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Liberty's response to the Human Genetic Commission's Consultation on the National DNA Database

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Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
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Introduction

1. Liberty is pleased to have the opportunity to respond to the Human Genetic Commission's Consultation on the forensic use of DNA and the National DNA Database (NDNAD). England & Wales currently has the largest DNA database (per capita) in the world. DNA samples can be taken from anybody arrested for a recordable offence and permanent DNA retention is permitted even if no charge follows. The development of NDNAD has largely take place in a regulatory vacuum. Additionally, there has been limited public discourse around DNA retention policy and what debate there is frequently takes place in the wake of a high profile conviction or acquittal where DNA evidence has been a determining factor. In these circumstances, rational balanced debate becomes harder still. Liberty believes it is time for ethical and political debate to catch up with forensic science practice and we welcome consultations such as these which go some way toward informing discussion.

Q1. What information should be given to people when a DNA sample is taken following their arrest?

2. Liberty believes it essential that several pieces of information are given to anybody who has a DNA sample taken (either voluntarily or under the *Police and Criminal Evidence Act* 1984 (PACE)). Those from whom DNA is taken should be told: why the sample has been taken (including the possible use of DNA evidence in criminal proceedings); how the sample and the numerical profile derived from it will be stored and used; for how long the sample and numerical profile will be retained; and how they can request the destruction of the sample and the deletion of the numerical profile. The information should be explained verbally and an accessible written leaflet containing the information could also be useful.

3. We believe that whenever DNA is taken for crime detection and prevention purposes it should be taken by the police, and specifically by the custody officer, who is the custodian of the PACE. Similarly, information about DNA sampling should also be given by police or custody officers. DNA is, by its very nature, incredibly intimate. Combined with this, those whose DNA is taken after arrest are, for a limited period at least, under the control of the State. The power which allows for the taking of DNA is

also potentially coercive. Under section 63 PACE & paragraphs 6.6 and 6.7 of Code C of PACE, reasonable force may be used, if necessary, to take a non-intimate[1] sample from a person without their consent. Liberty believes that the intimacy of DNA, combined with the coercive circumstances and potentially forceful way in which DNA can be taken mandates for the power to be exercised only by those who are trained and accountable agents of the State. We have therefore become increasingly concerned about the use of private security firms, such as Group 4, taking DNA samples after arrest. This is also part of a wider, worrying, trend which has seen traditional policing functions rolled out to those without sufficient expertise, with inadequate accountability mechanisms in place. We would also add that while we don't think the giving of information about DNA extraction needs always to be independently witnessed, if a suspect's legal representative is present, they should be able to witness the taking of a sample.

Q2. In what way should the National DNA Database be populated?

4. Liberty's starting point is that DNA evidence can be a highly effective crime detection and prosecution tool. Thus we take no issue with the collection of DNA from suspects for the purposes of a criminal investigation. Anyone who comes under suspicion in an ongoing criminal investigation is likely to have their DNA taken in any event. Our concerns essentially relate to the regime of permanent retention of DNA taken from people arrested for any recordable offence, even if no charge (let alone conviction), follows. While successive Acts of Parliament have expanded the grounds allowing for retention of DNA, the law has been silent on the creation of a framework for deletion.

5. We believe that the human rights principles of necessity and proportionality should place limits on DNA retention. The significant value of DNA retention as an intelligence and evidence tool must be balanced against the incredibly intimate nature of material that reveals so much more than the identity of the person profiled. Further, as with any database, the larger the number of entries, the greater the risks of error and abuse. Some argue that there should be no permanent DNA retention whatsoever; others that

[1] Under section 65 of PACE a non-intimate sample means: (a) a sample of hair, other than pubic hair, which includes hair plucked with the root; (b) a sample taken from a nail or from under a nail; (c) a swab taken from any part of a person's body other than from the genitals or body orifice other than the mouth; (d) saliva; (e) a skin impression

there should be permanent retention relating to every man woman and child in the country. The first view underplays the importance of solving serious sexual and violent crimes; the second ignores both the risks of human error and costs for human privacy and dignity. Whilst equally unrealistic, both positions have the attraction of clarity and the avoidance of making arbitrary and potentially discriminatory distinctions between different groups of innocent people. In particular, we share concerns (held by some calling for the universal database), about the arbitrary and thus discriminatory nature of the current policy which allows permanent DNA retention in respect of anyone arrested for a recordable offence. Recordable crimes include such minor offences as begging (section 3 of the *Vagrancy Act* 1824) and being drunk in a public place (section 91 of the *Criminal Justice Act* 1967). The discriminatory impact of current roll out policy means that one half of all black men can expect to have their samples retained on the NDNAD by 2010.

6. Liberty therefore seeks to focus debate around what a necessary and proportionate database might look like and which underlying principles might aid the selection of 'trigger offences' for permanent retention. It seems to us that within the overarching principle of 'proportionate retention of DNA'; there might be three further principles that assist:

- The relevance or probative value of DNA to the type of crime in question.
- The potential propensity of the trigger offender to future crime of a relevant nature.
- The gravity of both trigger offence and the type of crime feared in the future.

Liberty has suggested that applying these principles, the easiest argument for permanent DNA retention may be made in relation to those convicted of (and arguably cautioned for) offences of a sexual or violent nature. Further, the relevance, propensity and gravity factors may also suggest consideration of some other potential trigger offences (e.g. domestic burglary).

7. If on the other hand, one takes the view that anyone convicted of any offence should have his/her DNA retained forever, the principles of relevance, propensity and gravity have been replaced with the logic of seeking the largest possible database that one might get away with. This is a small step from the disproportionate logic of

universality. Is there really any evidence to suggest that a convicted shoplifter, drunk driver or insider dealer is more likely to commit rape or murder than any other person?

Should only samples collected by the police be used to populate the database or are there other sources from which samples might be used?

8. Liberty is aware that the Secret Intelligence Service (MI6) and the Secret Service (MI5) have, for some time, been collecting DNA samples (and storing profiles[2]) of those under surveillance. The Counter-Terrorism Bill currently going through Parliament seeks to allow the cross-referencing of DNA profiles held by the security services database with those held by the police on the NDNAD. Liberty has no issue in principle with the cross-referencing of DNA profiles held on these databases. There is no reason why databases such as the NDNAD should not have an interface with counterpart databases. We do however have concerns about the potential for expansion of the NDNAD police database under this scheme while retention and deletion of DNA profiles remains unregulated. Should DNA profiles from the security services database be permanently uploaded on to the police database this would result in a further wholesale extension of the NDNAD. Furthermore, by its very nature the entry of samples onto MI5 & MI6 databases are likely to be uploaded without the person knowing that their DNA has been taken. There will not be the need for arrest as required under PACE retention. Such a secretive manner of uploading onto the NDNAD underlines the need for effective deletion policy. Liberty believes that any attempt to extend the potential scope of the current database needs, at the very least, to be matched by a statutory retention and deletion scheme.

Should the police, the forensic science service providers, or another person or body decide which profiles are recorded on the database?

9. Liberty believes that the police, using published and specified criteria, are the most appropriate body, at first instance, to decide which profiles are retained on the database. The National Policing Improvement Agency website states that "*records on the NDNAD may in accordance with PACE legislation only be used for the prevention and detection*

[2] Earlier this month, Lord West of Spithead, Parliamentary Under-Secretary of State (Security and Counter-Terrorism), labelled this database the 'counter-terrorism database'.

of crime, investigation of an offence or to support the prosecution of an offender…The NDNAD is a criminal intelligence tool and is mandated to be used as such".[3] While we disagree with current practice on DNA retention, we agree with this assessment of the rationale for the NDNAD as criminal intelligence tool. As such, it is the police, a body primarily charged with crime prevention and detection, who are best placed (within statutorily defined criteria) to make determinations on DNA retention. As with any decisions exercised by an arm of the State, retention decisions made by the police should be amenable to judicial review by an independent body.

Q3. What, if any, profiles, other than those relating to individuals convicted of a criminal offence, should be retained indefinitely (or for periods of many years) on the NDNAD?

10. Our comments so far have related to situations involving conviction or caution. We find it much harder to find principled justification for permanent DNA retention of those who have been arrested or charged but not convicted. One popular rationale seems to be that such retention would be more relevant to crime detention than random sampling. However, there is no evidence to support this assumption. On 9th October 2006, the former Home Office Minister Joan Ryan told the House that *"As far as we are aware, there is no definitive data available on whether persons arrested but not proceeded against are more likely to offend than the population at large."* We do accept however, that the consistently low conviction rates for sexual offences caused by victim vulnerability, complex issues around consent and so on raise real proportionality arguments about possible retention from an earlier point in the process.

11. While there should be a strong presumption against retention for a person that has never been cautioned or convicted, the possibility of retention in exceptional circumstances could be provided for on application by the police to a court. Applications for retention could be made following an acquittal or decision not to press charges. The situations in which retention could be deemed still possible could be set out in a schedule of offences and circumstances. For the avoidance of perceptions of guilt, applications for DNA retention in these circumstances could be considered in closed session.

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[3] http://www.npia.police.uk/en/9818.htm

Should volunteer profiles be routinely retained?

12. Liberty does not see any justification for volunteer profiles to be routinely retained. We believe that there should be a presumption for volunteer profiles to be deleted following their investigative use. This presumptive could be overturned if, for any particular reason, a volunteer specifically requested retention of their DNA.

Should the same database include scene-of-crime officers or other investigating officers of members of the police force?

13. We believe that DNA profiles required to exclude law enforcement professionals (such as scene-of-crime officers or other investigating officers) should be held on a separate database. If, as Liberty believes should be the case, the NDNAD is a tool for crime detection and prevention DNA profiles for law enforcement officials taken for elimination purposes should be retained elsewhere. Of course police officers who have their DNA taken under PACE should be subject to the same retention deletion regime on the NDNAD as everyone else.

Should retention times be relative to utility of retaining them?

14. As outlined in our response to question 2, we believe that proportionality needs to be built into any retention scheme. The principle of proportionality should inform (i) whether a DNA profile is to be retained and (ii) the duration for which the profile should remain on the database. You might, for example, expect that the DNA profiles for those convicted of the most violent and sexual offences to be retained indefinitely. On the other hand the profile of a person accused but not convicted of specified violent or sexual offences could have their DNA retained for a time limited period. This model was in fact adopted in Scotland in 2007. Under Scottish law the police are required to destroy the DNA of those accused of sexual or violent offences if a conviction has not been obtained. Since 2007 they have been able to retain DNA samples for up to three years

where allegations of serious violence or sexual offence have been made.[4] They are also allowed to apply for an extension beyond 3 years if it is felt necessary.

15. Proportionality is also, of course, an important principle of data protection. Schedule 1, Part 1 of the *Data Protection Act* 1998 (DPA) sets out the data protection principles that govern all data controllers. The fifth data protection principle states that "*personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes for which data may be stored and processed*". The current indefinite retention scheme does not sit easily with this principle. A more proportional approach to retention which considers relevance, seriousness, and propensity for re-offending would allow the NDNAD to comply with the DPA.

Should there be separate arrangements for the retention of DNA profiles from children?

16. Liberty believes that there should be a separate regime for the taking and retention of DNA from those under 18. As previously outlined, our DNA is intimate and the retention of DNA by the State represents a shift in the relationship between the individual and the State in each individual case. We believe that a distinction between DNA retention for adults and children is vital and have, in the past, expressed concerns about calls for more children to be added to the NDNAD.[5] Recognising the potentially negative impacts of early stigmatisation, we believe that the State should not seek to take DNA from children unless there are exceptional circumstances. We also believe that an approach similar to that adopted in the *Rehabilitation of Offenders Act* 1974 (RHA) is appropriate. Under the RHA convictions and cautions for those under 18 become 'spent' in half the time they do for adults.

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[4] See the *Police, Public Order and Criminal Justice (Scotland) Act* 2006

[5] Liberty publicly expressed concern earlier this year after Gary Pugh, Director of Forensic Sciences at Scotland Yard and the DNA spokesman for the Association of Chief Police Officers (ACPO), suggested that DNA could be taken from children as young as five if they demonstrated behavioural problems in the classroom: "*'You could argue the younger the better. Criminologists say some people will grow out of crime; others won't. We have to find who are possibly going to be the biggest threat to society*". The full interview can be found at http://www.guardian.co.uk/society/2008/mar/16/youthjustice.children

Q4. In what circumstances, and for what reasons, should DNA (as opposed to the numerical profile derived from it) be retained from individuals whose profiles are recorded on the database?

17. Liberty does not believe that DNA samples (as opposed to DNA profiles) should be retained. It is our understanding that science cannot currently predict with any accuracy a person's hair or eye colour based on a DNA sample. We, therefore, cannot see how the desire to extract additional information could justify sample retention. We also believe that the intimacy of the information contained in a DNA sample mitigates against retention by the State. DNA samples can, among other things, provide information as to ethnicity, family connections, and life expectancy. Genetic information contained in DNA samples will often not even be known by the individual concerned. In our view it is an important point of principle that the State should not have access to such personal information while no justification can be shown. Until and unless, a legitimate or compelling reason can be put forward as to the utility or proportionality of sample retention, Liberty advocates for the removal of DNA samples.

Q5. What evidence would be required to demonstrate the 'forensic utility' of the NDNAD (i.e. its values as a tool for the identification and prosecution of criminals)?

18. Liberty has never questioned the utility of a properly regulated DNA database in crime prevention and detection. We understand that the use of DNA profiles can, in certain circumstances, both identify suspects more quickly and identify suspects where other investigative techniques would have failed. We have, therefore, never advocated against the ability of law enforcement officials being able to extract DNA during the ordinary course of criminal investigations. We do, however, take issue with a pervading public perception that DNA taking and retention provides some sort of silver bullet for crime detection and reduction. In fact, DNA is a factor in only a very small number of cases and will, necessarily, not be relevant in many types of crime. In addition, in some high profile cases where DNA has been a factor, it has been wrongly reported that it was

solely the suspect's retention on the NDNAD for a minor crime that led to arrest and conviction.

19. One particular example is the conviction of Steve Wright, earlier this year, for the murder of five women in Ipswich. CCTV footage studied during the investigation placed his car in close proximity to several of the victims making him a police suspect. Incidental to that Mr Wright's DNA had been retained as a result of a minor theft several years before. It is likely that a failure to provide a satisfactory explanation for the circumstantial evidence against him would have provided the required 'reasonable suspicion' threshold for arrest and DNA extraction. Retention on the database for a minor crime was, therefore, not a pre-requisite for formal charges to be brought and the conviction which followed. Traditional policing techniques which had identified Mr Wright as a suspect would probably have provided sufficient evidence for an arrest and a DNA sample to be taken.

20. Another case, often cited in support of DNA retention is that of Mark Dixie, also convicted, earlier this year, for the murder of Sally Ann Bowman. Mark Dixie's DNA was taken by police nine months after the murder following his arrest for a drunken brawl in a Sussex pub. It was this DNA swab that revealed his link to Miss Bowman's murder after it was compared with the database of unidentified crime scene DNA. Liberty can see no principled reason why those who are arrested on suspicion of violent or sexual offences, and whose DNA is taken on arrest, should not have their DNA profile compared with the unidentified crime-scene database. This is a very different matter to the retention of DNA of innocent persons for a definite or indefinite period. If police are routinely taking DNA upon arrest, it makes sense from a resource and efficiency perspective for that DNA to be compared with unidentified DNA from unsolved crimes. If no link is found, and no charges pressed, the DNA should be destroyed unless retention is justified on the basis of the determining factors referred to in paragraph 6 above. In essence, Liberty's principal objection to the routine retention of DNA for all those arrested is that the premise for retention seems to be 'just in case' a person commits a crime at a future date. Checking the possibility of past criminal behaviour for those arrested for violent and sexual offences can be distinguished from the 'just in case' retention policy currently in operation.

21. On the issue of utility, Liberty is also aware of anecdotal evidence that police may drop investigations if DNA evidence is not found at the crime scene. In an ideal world, each crime reported will have sufficient resources allocated to its investigation. In reality compromises are made and police forces may decide that greater efficacy and effectiveness is achieved by directing resources to those cases where DNA evidence is available. This will necessarily skew any figures which aim to show the number of cases in which DNA is a factor in conviction.

22. It is also worth noting recent developments with regard to the use and utility of low-copy number DNA (LCN DNA). Sean Hoey, the main suspect in the Omagh bombing case, was last year, acquitted of 29 charges of murder. In clearing the suspect Justice Weir questioned the science behind the LCN DNA method, highlighting disagreements between experts and emphasizing his concern that there was no international consensus about its value. The judgment led the Crown Prosecution Service (CPS) to announce a review of all pending cases involving the low template method. This review and a subsequent report commissioned by the Forensic Science Regulator have since found LCN DNA to be fundamentally sound. Concerns were however raised regarding current practice as regards LCN DNA and several recommendations were made by Professor Brian Caddy as a result of the review, including: a national training standard for police forensic teams; an advisory panel to advise courts on the interpretation of LCN DNA; caveats to be included in directions given to jurors in LCN DNA cases.

Q6. What will be the likely social impact of maintaining the database at current levels or expanding it substantially?

23. It is sometimes difficult to weigh the societal impact of retaining millions of intimate genetic profiles of entirely innocent people against the intelligence benefits of an ever-larger NDNAD. Rational balanced debate becomes harder still against a back-drop of either high-profile acquittals or quashed convictions on the one-hand and high profile convictions for heinous crimes on the other. Liberty believes that ethical and political debate began catching up with forensic science. In particular, we would like the 'wide impact, soft touch' implications of a creeping database to receive greater attention. As with many issues in the privacy sphere, it is sometimes difficult to demonstrate the 'harm' of a particular policy or measure when considering only one case in isolation.

When the wider impact is considered, societal harm can become clearer. One example of societal harm would be the discriminatory results created by retention by stealth. The racial demographic of profiles currently held on the database reveals that by 2010, half of all black men will have their profiles retained. Some argue that this societal harm could be addressed by creating a universal database. We, however, believe that this would be a blunt, sledgehammer, solution which would replace one harm with another: a fundamental shift in the relationship between the individual and the State and all that flows from it.

24. Liberty also believes that the database, as currently conceived and controlled, affects the willingness of individuals or groups to co-operate with the police. The disproportionate number of black men and young persons on the NDNAD scheme has been widely documented and does little to harmonise police relations with these two groups. Similarly, anecdotal evidence from MPs and the media point to greater awareness and dissatisfaction with the scheme among constituents and individual members of the public.

Q7. What governance arrangements are necessary to secure confidence in the acceptable and appropriate management and use of the NDNAD?

Is it important that the NDNAD is overseen by an independent body? How should this body be constituted?

25. Liberty believes that the NDNAD should be overseen by an independent body. While there currently exists an Ethics Committee the function of this Committee is no more than advisory and is, in our view, insufficient for the exercise of proper accountability. We believe that a NDNAD Commissioner with greater powers of oversight (who reports to Parliament rather than the Executive) could provide an appropriate monitoring model. Alternatively, the Office of the Information Commissioner (ICO) could be pluralized to bring the NDNAD within its remit. We have written elsewhere about the need for the ICO's enforcement powers to be enhanced and for the

office itself to be better resourced.[6] Any extension of the ICO's remit to include the NDNAD would, of course, be on the premise that these concerns were met.

Would there be advantages of providing for the regulation of the NDNAD through legislation?

26. Liberty believes that it is essential for the regulation of the NDNAD to be put on a statutory footing. The DNA retention scheme currently exists in a regulatory vacuum. In 2001 the *Criminal Justice & Police Act* amended PACE and removed the requirement to destroy DNA samples and fingerprints following acquittal or discontinuance of a case. In 2003 the *Criminal Justice Act* amended PACE to allow the taking of DNA from those detained at a police station without consent. Over the same period the Government made no legislative attempt to outline when DNA profiles and samples might be subject to deletion.[7] Instead, a set of ACPO guidelines has sought to set national policy for DNA retention.[8] Appendix 2 of the Guidelines states:

"*Chief Officers have the discretion to authorise the deletion of any specific data entry on the PNC 'owned' by them…It is suggested that this discretion should only be exercised in exceptional cases…Exceptional cases will by definition be rare. They might include cases wh ere the original arrest or sampling was found to be unlawful. Additionally where it is established beyond doubt that no offence existed, that might, having regard to all the circumstances, be viewed as an exceptional circumstance."*

To achieve 'national consistency' ACPO operate a precedent bank of exceptional cases. They have also produced a template letter to be sent in the first instance by the Chief Officer to those seeking deletion of their DNA informing them that deletion/destruction is refused. If an applicant persists by setting out the grounds on which their case is

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[6] Liberty's response to the Ministry of Justice consultation on the Information Commissioner's Inspection Powers and funding arrangements is available at: http://www.liberty-human-rights.org.uk/pdfs/policy08/ico-powers-consultation.pdf

[7] Although there has been no such initiative from the Government, the House of Lords recently added an amendment to the Counter-Terrorism Bill which would require the Secretary of State to enact regulations to govern deletion requests. At the time of writing the Bill had not been returned to the House of Commons for post-Lords scrutiny.

[8] ACPO Retention Guidelines for Nominal Records on the PNC available at: http://www.acpo.police.uk/asp/policies/Data/Retention%20of%20Records06.pdf

exceptional, Guidelines instruct the Chief Officer either to reject the application once again or refer the case papers to the police DNA and Fingerprint Retention Project.

27. Liberty has commented elsewhere about ACPO's mission-creep, lack of transparency and lack of accountability.[9] ACPO's DNA retention policy is a neat example of how these concerns can manifest once a policy void has been left by Parliament. For these reasons we would urge that the NDNAD is urgently put on a proportionate statutory footing.

Q8. What further uses might it be appropriate to make of the genetic information collected for the NDNAD in the future?

28. We believe that the genetic information collected for the NDNAD should be used for no other purpose than crime detection and prevention. We take issue with claims that the NDNAD is an 'informational database' and maintain that the enforced collection of such intimate information can be justified only for the prevention and detection of crime. We would, as a result, oppose linking the NDNAD with other non-counterpart databases; inferring phenotypic traits; or research in behavioural genetics which would unreasonably and disproportionately interfere with fundamental privacy rights. We would, on privacy grounds, also object to familial searching in all but exceptional cases where independent oversight has been exercised.

29. We are, therefore, highly concerned by the evolving unregulated practice of using information on NDNAD for genetic research unrelated to law enforcement. Under this practice legal concepts of consent and data protection are being entirely overlooked.

Q9. Are there circumstances in which it might be acceptable for information contained on the NDNAD to be shared or linked, perhaps anonymously, with other agencies or databases?

[9] See Police Foundation Speech 2008 given by Liberty Director, Shami Chakrabarti, available at: http://www.liberty-human-rights.org.uk/publications/pdfs/police-foundation-lecture.pdf

Should there be routine sharing of information from the NDNAD with similar databases in other countries or should this be decided, for example, on a case-by-case basis?

30. Serious crime in particular is not tied to national borders, so the principle of allowing countries mutual controlled access to databases has merit. However most countries limit their DNA databases to those convicted of serious offences. With 4.5 million samples the UK's database is proportionately several times larger than that of any other nation. The implications of allowing access to foreign agencies are therefore more significant.

31. While it would be difficult to make a principled case for the routine sharing of information from the NDNAD with foreign DNA databases, Liberty believes that sharing on a case-by-case basis could be justified where the co-operating State could show compliance with data protection standards.

Q10. Under what conditions or in what circumstances might arguments for a universal DNA database be persuasive?

32. Liberty's opposition to a universal DNA database is well documented and our approach is outlined in the responses to questions 2 and 3.

33. We would, however, seek to warn that if collection of DNA samples continues at its present rate, a tipping point will be reached whereby arguments for further retention roll-outs will gain greater traction, particularly in response to concerns about discrimination and stigmatisation.

34. In addition to our principled opposition we also have significant practical concerns regarding the security of a universal database. Over the course of the last year, the difficulties faced by the State in protecting people's personal information have been thrown into sharp relief. Liberty has calculated that in last 12 months over 30 million pieces of personal information have been lost by the Government. From this starting point, it is impossible to imagine the development of a universal database that would not be hugely vulnerable to infiltration, abuse and human error.

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