htm) See paragraphs 430-32.



provides the lens through which many people's views about the NDNAD are focused.

11. The Government therefore has a special responsibility to avoid bias and prejudice, which, when apparent, risks arousing suspicion and compromising the public debate. The statement (at para.3.2), for example, that “this consultation paper is about how to preserve public protection as much as possible while complying with the court decision in *S and Marper*” might be taken to imply that the judgement is a threat to public protection. This risks the appearance of bias, as it should be recognised that the *ratio* of the judgement was that restraint was necessary in order to protect members of the public from disproportionate interference in their private lives.
12. The use of individual, personalised and emotive examples in the document, particularly where they do not exemplify the reliance on retained data particularly well (as in the case of Mark Dixie, the killer of Sally-Ann Bowman, who was identified as a result of his arrest for a subsequent offence), risks contributing to this distortion. The use of the quotation from Mrs Linda Bowman at the head to Section 3 (conspicuously the only quotation in the document) to assert that the NDNAD is a significant deterrent to potential offenders, a claim for which we have been able to find no significant evidence, likewise risks being interpreted as somewhat cynical (in the modern sense of the term). We prefer that, wherever possible, apparently factual claims about the database should be susceptible to testing in relation to evidence, although we appreciate that clear evidence in this area is at present often hard to obtain or extract. We will return to the problem of obtaining evidence later in our response.
13. Finally, we wish to make a brief remark on the need for careful explanation of the meaning of figures quoted in the document. In particular, the role of a ‘DNA match’ in an investigation is often opaque and can lead to confusion. For example, paragraph 4.12 of the document refers to the 37,376 crimes for the period 2007-08 “with a DNA match which provided the police with an intelligence lead for further investigative follow-up”. This contrasts conspicuously with the 390,000 “crimes with DNA matches, providing the police with a lead on the possible identity of the offender” in only 5 months in 2008, mentioned in the Home Secretary’s Foreword. For the 2007-08 period, the Foreword states that 17,614 crimes were ‘detected’ “in which a DNA



match was available.” This is nearly half the number of crimes in the same period (37,376) in which an available DNA match is said to have provided an intelligence lead, but the relationship between these two sets of crimes is impossible to infer from the document. No figures whatsoever can be deduced for crimes in which a ‘DNA match’ contributed materially to the ‘detection’ (a term that needs explaining to the general reader), or where it was effective in exculpating a suspect who might otherwise have been proceeded against wrongly. As the most recent NDNAD Annual Report (2006-07) cautions: “It is important to note that the availability of DNA match intelligence may not have been causal in solving the crime as detections are achieved through integrated criminal investigation and not by forensic science alone” (page 15). However, understanding the role played by the DNA database in police investigations and criminal prosecutions is an important and urgent matter, with which the presentation of these figures does not usefully assist and from which it may, in fact, detract.

### **Biological samples**

14. The retention of biological samples raises issues of interference with individual privacy over and above those raised by the retention of numerical profiles obtained from them. We acknowledge three potential reasons why it might be thought desirable to retain biological samples: to extract additional information (for example, familial or phenotypical information), to create a further profile (for example, an upgraded profile, measuring more markers) and to carry out research (for example, to improve forensic processes or to advance knowledge in some other way). On balance, we do not find the argument that retention is necessary as there may be a future need to re-analyse them to be significant as, where re-analysis becomes genuinely necessary, it will usually (except, for example, in the case of his death and cremation) be possible to obtain a fresh sample from the individual concerned (or, if not, it will usually not be possible to proceed against them).
15. Set against the reasons for keeping a sample must be set the cost of continued storage and the risk to data security posed by an ever-increasing holdings, as well as, perhaps most importantly, the ongoing



interference with individual's private life constituted by holding such 'data'.<sup>8</sup>

16. On balance, we do not find the reasons for keeping biological samples to be sufficient to outweigh the good reasons for destroying them, although we understand that orderly destruction of samples could take time to achieve. In particular, we do not feel that it would be necessary to upgrade profiles beyond the current STR+ standard retrospectively, and research for quality assurance purposes could be carried out using samples specifically obtained for the purpose. The destruction of samples would, additionally, put to rest fears that have been expressed about possible future research that might investigate coding regions of DNA. Accordingly, we support the proposal in the consultation document to destroy all biological samples after a period of six months following collection.

### **Retention of profiles from adults not convicted of an offence**

17. The European Court of Human Rights held, in *S and Marper v. the United Kingdom*, that “the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, ... constitutes a disproportionate interference with the applicants’ right to respect for private life”<sup>9</sup> in violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the judgement,<sup>10</sup> there is some suggestion that the imposition of time limits for retention of profiles from non-convicted persons would meet the judges’ principal criticism of the ‘blanket and indiscriminate’ nature of the retention powers in England and Wales. This is the approach adopted by a number of other Council of Europe Member States, and notably, within the UK, in Scotland.
18. The approach raises three distinct issues: (1) the appropriateness of retaining any profiles at all from persons who have not been convicted of an offence, (2) the appropriateness of distinguishing different time periods for the retention of profiles from people not convicted of different kinds of offence on the basis of the seriousness of the offence

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<sup>8</sup> *vide* paragraph 68 of the *S and Marper* judgement.

<sup>9</sup> Judgement, paragraph 125.

<sup>10</sup> *e.g.* paragraph 119.



of which they were not convicted and (3) the appropriateness of the time period for which the profiles are retained.

19. We will not discuss the first of these issues in this response, although, as we have said, we believe that it is a fundamental issue that should be subjected to earnest and informed public and parliamentary debate. However, we recognise that such a debate is beyond the scope of the present exercise.

20. The second issue likewise engages fundamental questions of principle that we believe have not been sufficiently discussed. We hold that it is unintelligible to claim an entitlement to hold a profile from one person for longer than that of another on the basis of a difference in kind between two crimes of which they are both equally presumed to be innocent. An alternative approach is therefore to base retention periods on risk of future offending. The difficulty to be addressed in taking this approach is therefore to establish a differential risk that is of such significance and is sufficiently reliable that it would justify differential interference with individual rights. The consultation document makes clear that the proposed distinction is licensed not by the likelihood of future offending but by the presumed impact of the future offence should it ever be committed (paragraph 6.13).<sup>11</sup> This approach is contradicted somewhat by the Jill Dando Institute (JDI) research relied upon in establishing retention periods in the first place, which concludes ‘importantly’ that “the seriousness of the initial offence for which the person was arrested does not necessarily predict the seriousness of the subsequent offences with which the person may be associated”.<sup>12</sup>

21. We are aware, however, that a different argument has been applied to some categories of serious offence, notably rape cases, namely, that the nature and circumstances of the offence make prosecutions notoriously hard to obtain and a proportion of genuine offenders may therefore evade justice. Although it has been much discussed, we find this an important and profoundly challenging assertion when used as a

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<sup>11</sup> “The evidence of reoffending in more serious and violent cases is unclear, but we believe a longer retention period is a commonsense approach given the more serious consequences of reoffending and therefore the damage that a missed detection would imply.”

<sup>12</sup> The quotation continues: “For example, the most common offences for which profiles ultimately linked to murder cases were originally taken are drug offences.” Consultation, paragraph 6.5.



justification for retaining profiles of those not convicted – and therefore presumed to be innocent – of an offence since, although some of those not convicted may, in fact, be genuinely guilty, others will be wholly innocent and these latter deserve to be defended against lingering suspicion or false accusation; otherwise the NDNAD risks becoming an outlet for social antipathies and personal vindictiveness. The challenge this claim represents to the presumption of innocence in our view urges open and wide-ranging debate, as we have said above. As well the need to inform this debate as far as possible with robust evidence, in the interim, very careful consideration should be given to the categories of offence that are considered ‘serious’ for these purposes.

22. Satisfactory resolution of the third issue (the appropriateness of the time period for which profiles of non-convicted persons are retained) will depend on the consideration of convincing evidence. There are two distinct types of evidence that are important here: (1) evidence that may show an incidence of proven later offending for those who were not convicted for the offence in relation to which an initial DNA profile was obtained that is significantly higher than the general population, and (2) evidence that obtaining a DNA profile, recording it on the NDNAD and searching the NDNAD in the course of an investigation may lead to higher rates of conviction (or significantly more efficient investigation, that thereby reduces the occurrence of further offending) than alternative investigation strategies not involving the use of the NDNAD. We note that on the second of these points (*i.e.* the utility of the NDNAD as an investigative resource) the evidence adduced in the consultation document is entirely silent. Whilst we appreciate the difficulty of obtaining evidence of this sort and the efforts that are being made by the Custodian and NDNAD Strategy Board among others to extract relevant evidence from existing records, the compiling of an evidence base that would demonstrate the utility of the NDAND as an investigative and probative resource is, we believe, an urgent and important task. As a general point, we would urge that the prospective collection of evidence is designed appropriately in consultation with academic experts, and that this evidence is subjected to independent scrutiny and placed in the public domain.
23. On the first point (evidence of criminal career progression), we recognise that the available evidence is highly limited, and acknowledge again that the Government’s hand has been forced by the need to comply with the Strasbourg judgement. We note the caution with which the Government



approaches the need to set retention time limits although the task that it has set itself, of substantiating the ‘controversial assertion’ that “the risk of offending following an arrest which did not lead to a conviction is similar to the risk of reoffending following conviction” (para.6.10) is unnecessarily burdensome: it necessary to show only that the risk of offending following an arrest which did not lead to a conviction is significantly higher than the risk of offending posed by the general population. However, the scant evidence available in our view falls short of demonstrating this in any robust way, and although it does gesture towards this conclusion, it does so without in any way explaining it, leaving this vacuum to be filled entirely by speculation. We recognise that attempts to prove this hypothesis are frustrated by the lack of available evidence and urge again that the Home Office take the initiative to ensure prospective collection and systematic extraction of evidence that is relevant to determining this issue, with the research designed in consultation with relevant academic experts. We expect that such research would require a vastly superior sample size to that presented in the cited research and the application of statistical methods.

24. We appreciate that the Government must yield in some way to the exigency to comply with the Strasbourg judgement and we recognise the proposed retention periods of six and 12 years as an improvement to the present arrangements of indefinite retention. We hope that if these retention periods are instituted, there will simultaneously be an earnest attempt to assemble, analyse and interpret an evidence base, and that the retention periods should be regularly reviewed in the light of this. In particular, if the evidence were to show convincingly that no significant value (proportionate to the established harms) was obtained from retaining profiles of persons not convicted of an offence, we would hope that the Government would take appropriate steps to revise the retention policy accordingly. In line with our earlier conclusions, we urge that the prospective collection of evidence is designed appropriately in consultation with academic experts, and that the evidence is subjected to independent scrutiny and placed in the public domain.

### **Retention periods for profiles relating to children**

25. The Commission welcomes the steps that have already been taken to delete the profiles of children under the age of 10 from the NDNAD, and the recognition that special considerations should apply to the retention of profiles from children and young people from the ages of 10



to 18. Although the reasons for the Government's proposals are not given in the consultation document, the Commission believes that the privacy of children, as a vulnerable group, merits special protection, that the status of children as moral agents and their corresponding vulnerability to external influences is relevant, and that every opportunity should be taken to rehabilitate those who have committed only sporadic minor offences in their youth, deletion of a profile from the NDNAD being a sign of faith in this endeavour.

26. Whilst we therefore appreciate the desire to 'wipe clean the slate' to allow a fresh start in their relationship with the criminal justice system for young people when they enter adulthood, we find the proposal to delete profiles automatically when a person reaches the age of 18 (for those arrested but not convicted for non-serious offences or convicted only once of a minor offence) to be difficult to justify. In effect, the proposals impose a different retention period depending on the age at which the offence is committed in a way that favours older children and teenagers – who might be expected to have a more developed sense of moral responsibility – disproportionately over younger children. We believe that the case for any retention of profiles obtained from non-convicted children needs to be made more clearly. We believe that further and continuing consultation with relevant stakeholders, including those who have relevant and extensive qualitative experience in relation to children and childhood offending, as well as the careful review of the available statistical evidence, is required to establish the appropriateness of a policy of profile retention for this group.
27. Similar arguments apply to the distinction in terms of retention periods between those who have not been convicted of minor offences and those who have not been convicted of serious offences (serious violent or sexual or terrorism-related offences) as apply to adults.

### **Applications for deletion of profiles**

28. The Commission welcomes, as an improvement over the current 'library of precedents' approach, the proposal to set out in Regulations the criteria for deletion of a DNA profile on application. However, consistently with our previous recommendations, we believe that the visibility of this issue could be raised by a debate in the context of primary legislation. At the very least, further consultation on the criteria prior to the introduction of the Regulations would be highly desirable as



the criteria cited as examples (where the arrest was unlawful, where the samples were taken unlawfully, or where no offence had been committed) may not necessarily exhaust the cases in which deletion would be appropriate.

29. The observation that the existing right to appeal to the Chief Officer is ‘rarely exercised’ (paragraph 6.20) should not be taken uncritically to imply that there is widespread acceptance of DNA retention among those un-convicted persons whose DNA is retained. Certainly, we believe that the process could be more balanced; in particular the existing guidance that initial applications should automatically be met with refusal may be discouraging to the applicant and does not seem consistent with balanced consideration of the merits of an application.
30. The Commission does, however, continue to believe that there should be an independent appeals process to review applications for deletion of DNA profiles before judicial review proceedings. Judicial review is unlikely to address fully the substantive question of the justification for retention (rather than the entitlement of the Chief Officer to make a decision and the appropriateness of the procedure followed). In our view, good governance requires an independent review procedure interposed between the decision of the Chief Officer and the High Court. Such a procedure might rely on the Information Commissioner or other appropriately qualified and constituted body. Once again, the Commission’s hope is that the proposals set out in the consultation, whether or not they are implemented as stated, will not be the final word but the beginning of an open and informed debate on this issue.

### **Legacy profiles of un-convicted persons**

31. The Commission welcomes the proposal to apply a consistent approach to the retention of subject profiles from un-convicted persons retrospectively where linked PNC records exist. In the case of those estimated 500,000 profiles with no linked PNC record, the Commission looks forward to the detailed impact assessment in the hope that this will not indicate that it is prohibitively difficult or costly to identify those who are on the NDNAD who should not be on it. We note that there is no proposal relating to cases where a profile is present but no record is identified and that the Home Secretary’s commitment to ensuring the profiles of those who have been convicted are retained on the database sets the presumption in favour of retention in cases of doubt. Failure to



find records in a significant number of cases would be troubling from the point of view of data integrity and security and may make the presumption in favour of retention inappropriate. If the absence of a link to a PNC record implies that the retention of the profiles may not serve any useful operational purpose, then, in the Commission's view, the profiles should be destroyed.

### **Taking additional samples**

32. We welcome the indication given in section seven of the consultation document that provision for taking samples in circumstances additional to those currently provided for under PACE 1984 (as amended) will be introduced through in primary legislation.
33. It is the Commission's view that the National DNA Database, and therefore provisions for obtaining, retaining and removing profiles, should be the subject of dedicated primary legislation, since it raises important issues about the relationship between citizens, society and the State. We express the hope that proposals for consolidating framework legislation may be set out for consultation as soon as possible and that the issues raised in the present consultation may be debated within this context.

### **Volunteers**

34. We are aware that concerns have been raised about the way in which 'volunteer' samples have been taken in the past, and the work undertaken by the NDNAD Ethics Group to improve the consent forms used. In particular, we believe that the fact that 'consent' to sample/profile retention, once given, cannot later be withdrawn (or rather, that the withdrawal of the 'consent' is not a sufficient condition for the profile's or sample's destruction) invalidates that consent *qua* consent.
35. We are aware that the term 'volunteer' covers a variety of different cases, including , as well as participants in intelligence-led mass screens, those who have sought to be included on the NDNAD out of a sense of public duty or because they live in areas of endemic crime and wish to achieve early and non-intrusive elimination from frequent investigations, and those who believe they are at risk of being victims of 'Honour-Based Violence' so that they might be identified as the victims of future offences.



36. We observe that there may therefore be good individual reasons for profiles of some of these people to be included in the database, where those reasons are operationally valid and genuine consent is given by the sample provider. However, we welcome the proposal to remove from the NDNAD records relating to participants in intelligence-led mass screens and the commitment that such profiles will be used only in connection with the investigation of a particular offence in the course of which they were obtained.

### **Governance and accountability**

37. We welcome the suggestion, in section 10 of the consultation document, that there should be independent oversight of aspects of the operation of the NDNAD although we find it difficult to infer from this section exactly what is being proposed. It appears to us to propose a new function of monitoring the implementation and operation of the proposed Regulations that would set out the criteria for the making and consideration of applications to have DNA and fingerprints deleted. It is, however, made clear that this would not extend to reviewing particular decisions relating to applications but would review the general approach and produce an annual report for Ministers. This function would be given to a 'strategic and independent advisory panel', possibly the existing NDNAD Strategy Board.

38. We agree that it would be good practice to review the impact of the proposed Regulations and that this should be done systematically and independently. We also welcome the work initiated by the NDNAD Strategy Board to strengthen its own governance arrangements. However, along with the participants in our Citizens' Inquiry, we conclude that there should be additional, properly independent scrutiny of the development and use of the database, and a mechanism other than judicial review for the review of decisions on applications for deletion of records. This would help to consolidate public confidence in the database and ensure that its evolution, which has hitherto taken place in a piecemeal and occluded way, is managed in an open and accountable manner.

### **The need for dedicated primary legislation**

39. Our overriding conclusion is that there remains a need for open and earnest debate about the fundamental principles of DNA profile



retention, informed by evidence about the utility of the NDNAD as an investigative and probative resource for policing and the delivery of criminal justice. The issues raised by the NDNAD are so fundamental that we believe it should be established on a statutory basis, through framework primary legislation, following thorough debates in Parliament. Furthermore, we believe that the legislation should provide for a governance arrangement that includes strengthened independent oversight of the NDNAD and includes appropriate powers to review record retention and to require removal of records. We will expand this conclusion further in our own forthcoming report. Whilst we recognise that the proposed Regulations provide a timely response to the need to comply with the *S and Marper* judgement, the piecemeal use of secondary legislation does not provide the opportunity to address as a whole the broad range of concerns and opportunities that relate to the NDNAD.

40. I trust that the comments above are helpful to the Home Office. A copy of the HGC's report on the NDNAD will be sent to Home Office Ministers in due course and I should be happy, if this would be helpful, to meet the relevant Minister to discuss our findings. In accordance with the HGC's open working style, a copy of this response will be placed on the HGC's website.

Yours sincerely,

Professor Jonathan Montgomery  
Chair, Human Genetics Commission