



House of Lords
House of Commons
Joint Committee on Human
Rights

Retention, use and destruction of biometric data: correspondence with Government

**Twenty-seventh Report of Session
2008-09**



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*Report, together with formal minutes and
written evidence*

*Ordered by the House of Lords
to be printed 10 November 2009
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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, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

Current membership

HOUSE OF LORDS

Lord Bowness
Lord Dubs
Lord Lester of Herne Hill
Lord Morris of Handsworth OJ
The Earl of Onslow
Baroness Prashar

HOUSE OF COMMONS

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Mr Andrew Dismore MP (Labour, *Hendon*) (Chairman)
Dr Evan Harris MP (Liberal Democrat, *Oxford West & Abingdon*)
Mr Virendra Sharma MP (Labour, *Ealing, Southall*)
Mr Richard Shepherd MP (Conservative, *Aldridge-Brownhills*)
Mr Edward Timpson MP (Conservative, *Crewe & Nantwich*)

Powers

The Committee has the power to require the submission of written evidence and documents, to examine witnesses, to meet at any time (except when Parliament is prorogued or dissolved), to adjourn from place to place, to appoint specialist advisers, and to make Reports to both Houses. The Lords Committee has power to agree with the Commons in the appointment of a Chairman.

Publications

The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm.

Current Staff

The current staff of the Committee are: Mark Egan (Commons Clerk), Chloe Mawson (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Assistant Legal Advisers), James Clarke (Senior Committee Assistant), John Porter (Committee Assistants), Joanna Griffin (Lords Committee Assistant) and Keith Pryke (Office Support Assistant).

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Contents

Report	<i>Page</i>
1 Report	3
Formal Minutes	4
Written Evidence	5
Letter from the Chair of the Committee to Rt Hon Jacqui Smith MP, Home Secretary, dated 9 December 2008	5
Letter from Rt Hon Jacqui Smith MP, Home Secretary, to the Chair of the Committee, dated 5 January 2009	7
Letter from the Chair of the Committee to Rt Hon Jacqui Smith MP, Home Secretary, dated 21 May 2009	7
Letter from the Chair of the Committee to Rt Hon Alan Johnson MP, Home Secretary, dated 8 July 2009	10
Letter to the Chair from Alan Campbell MP, Parliamentary Under Secretary of State, Home Office, dated 9 July 2009	10
Letter to the Chair from Alan Campbell MP, Parliamentary Under Secretary of State, Home Office, dated 17 July	13
Letter from the Chair of the Committee to Sir Hugh Orde OBE, President, Association of Chief Police Officers, dated 13 October	14
Letter from Sir Hugh Orde OBE, to the Chairman , dated 27 October 2009	15
Letter from the Chairman to the Rt Hon Alan Johnson MP, dated 29 October 2009	16
Letter from Rt Hon Alan Johnson MP, Home Secretary, to the Chairman, dated November 2009	17
List of Reports from the Committee during the current Parliament	19

1 Report

1. In March, we published a report on the Policing and Crime Bill which included scrutiny of clauses added in Committee in the Commons to deal with the retention, use and destruction of biometric data following an adverse judgment of the European Court of Human Rights (ECtHR) in the *Marper* case. The clauses would have enabled the Government to deal with this issue in secondary legislation, an approach which we criticised.¹ We called for the clauses to be removed from the Bill and this subsequently occurred in the House of Lords.

2. We have corresponded with the Home Office and the Association of Chief Police Officers about their response to the *Marper* judgment and how the Government intends to ensure that the breach of Convention rights found by the ECtHR is rectified. We decided it would be helpful to publish this correspondence – nine letters in total – ahead of debate on the Lords Amendments to the Policing and Crime Bill in the House of Commons on 12 November. We intend to report on the issue substantively early in the new session in our next report on the implementation of adverse human rights judgments.

¹ Tenth Report of Session 2008-09, *Legislative Scrutiny: Policing and Crime Bill*, HL Paper 68, HC 395, paragraphs 1.111 to 1.119.

Formal Minutes

Tuesday 10 November 2009

Members present:

Mr Andrew Dismore, in the Chair

Lord Bowness

Lord Dubs

Lord Morris of Handsworth

Lord Lester of Herne Hill

Earl of Onslow

Dr Evan Harris

Mr Virendra Sharma

Mr Edward Timpson

Draft Report (*Retention, use and destruction of biometric data: correspondence with Government*), proposed by the Chairman, brought up and read.

Ordered, That the Chairman's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 and 2 read and agreed to.

Several papers were appended to the Report together with papers reported and ordered to be published on 16 December 2008, 13 January, 2 June, 14 and 21 July, and 20 October.

Resolved, That the Report be the Twenty-seventh Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

[Adjourned till Tuesday 24 November at 1.30 pm]

Written Evidence

Letter from the Chair of the Committee to Rt Hon Jacqui Smith MP, Home Secretary, dated 9 December 2008

Monitoring the Government's Response to Human Rights Judgments: S and Marper v United Kingdom (App. No 30562/04 and 30566/04)

During this session, the Joint Committee on Human Rights will be continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR).

I am writing to ask for further information about the Government's response to the judgment of the Grand Chamber of the European Court of Human Rights in *S and Marper v United Kingdom* (App. No 30562/04 and 30566/04, 4 December 2008). In this case, the Grand Chamber noted that the UK is currently the only member State of the Council of Europe expressly to permit the systematic and indefinite retention of DNA profiles and cellular samples of persons who have been acquitted or in respect of whom criminal proceedings have been discontinued. The applicants in this case were two people who had never been convicted of a crime, but whose fingerprints and DNA samples had been retained. One of the applicants was a child when his samples were taken. Section 64(1A) of the Police and Criminal Evidence Act 1984 (PACE) provides that fingerprints or samples taken for the purposes of investigating a crime need not be destroyed when a person has been convicted of that crime and his samples were also collected during the investigation. This has allowed the samples of a significant number of people never convicted of any crime to be retained. The Grand Chamber concluded 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, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests...the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.” (paragraph 125)

While the Court accepted that different levels of interference with individuals' private lives could arise in respect of different types of sample, it was particularly concerned about the impact on private life interests of the retention of cellular samples. It concluded that despite the differences in the nature of these impacts, the open-ended and blanket retention scheme in place in England, Wales and Northern Ireland required careful scrutiny. The Grand Chamber rejected the Government's argument that innocent individuals suffered no detriment or stigma as a result of being treated in the same manner as individuals who had been convicted of an offence (paragraph 121-122). Although the Court was particularly concerned about the implications of retention for those whose samples had been taken when they were minors, the Court's decision hinged on the implication of treating the applicants differently from other unconvicted persons (those who volunteer their DNA can request its destruction). The Court thought that weighty

reasons would be necessary to justify treating the applicants differently (paragraph 123-125). No such reasons had been provided by the Government.

This decision has received widespread coverage in the press and we note that the Government is 'disappointed' by the decision that the current arrangements for the national DNA database are operating in a way which is incompatible with the right to respect for private life of certain individuals, in breach of the UK's obligations under Article 8 ECHR (the right to respect for private life).

I am writing to ask for further information on the Government's response to this judgment:

- **What general measures does the Government consider are necessary in order to remove the breach of the Convention identified by the Grand Chamber?**
- **Does the Government now intend to destroy all fingerprints or samples currently held on the national DNA database, or otherwise held by the police, except those which were gathered during an investigation which led to the donor's conviction? If not, why not?**
- **Does the Government intend to amend the provisions of Section 64 (1A) PACE?**
- **Specifically, does the Government intend to bring forward proposals similar to those which currently apply in Scotland? If not, why not?²**
- **If the Government considers that legislative changes are necessary to remove the breach, does the Government intend to (a) use the remedial order process provided for in the Human Rights Act; or (b) bring forward proposals in the expected Policing and Crime Bill.**
- **If the Government intends to use a remedial order, I would be grateful if you could explain whether the Government intends to use the urgent or non-urgent procedure.**
- **If the Government considers that legislative changes are necessary but does not intend to bring forward proposals in the Policing and Crime Bill or in a remedial order, I would be grateful if you could provide a detailed explanation for that view.**
- **If legislative reform is proposed, my Committee would be grateful for copies of the draft proposals as soon as they are available.**
- **If the Government does not consider that legislative changes are necessary, please provide a detailed explanation for that view.**

Following the timetable we recommended in our earlier reports, we would expect the Government to write to us with their initial reaction to the judgment by **4 January 2008**

² The Criminal Procedure (Scotland) Act 1995 provides that DNA samples and resulting profiles must be destroyed if the individual is not convicted or is granted an absolute discharge. In 2006, special provision was made for the retention of samples of those suspected of certain sexual or violent offences, for an additional period of up to 3 or 5 years.

and with their proposed response to the judgment, including any proposals for general measures which the Government considers necessary to remedy the breach before **4 March 2008**.³

Letter from Rt Hon Jacqui Smith MP, Home Secretary, to the Chair of the Committee, dated 5 January 2009

MONITORING THE GOVERNMENT'S RESPONSE TO HUMAN RIGHTS JUDGMENTS: S AND MARPER V UNITED KINGDOM (APP.NO 30562/04 AND 30566/04)

Thank you for your letter of 9 December on the implementation of the judgment of the European Court of Human Rights in the case of Sand Marper which was given on 4 December.

Technological developments and, in particular, the use of DNA in investigations has been one of the breakthroughs for modern policing in which we have led the world. It has contributed to convictions for serious crimes and also to the exoneration of the innocent. However, I am conscious that we need to ensure that our policy enjoys public confidence. We need also, of course, to implement the judgment of the ECtHR. As you may be aware, I announced on 16 December at the Intellect trade association that we will consult via a White Paper on Forensics next year on bringing greater flexibility and fairness into the system, using a differentiated approach to the retention of samples, DNA profiles and fingerprints.

You will be aware that implementation of ECtHR's judgments are overseen by the Committee of Ministers. I am informed that the first substantive consideration of the Government's response will be at the June meeting for which papers will be circulated in early/mid April. We will send plans for implementation to the JCHR when we send them to the Committee of Ministers .

Letter from the Chair of the Committee to Rt Hon Jacqui Smith MP, Home Secretary, dated 21 May 2009

S and Marper v United Kingdom (App. Nos. 30562/04 and 30566/04, 4 December 2008, Grand Chamber)

The Joint Committee on Human Rights is continuing its practice of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights. On 4 December 2008, the Grand Chamber of the European Court of Human Rights found a violation of Article 8 ECHR (right to respect for private life) holding 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, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate

³ Sixteenth Report of Session 2006-07, paras 155-163

interference with the applicant's right to respect for private life and cannot be regarded as necessary in a democratic society.⁴

We wrote to you on 9 December 2008 seeking further information on the Government's response to the Grand Chamber's judgment and asking for responses to nine specific questions. Following the timetable we recommended in our earlier Reports, we noted our expectation that the Government would write to us with its initial response to the judgment by 4 January 2009 and with its proposed response to the judgment, including any proposals for general measures which the Government considers necessary to remedy the breach, before 4 March 2009.

You replied on 5 January 2009 stating that the Government would consult in 2009 via a White Paper on Forensics on "bringing greater flexibility and fairness into the system, using a differentiated approach to the retention of samples, DNA profiles and fingerprints". You also noted that the Government's response would be considered by the Committee of Ministers at its meeting in June 2009 and that you would send plans for implementation to the JCHR at the same time as sending them to the Committee of Ministers.

During the Public Bill Committee on the Policing and Crime Bill, the Government introduced amendments to enable the Secretary of State to make regulations on the retention, use and destruction of biometric data such as fingerprints and DNA collected as part of the investigation of a criminal offence. These regulations would be subject to the affirmative resolution procedure. In our first Report on the Bill, we expressed our concern at the Government's approach to the implementation of this important judgment stating:

Whilst the Government is right to consider that the public may wish to be consulted on proposals for reform, we are alarmed that the substance of these proposals will not be contained in primary legislation, subject to the usual scrutiny by both Houses. We strongly urge the Government to think again and to ensure that there is sufficient time for scrutiny of measures which, as the European Court has held, substantially interfere with the right to respect for private life. In addition, given the Court's findings on the harmful effects on unconvicted minors of retaining their data, we recommend that the Government considers a swifter solution for dealing with the position of those under 18 years of age.⁵

The Government responded to our Report on 19 May 2009 accepting that there was a case for dealing with the issue by way of primary legislation, but stating that this had to be weighed against the importance of responding to the Court's judgment within a reasonable timeframe. It suggested that the Committee of Ministers would expect significant progress towards implementation of a judgment within 12 months of the judgment and that any delay would build uncertainty and raise the potential for legal challenge. It also noted that using primary legislation would delay implementation until mid to late 2010. Whilst noting that the enabling powers were broad, according to the Government, this was to allow sufficient flexibility. The Government also noted that although it was confident that the new proposals would comply with the Court's judgment, one advantage of the

⁴ Para 125.

⁵ Tenth Report of Session 2008-09, Legislative Scrutiny: Policing and Crime Bill, HL Paper 68, HC 395, para. 1.118.

Government's approach would be that courts would be able to require the regulations to be amended if they judged that they failed to fully comply with the Convention.⁶

The Government referred to the publication, on 7 May 2009, of Keeping the Right People on the DNA Database. This consultation, which concludes on 7 August 2009, proposes a number of possible changes to the current regime for retaining samples, profiles and fingerprints in the light of the S and Marper judgment. Key proposals include:

- 1. Destruction of all DNA samples, regardless of whether or not a person is convicted, after 6 months maximum;**
- 2. Adults arrested but not convicted of a recordable offence to have DNA profile retained for 6 years (where the offence is not serious, violent, sexual or terrorism-related) and 12 years (if it is);**
- 3. DNA profiles of volunteers not to be retained on database;**
- 4. DNA of all children under 10 to be removed and not to be retained in future;**
- 5. DNA profiles of under 18 year olds convicted of serious, violent, sexual or terrorism-related offences to be retained indefinitely, and if not convicted of same offence, profiles to be retained for 12 years;**
- 6. Profiles of under 18 year olds convicted once of a lesser offence to be removed at the age of 18, and if not convicted to be deleted after 6 years or on eighteenth birthday, whichever is the sooner; and**
- 7. Fingerprints of those arrested but not convicted to be retained for 6 years or 12 years (if a violent, sexual or terrorism-related offence).**

We note that Part 8 of the Policing and Crime Bill dealing with DNA and fingerprints remained unchanged after Report stage and Third Reading in the House of Commons on 19 May.

We understand that on 19 January 2009, the Government provided the Committee of Ministers with information on general measures, which we have not seen, and that the case will receive its first substantive consideration by the Committee in June 2009.

We welcome the Government's decision to destroy all DNA samples and to delete the DNA of all children and not to retain such information in the future. However, we have concerns about some of the other proposals, on which we would be grateful for your response:

- 1. How does the Government consider the measures proposed in the consultation paper (which will permit the continued retention of profiles and fingerprints of people not convicted of a criminal offence) to be compatible with the presumption of innocence (Article 6 ECHR)?**

⁶ The Government Reply to the Tenth and Fifteenth Reports from the Joint Committee on Human Rights Session 2008-09, Legislative Scrutiny: Policing and Crime Bill, Cm 7628, pp. 19-20.

2. Does the Government intend to amend the provisions of Section 64(1A) Police and Criminal Evidence Act 1984?

3. Why has the Government rejected the Scottish model?

4. Why does the Government not consider the remedial order process provided for in the Human Rights Act 1998 to be appropriate in this case?

5. Why has the Government rejected the possibility of a tailor-made one purpose Bill to give effect to the judgment?

6. What account has the Government taken of the views and experience of Professor Alec Jeffreys of the University of Leicester on the necessity of the proposed measures?

7. As previously requested, please provide us with copies of the Government's submissions to the Committee of Ministers and ensure that we continue to be updated as further information is provided.

Letter from the Chair of the Committee to Rt Hon Alan Johnson MP, Home Secretary, dated 8 July 2009

S and Marper v United Kingdom (App. Nos. 30562/04 and 30566/04, 4 December 2008, Grand Chamber)

We wrote to your predecessor Jacqui Smith MP on 21 May 2009 seeking further information on the Government's response to the Grand Chamber decision. We requested a reply by 18 June 2009 and are disappointed not to have received a response.

Since sending our previous letter, the Government has published its Draft Legislative Programme which includes a Policing, Crime and Private Security Bill. This Bill proposes to retrospectively add to the DNA database those convicted of serious violent or sexual offences before 2004. In addition to the seven questions we asked in our previous letter, we should be grateful if you would explain:

8. Whether the Government considered including detailed proposals to implement S and Marper within the Policing, Crime and Private Security Bill, rather than by way of an order making power within the current Policing and Crime Bill (Chapter 2 of Part 8). If so, why did it reject doing so?

I would be grateful for a response to this question and our previous questions as soon as possible. As you are aware, your response is highly pertinent to ongoing debates around Part 8 of the Policing and Crime Bill currently before Parliament.

Letter to the Chair from Alan Campbell MP, Parliamentary Under Secretary of State, Home Office, dated 9 July 2009

S AND MARPER JUDGMENT: EUROPEAN COURT OF HUMAN RIGHTS

Thank you for your letter of 21 May addressed to the then Home Secretary. I am responding in view of my Ministerial responsibilities for the DNA Database and forensic science services. Please accept my apologies not responding within your deadline.

I note your supportive comments on the proposals to destroy all DNA samples and to make special arrangements for juveniles. Proposals in both these areas go further than the ECtHR judgment but, in both cases, we have considered the balance between public protection, operational need and protecting the rights of the individual. We have applied those criteria to all the proposals in the consultation paper. We are clear on the need to ensure there is an appropriate balance in establishing a new retention and for the first time statutory retention framework. We therefore welcome the debate and have set out the basis of our proposals.

You also say in your letter that the measures in the Policing and Crime Bill dealing with DNA and fingerprints "remained unchanged after Report stage and Third Reading in the House of Commons on 19 May". In fact, a Government amendment was passed at Report, inserting a new subsection (4) into the proposed new section 64C of the Police and Criminal Evidence Act, and making a similar change to the equivalent Northern Ireland provisions. The amendment has the effect of imposing a requirement on the Secretary of State to consult various bodies before laying draft regulations in Parliament. This consultation would be in addition to the consultation exercise already underway, and would have the effect of guaranteeing that any future exercise of the power would be preceded by consultation.

In response to the specific questions you raise:

1. How does the Government consider the measures proposed in the consultation paper (which will permit the continued retention of profiles and fingerprints of people not convicted of a criminal offence) to be compatible with the presumption of innocence (Article 6 ECHR)?

The retention of DNA and fingerprints does not indicate innocence or guilt. Biometric DNA provides evidence of identity and can be used to ensure that the innocent are eliminated from investigation. The National DNA Database does not contain information as to whether a person has been charged or convicted or acquitted. Even if it did, there is no reason for the prosecution to disclose during the course of a trial that a person has had their DNA taken. That is because the taking of DNA is the consequence of arrest. The prosecution would only seek to make use of the

DNA profile if it was relevant to the individual case e.g. if a search on the DNA database provided a match between the person and a crime scene. There are explicit instructions to prosecutors that evidence other than DNA is required in order to take forward a prosecution.

Moreover, the Government considers that the judgment in *Marper* plainly falls short of saying that any proposals which permit the retention of biometric data of people not convicted of a criminal offence are incompatible with the presumption of innocence under Article 6. Paragraph 122 of the judgment, which acknowledges that the retention of data "cannot be equated with the voicing of suspicions" regarding a person's innocence, indicates that a system which allowed the data of innocent people to be retained "in the same way as the data of convicted persons" would cause concern. However, the measures in the Government's consultation paper differentiate between such cases, on the basis of an evidence-based assessment of risk.

2. Does the Government intend to amend the provisions of Section 64(1A) Police and Criminal Evidence Act 1984?

Regulations would amend this subsection to take account of the destruction of samples and to insert the relevant retention periods.

3. Why has the Government rejected the Scottish model?

We have given significant consideration to the Scottish model. We note that the Court did indicate that it agrees with the Government that the retention of fingerprint and DNA information pursues the legitimate purpose of the detection, and therefore, prevention of crime. The Court also recognised the need for "an approach which discriminated between different kinds of case and for the application of strictly defined storage periods for data".

That is why we have sought to provide an evidence base which would indicate the potential public protection risks arising from a retention policy which would impact on the number of future detections. The DNA consultation paper published on 7 May sets out that evidence base, which was not available to colleagues in Scotland when they determined their policy. For example, the evidence which was available to us indicated that the seriousness of the offence in respect of which biometric data was taken is not a good indicator of the seriousness of any subsequent offending.

4. Why does the Government not consider the remedial order process provided for in the Human Rights Act 1998 to be appropriate in this case?

The Government did consider the option of making a remedial order but concluded that there was doubt over whether the powers in the Human Rights Act were wide enough to implement a policy which comprehensively responded to the Marper judgment, going beyond what was necessary to address provisions that were incompatible with ECHR rights.

5. Why has the Government rejected the possibility of a tailor-made one purpose Bill to give effect to the judgment?

The Government has pursued the approach of implementing the judgment through the Policing and Crime Bill rather than by introducing a separate piece of legislation because that Bill was already poised for introduction in Parliament at the time of the judgment, and thus offered a likely swifter means of implementation. We acknowledge the concerns at the use of secondary legislation in this area but we have followed this route rather than primary legislation because it is the most effective approach to:

- achieve the speediest route to implementing the judgment
- minimise operational impact on policing and public protection and avoid increasing public confusion on the status of their DNA profiles and samples.

The secondary legislation approach has allowed for consultation to be carried out before proposals are put in draft regulations. We have listened to the views expressed by Members of both Houses to the procedure adopted. We have added a further period of public consultation on the content of the draft regulations before these are submitted to Parliament and have set out our detailed proposals in the public consultation paper.

The Committee will also be aware of the views expressed by the Delegated Powers and Regulatory Reform Committee. We take on board their concerns and will assess that in the light of the need for prompt compliance with the ECtHR judgment; and, importantly, on the need for public and policing operational certainty on the retention of biometric data.

6. What account has the Government taken of the views and experience of Professor Alec Jeffreys of the University of Leicester on the necessity of the proposed measures?

We very much welcome the contribution to the debate by Professor Sir Alex Jeffreys. The key divergence in our approach and that of the Professor is that whilst the evidence points to a propensity that future offending may occur, Professor Jefferys suggests that the Government has adopted a presumption that if a person is arrested and not convicted that it is only a matter of time before they are convicted. That is far from our approach. However, as the evidence indicates, a proportion which diminishes over time (higher than that in the population at large) of those who are arrested and not convicted do go on to commit offences and are convicted for those offences. We have tried to balance the rights of the individual with public protection considerations. In the real world it is very difficult for the victim of a rape or the parents of a murdered child or a burglary victim to understand why the police have had to destroy material which would have contributed to early detection.

7. As previously requested, please provide us with copies of the Government's submissions to the Committee of Ministers and ensure that we continue to be updated as further information is provided.

I am sorry this information was not given earlier and it is now attached. The Committee of Ministers decided following its June meeting to consider the case at the latest at its 1-4 December meeting. The Secretariat have informed us that it will be on the agenda of the Committee of Ministers' 15-16 September meeting. This is in order to ensure the Committee is kept informed of progress; the Secretariat's Annotated Agenda notes have not kept up with events (publication of the consultation paper and other information provided in our 13 May response to the NGOs' communication).

I will ensure that you are kept fully informed of progress on this matter in the future.

Letter to the Chair from Alan Campbell MP, Parliamentary Under Secretary of State, Home Office, dated 17 July

S AND MARPER v UK JUDGMENT: EUROPEAN COURT OF HUMAN RIGHTS

Thank you for your letter of 8 July. I apologise to the Committee for missing your deadline in response to your earlier letter to which I sent a full reply on 9 July.

You have raised the further question:

8. Whether the Government considered including detailed proposals to implement Sand Marper within the Policing, Crime and Private Security Bill, rather than by way of an order making power within the current Policing and Crime Bill (Chapter 2 of Part 8). If so, why did it reject doing so?

As I indicated in my earlier response to your question "Why has the Government rejected the possibility of a tailor-made one purpose Bill to give effect to the judgment?", we had considered the option of putting the proposals on the face of primary legislation. In my letter of 9 July, I explained that we did consider inclusion of substantive provisions in the Policing and Crime Bill but we were still considering the implications of the judgment, did not have the benefit of research to inform our consideration of a new retention framework nor of public consultation.

The detail of the Government's legislative programme for the Fifth Session had yet to be determined when we were drawing up the implementation timelines for the judgment in *Sand Marper*. These timelines were drawn up against the background of seeking to comply with the judgment by having the required statutory framework in place as soon as possible. Legislating in the Fourth Session was clearly preferable in this respect.

Although putting the detail of a new retention framework in primary legislation has clear attractions in terms of the level of Parliamentary scrutiny that would be possible, in view of the need to move quickly to minimise operational uncertainty since the judgment, and the need to implement the judgment efficiently, we considered it appropriate to use the legislative vehicle of the Policing and Crime Bill. I will, of course, be giving full consideration to the outcome of the public consultation on the DNA proposals (which is due to end on 7 August) and to the views of Parliament including those of the various Parliamentary Committees that have scrutinised the Bill, like the JCHR, during the passage of the Policing and Crime Bill. It is our aim to produce the final proposals on both the policy and legislative handling of the proposed retention framework as soon as possible after the end of the consultation period.

Letter from the Chair of the Committee to Sir Hugh Orde OBE, President, Association of Chief Police Officers, dated 13 October

Retention of fingerprints and DNA: S and Marper v United Kingdom (App. Nos. 30562/04 and 30566/04, 4 December 2008, Grand Chamber)

I wish to welcome your appointment as President of ACPO. I am confident that we can continue the constructive relationship we have developed over the Parliament with your predecessor and colleagues.

The Joint Committee on Human Rights, which I chair, is reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights. On 4 December 2008, the Grand Chamber of the European Court of Human Rights found a violation of Article 8 ECHR (right to respect for private life) holding 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, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate

interference with the applicant's right to respect for private life and cannot be regarded as necessary in a democratic society.⁷

We have reported on the Policing and Crime Bill, part of which proposes to enable the Home Secretary to make Regulations on the retention, use and destruction of biometric data such as fingerprints and DNA collected as part of the investigation of a criminal offence.⁸

We understand from press reports in August that in July 2009, Ian Readhead, ACPO's Director of Information, wrote to all Chief Constables regarding the current retention policy on fingerprints and DNA and the effects of the *Marper* judgment on decisions to keep or remove records. Given our commitment to monitoring the implementation of this judgment by the UK, please could you send us a copy of this letter. Should ACPO revise its guidance to officers on this issue, please could you keep us updated.

Letter from Sir Hugh Orde OBE, to the Chairman , dated 27 October 2009

RETENTION OF FINGERPRINTS AND DNA: S & MARPER V UNITED KINGDOM

Thank you for your letter of 13 October 2009 and your warm words of welcome.

ACPO acknowledges the European Court of Human Rights findings in the case of S and Marper and has been supporting the Government in developing its response. It is understood that the Government legislation addressing this case is likely to deal with both issues of retention and the discretionary power to remove a DNA profile from the database currently exercised by Chief Constables.

I have attached the letter from Ian Readhead sent to Chief Constables in July 2009 that you refer to in your correspondence. Mr Readhead's letter was intended to confirm the continuing existence of statutory powers pending new legislation.

ACPO continues to closely monitor the passage of the Bill and will amend its guidance as appropriate.

ANNEX

Letter from Ian Readhead, Director of Information, ACPO, to Chief Constables, dated 28 July 2009

Re: S&Marper European Court Ruling 4th December 2008 and The Retention Guidelines Exceptional Case Procedure

I write concerning the above ruling in which it was unanimously held that in this particular case it was a disproportionate interference with an individual's right under Article 8 of the European Convention on European Rights to retain fingerprints and DNA of persons suspected but not convicted of offences.

⁷ Para 125

⁸ Tenth Report of Session 2008-09, Legislative Scrutiny: Policing and Crime Bill, HL Paper 68, HC 395, paras 1.11-1.119.

Since this ruling, the Home Office have prepared a considered response in the form of a consultation paper with proposed changes to the retention of DNA and fingerprints. The Association of Chief Police Officers (ACPO) has been consulted, resulting in further recommendations for consideration. The final draft for publication of new guidelines is not expected to take effect until 2010.

Until that time, the current retention policy on fingerprints and DNA remains unchanged. Individuals who consider that they fall within the ruling in the *S&Marper* case should await the full response to the ruling by Government prior to seeking advice and/or action from the Police Service in order to address their personal issue on the matter.

ACPO strongly advise that decisions to remove records should not be based on proposed changes. It is therefore vitally important that any applications for removals of records should be considered against current legislation and the Retention Guidelines Exceptional Case Procedure.

Please feel free to contact my office if you have any further questions on this matter .

Letter from the Chairman to the Rt Hon Alan Johnson MP, dated 29 October 2009

***S and Marper v United Kingdom* (App. Nos. 30562/04 and 30566/04, 4 December 2008, Grand Chamber)**

We have written previously to you regarding the Government's steps to implement the judgment of the European Court of Human Rights in *S and Marper*.

In our Report on the Policing and Crime Bill, we expressed concern at the Government's proposal to enable the Secretary of State to make Regulations on the retention, use and destruction of biometric data such as fingerprints and DNA collected as part of the investigation of a criminal offence. We were alarmed that the detail of the proposals would not be contained in primary legislation to ensure sufficient scrutiny of the measures and proposed that the relevant clauses be deleted from the Bill.⁹ We therefore welcome the decision to remove the clauses from the Bill during the Committee stage in the House of Lords. During the debate, Lord Brett stated:

Although we remain committed to implementing the judgment of the European Court of Human Rights at the earliest opportunity, we accept the concerns raised by the Committee and other stakeholders and we accept the strength of feeling in your Lordships' House. Given that strength of feeling, we feel it is important to move forward with consensus, if possible. We therefore accept the view that this issue is more appropriately dealt with in primary legislation and have decided to invite Parliament to remove Clauses 96 to 98. As soon as parliamentary time allows, we

⁹ Tenth Report of Session 2008-09, Legislative Scrutiny: Policing and Crime Bill, HL Paper 68, HC 395.

will bring forward appropriate measures which will place the detail of the retention periods in primary legislation, allowing full debate and scrutiny of the issue in both Houses.¹⁰

We also note that Baroness Neville-Jones indicated that she intended to bring forward Conservative proposals on Report.¹¹

Given the decision to remove the clauses from the Policing and Crime Bill, we are writing to request an update on the Government's proposals for implementing this important judgment. In addition to an update on the next steps that the Government proposes to take, we would be grateful if you could respond to the following questions:

- 1. Does the Government propose to use the Policing, Crime and Security Bill in the next session to implement the judgment?**
- 2. Within what timescale does it anticipate implementation will take effect?**
- 3. In the meantime, what guidance, if any, has the Government provided to police officers about how to exercise their discretion to remove data from police records?**
- 4. Does the Government consider that the data of unconvicted children under the age of 18 should be treated differently to adults during this period? If so, how?**

Further, we understand that the Committee of Ministers proposes to consider the UK's implementation of this judgment at its December meeting. **Please provide us with copies of the Government's submissions to the Committee of Ministers for this meeting and ensure that we continue to be regularly updated on the steps that the Government is taking to implement this judgment.**

Letter from Rt Hon Alan Johnson MP, Home Secretary, to the Chairman, dated November 2009

Thank you for your letter of 29 October, which was not received here until last week, about the Government's response to the judgment of the European Court of Human Rights in the case of *S & Marper vs. UK*. As you know, we are committed to responding to the judgment in a manner that takes account of both the letter and spirit of the judgment, while also answering the concerns present in Parliament and in the wider community. To answer your four questions in turn:

- 1. Does the Government propose to use the Policing, Crime and Security Bill in the next session to implement the judgment?**

You will be aware that I have today tabled a Written Ministerial Statement containing our proposals on DNA and fingerprint retention. I can confirm that we intend to deal with the legislative implications of these proposals as soon as legislative time allows.

- 2. Within what timescale does [the Government] anticipate implementation will take effect?**

¹⁰ HL, 20 October 2009, Col. 668.

¹¹ HL, 20 October 2009, Col. 666.

Once the proposals set out in my Written Ministerial Statement take effect, there are significant practical issues surrounding their implementation, particularly in respect of the destruction of DNA samples and profiles, but also in respect of fingerprints. While removal of profiles and fingerprints from their respective databases will be an automated process, and should therefore be a relatively quick task, the process of destroying all the DNA samples (i.e. the biological material) currently held in forensic laboratories is a manual one and may take up to two years.

3. In the meantime, what guidance, if any, has the Government provided to police officers about how to exercise their discretion to remove data from police records?

We continue to work closely with the Association of Chief Police Officers (ACPO) on all matters relating to the S & Marper judgment; chief officers of police are, of course, the owners of the material held on the national DNA and fingerprint databases. We have not issued guidance to chief officers in the course of our work on our proposals following the consultation exercise.

4. Does the Government consider that the data of unconvicted children under the age of 18 should be treated differently to adults during this period? If so, how?

We do not believe it would be appropriate to introduce interim arrangements, which might serve only to cause operational confusion. However, as with adults, we are working with ACPO to put guidance on the new arrangements in place as soon as practicable.

Committee of Ministers Correspondence

Finally, as Lord Brett indicated to Lord Lester last Thursday (Hansard column 491) in debating the Report Stage of the Policing and Crime Bill, we will ensure that your Committee receives copies of all communications on the S & Marper case between the Government and the Council of Europe's Committee of Ministers. Because of the timescales involved in briefing the Committee of Ministers, we sent an interim response to the Committee in early October. We will be issuing a substantive response shortly and will provide a copy of that response to your clerk at that point.

List of Reports from the Committee during the current Parliament

First Report	The UN Convention on the Rights of Persons with Disabilities	HL Paper 9/HC 93
Second Report	The Work of the Committee in 2007-08	HL Paper 10/HC 92
Third Report	A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007-08	HL Paper 15/ HC 145
Fourth Report	Legislative Scrutiny: Political Parties and Elections Bill	HL Paper 23/ HC 204
Fifth Report	Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2009	HL Paper 37/HC 282
Sixth Report	UN Convention on the Rights of Persons with Disabilities: Government Response to the Committee's First Report of Session 2008-09	HL Paper 46/HC 315
Seventh Report	Demonstrating respect for rights? A human rights approach to policing protest	HL Paper 47/HC 320
Eighth Report	Legislative Scrutiny: Coroners and Justice Bill	HL Paper 57/HC 362
Ninth Report	Legislative Scrutiny: Borders, Citizenship and Immigration	HL Paper 62/HC 375
Tenth Report	Legislative Scrutiny: Policing and Crime Bill	HL Paper 68/HC 395
Eleventh Report	Legislative Scrutiny: 1) Health Bill and 2) Marine and Coastal Access Bill	HL Paper 69/HC 396
Twelfth Report	Disability Rights Convention	HL Paper 70/HC 397
Thirteenth Report	Prisoner Transfer Treaty with Libya	HL Paper 71/HC 398
Fourteenth Report	Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill	HL Paper 78/HC 414
Fifteenth Report	Legislative Scrutiny: Policing and Crime Bill (gangs injunctions)	HL Paper 81/HC 441
Sixteenth Report	Legislative Scrutiny: Coroners and Justice Bill (certified inquests)	HL Paper 94/HC 524
Seventeenth Report	Government Replies to the 2 nd , 4 th , 8 th , 9 th and 12 th reports of Session 2008-09	HL Paper 104/HC 592
Eighteenth Report	Counter-Terrorism Policy and Human Rights (Fifteenth Report): Annual Renewal of 28 Days 2009	HL Paper 119/HC 726
Nineteenth Report	Legislative Scrutiny: Parliamentary Standards Bill	HL Paper 124/HC 844
Twentieth Report	Legislative Scrutiny: Finance Bill; Government Responses to the Committee's Sixteenth Report of Session 2008-09, Coroners and Justice Bill (certified inquests)	HL Paper 133/ HC 882

Twenty First Report	Legislative Scrutiny: Marine and Coastal Access Bill; Government response to the Committee's Thirteenth Report of Session 2008-09	HL Paper 142/ HC 918
Twenty-second Report	Demonstrating respect for rights? Follow-up	HL Paper 141/ HC 522
Twenty-third Report	Allegations of UK Complicity in Torture	HL Paper 152/HC 230
Twenty-fourth Report	Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims	HL Paper 153/HC 553
Twenty-fifth Report	Children's Rights	HL Paper 157/HC 318
Twenty-sixth Report	Legislative Scrutiny: Equality Bill	HL Paper 169/HC 736
Twenty-seventh Report	Retention, use and destruction of biometric data: correspondence with Government	HL Paper 182/HC 1113

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006-07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132

Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501
Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007-08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554
Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007-08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007-08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527
Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper 172/HC 1077
Thirty-first Report	Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008	HL Paper 173/HC 1078
Thirty-second Report	Scrutiny of Mental Health Legislation: Government Response to the Committee's Sixteenth Report of Session 2007-08	HL Paper/ HC 1079