Police Retention and Storage of Evidence in England and Wales

Abstract

Central to the operation of the appellate system, is the ability of individuals who claim that their conviction is in error, to revisit and re-examine evidence gathered during the investigation, as well as that relied upon at their trial. High-profile miscarriages of justice have often only been remedied when there has been defence access to materials post-conviction. There is also an imperative for forces to retain evidence in investigations where no perpetrator has been detected or convicted, to facilitate cold case reviews. In order to give effect then to an appellate system and enable cold case reviews, evidence needs to be retained, and properly stored. If materials are not retained and stored correctly, then re-investigations are rendered impossible. Retention is especially critical in respect of physical materials that could be subject to forensic examination. With the progress of science and technology, and the interpretation of results, it is essential that such physical (and now, often digital) materials are retained for future (re)evaluation. From analysis of responses to a Freedom of Information request to all police forces in England and Wales, and qualitative interviews with criminal justice stakeholders, this article examines the retention and storage of materials, and considers the operation and future of the Forensic Archive Ltd (FAL). It details a worrying picture of inconsistency, with confusion over what should be retained, and how. It concludes that justice demands that we accept that the proper retention and storage of materials is fundamental to the fair and effective operation of our criminal justice system, and ensures that the Court of Appeal can fulfil its remit in addressing wrongful convictions and forces can pursue justice in cold cases.

Introduction

Criminal investigations undertaken by police forces can result in the collation of a huge volume of materials, both physical and digital. Reports state that today, even a 'run of the mill' investigation can generate tens of thousands of pages of data downloaded from multiple digital devices (see House of Commons 2018, paras 52-61). As well as often copious paper documents, seized (and created) materials can range from microscopic particles to large vehicles or even body parts. It is vital for the operation of the criminal justice process that the police not only gather all possible evidence that could assist with the identification of individuals involved, but also shed light on the potential criminal liability of those identified suspects. Following any resulting conviction, or a decision to close an unsolved case, there must be ongoing retention

and storage of these materials. In this paper, we examine the police retention and storage of materials collated during a criminal investigation.[1] In light of huge variance in retention practices across the 43 police forces of England and Wales, in 2017 the National Police Chiefs Council (NPCC) issued new national guidance. The results of a Freedom of Information Request to all 43 police forces; a series of stakeholder interviews, and a survey of relevant actors within the criminal justice system on the retention of investigative materials, together demonstrate that adherence to these rules appears to be 'patchy' at best. The paper thus examines whether this new national guidance has the potential to resolve the problem of the loss and destruction of material, materials that are critical in ensuring justice if the criminal justice process has resulted in a wrongful conviction, or a case has failed to be resolved.[2]

The Present Study

This research was inspired by a case where resolution has not yet been reached. Roger Kearney was convicted of the murder of Paula Poolton in 2010. Secret lover to Poolton, found dead in the boot of her own car, Kearney was convicted on circumstantial evidence. The prosecution case described a high level of interaction between the victim, who had been stabbed, and her attacker and yet no forensic evidence was ever located, which incriminated Kearney. When the conviction was reviewed by the Criminal Cases Review Commission (CCRC),[3] seven years into his life sentence, advances in DNA techniques meant scientists identified new tests to be undertaken on crime scene samples, assumed to be in storage. But investigations by the CCRC discovered that exhibits had been lost, contaminated and destroyed.[4] This case initially provoked one overriding question: what rules or regulations are there for the post-conviction retention of material gathered during a police investigation? From this, there arose a series of sub-questions: if rules have been breached, is legal redress available? What retention policy is in place for trial transcripts post-conviction, needed to provide context to any re-investigation? Which agency bears responsibility for implementing the retention rules? Is it proportionate and sustainable to retain material and should practical issues, such as size or value, be

[1] We are assuming the efficient, effective and assiduous collection of all potential evidentially valuable material, (and its subsequent disclosure) an assumption that itself is contentious, but this controversy lies beyond the remit of this particular paper.

[2] Increasingly, such unresolved serious cases must be subject to a 'cold case' review. However, this process will not be the focus of this paper, albeit most of the arguments will be exactly the same as those important for addressing wrongful convictions.

[3] The statutory body with the power to refer cases, which may be wrongful convictions, back to the Court of Appeal.

[4] Roger Kearney continues to protest his innocence while serving a life sentence in prison, see: Conviction: Murder at the Station, BBC, 2016.

considered? Is material generated by scientists treated differently to items held by the police; and has there been an impact on retention with the closure of the national Forensic Science Service?

A Freedom of Information (FOI) request sent in October 2017 to the 43 police forces of England and Wales (to which all forces responded), sought to determine their policies for decisions upon what material should be kept post-conviction, and for how long. The Freedom of Information question posed was:

> "Is there a designated length of time for which [force name inserted] and laboratories you instruct, both internal and external, retain physical material gathered during police investigations in respect of convicted crimes? If there is a divergence of policy according to crime type, please provide clarification. The phrase "physical material" above refers to all objects and items which are exhibited as part of both the "used material" at trial AND the "unused material", not subsequently used at trial."

Differing language used to represent 'exhibits', 'material' and 'information' exacerbates confusion with police officers and crime scene examiners often using the word 'exhibit' as a descriptor for all items seized. Every single item is given a unique number prefixed by the initials of the person who found, or created it, during a search, examination or some other process (Butler, 2016). That number allows continuity to be demonstrated, to show that every exhibit is logged, stored and shared appropriately. The word 'exhibit' may be unambiguous pre-trial but ambiguity can creep in post-conviction. Public – and arguably legal – understanding of the word 'exhibit' is more akin to something, which has been displayed publicly (in this context, display in court). For the sake of clarity, the use of the word 'exhibit' was avoided in gathering data for this research in an attempt to avoid this interpretation of the word. Interviews with a range of criminal justice practitioners (N=18) were also conducted, transcribed, approved as accurate, and used to provide dynamic insight. Most interviewees gave permission to be named and are detailed in Table 2.

Table 1. Interviewees - HERE

Police Retention and Storage of Materials

Pre-trial, evidence gathered during a criminal investigation is protected by legislation (Criminal Procedure and Investigations Act 1996, CPIA) and any police officer investigating alleged crimes has a duty to record and retain material, which may be relevant to an investigation. Supplementary Codes of Practice guide officers and police civilian staff in the execution of their duties in this regard. These of course are Codes of Practice and as such, an officer in breach of them cannot face criminal proceedings.[5] The CPIA 1996 not only sets out the manner in which police officers are to record, retain (and destroy) material obtained in investigations but also extends to what should happen to that material post-conviction. Once material has been subject to examination, and perhaps used in any criminal proceedings as evidence, it is commonly referred to as an 'exhibit', which can refer to physical exhibits seized during, or created by, the police investigation which may, or may not, have been used during the trial. Crucially, it will include all those objects, which anyone seeking to challenge their conviction, through new scientific or expert work, will hope to access if they are to progress their case to the appellate stage (particularly if there was a failure to fully disclose all evidence pre-trial). Exhibits include, but are not restricted to, items gathered in the search of premises, crime scene or deposition site; audio and digital recordings, which may include police interviews; footage from public and private CCTV cameras; suspects' and victims' clothing; intimate swabs or tapings; photographs. The list is dynamic and covers any item at all collected pre-trial.

The National Police Chiefs' Council (NPCC) published national guidance in 2017 for police forces and forensic science providers on retention periods for material post-conviction but, as detailed below, only two forces appeared in 2018 to be aware of these guidelines. Because a successful appeal will almost always require fresh evidence (Roberts 2017), which may well be found in unused trial material, the decision on what is relevant and what should be kept has the potential to directly affect the operation of the Court of Appeal. In a review of the first ten years of the Criminal Cases Review Commission (CCRC), a founding Commissioner commented: "Some of the clearest miscarriage of justice referred by the Commission have been where there has been fresh evidence to show that the jury convicted on a misleading, incomplete or simply wrong view of the relevant facts" (Elks, 2008). Clearly, the police retention of materials is crucial, and these materials must then be stored in such a way as to be discoverable, while also safe from destruction, loss or contamination.

[5] See McCartney and Shorter (2019) for more on the problems that this raises.

Police forces have always retained material generally classed as 'property', be it goods seized from police operations, or evidence gathered during a potential criminal investigation. Historically, it has been impossible to predict where such property might be stored by an individual force, and its location can often only be garnered by asking individual officers who may or may not know (officers frequently leave the force/retire and may take that knowledge with them). Yet similar guidelines to those in the CPIA concerning material pre-trial, create a framework post-conviction, which ought to be followed: exhibits will be safely packaged and stored securely, in a manner which prevents contamination and evidence degradation. While there are now NPCC guidelines, which are intended to give definitive rules on how long materials are retained for, there were a variety of potential sources of prior guidance (see Table 1), to which police forces could refer when determining local policy.

Table 2: Summary of National Retention Policies - HERE

The Current Retention of Material Post-Conviction.

The results reveal a catalogue of differing practice, with the majority apparently unaware of current guidance and the application, by a significant number of forces, of guidance (the so-called 'MoPI' rules), designed for another purpose entirely – that of preventing crime and the better detection of crime through intelligence – which applies the wrong test and imposes an unnecessary archiving burden.

In total (see Table 3), 36 forces (84%) referred to (a quartet of) national guidelines, 7 (16%) referred only to a policy defined by their own constabulary and 5 (12%) cited both. All four national guidelines mentioned were derived from the Criminal Procedure Investigations Act 1996 (CPIA) by national police initiatives but differ in terms of the length of retention and the justification for retention.[6] Reference to the four will be in the language used by forces: CPIA, MoPI, Forensics21 and NPCC Version 2.1.[7]

Table 3: Summary of FOI Responses Tabulated by Force and Policy – HERE

[6] The initiatives referred to here are the Association of Chief Police Officers and National Police Chiefs' Council.
[7] NPCC V2.0 was completed in October 2017. V2.1 was issued in December 2017.

The most commonly cited source of guidance, MoPI, was set by the police professional standards body, the College of Policing and sits within the CoP framework 'Authorised Professional Practice', which police officers and staff must follow (CoP 2018). MoPI, which specifically relates to 'police records', includes a section dedicated to *Information Management: Retention, Review and Disposal* and makes frequent references to data and intelligence, which can assist police in maintaining a proactive approach to policing: "Information collected for one policing purpose may have value to another" (MoPI, at 1.1.1). The aim of information gathering and sharing for intelligence purposes is, therefore, distinct from the aims of assisting the immediate investigation of specific incidents. As such, material which could point to the safety of an individual conviction – an exculpatory DNA result for example – may not be found in the paper records of the police information system designed to detect (to prevent, or disrupt) future criminality: "The primary purpose of review, retention and disposal procedures is to protect the public and help manage the risks posed by known offenders and other potentially dangerous people (*ibid*)".

The second most commonly cited policy was the CPIA 1996 Codes of Practice, which set out the "manner in which police officers are to record, retain and reveal to the prosecutor material obtained in investigations" (Ministry of Justice 2015: preamble). It also extends to what should happen to that material post-conviction (at 5.9). The Act helpfully defines the word 'material' as:

> "material of any kind, including information and objects, which is obtained or inspected in the course of a criminal investigation and which may be relevant to the investigation. This includes not only material coming into the possession of the investigator (such as documents seized in the course of searching premises) but also material generated by him (such as interview records)" (at 2.1).

A close reading of this paragraph is required when attempting to understand whether the drafter's intention was to set out the policy around written source material – case files, interviews, statements etc., or whether it extends to physical items. The use of the word 'objects' here is in addition to the word 'information' and as such suggests items beyond a paper-trail. It refers to physical exhibits seized during, or created by, the police investigation, which may, or may not, have been used during the trial. The Act imposes very clear duties for the disclosure officer to schedule and review all relevant material post-conviction:

> "Where the accused is convicted, all material which may be relevant must be retained at least until:
> • the convicted person is released from custody, or discharged from hospital, in cases where the court imposes a custodial sentence or a hospital order;
> • six months from the date of conviction, in all other cases" (at 5.9).

Provision is also made for the retention of material in all cases where the convicted person is released from custody but a Criminal Cases Review Commission (CCRC) investigation, into further possible appeals against conviction, is ongoing (at 5.10). The revised Attorney General Guidelines on Disclosure reinforce the principle that relevant material should be retained until the prisoner is released from custody stating that:

> "It may become apparent to an investigator that some material obtained in the course of an investigation, either because it was considered to be potentially relevant, or because it was inextricably linked to material that was relevant, is, in fact, incapable of impact. It is not necessary to retain such material, although the investigator should err on the side of caution in reaching that conclusion and should be particularly mindful of the fact that some investigations continue over some time and that what is incapable of impact may change over time. The advice of the prosecutor should be sought where appropriate." (Attorney General 2013: para 25).

The decision of course of what may be 'relevant', even if deferring to a prosecutor for advice, and 'erring on the side of caution', introduces a level of judgement and discretion for investigators.

As previously mentioned, investigative material falls into two categories: that which has been used at trial and, everything else that was gathered during the police investigation (disclosed, and also that not disclosed to the defence). Judgement is required to determine the fate of every single item, leading to a precarious framework, which offers little guidance and requires interpretation by many individuals across all 43 forces. Typically, the responsibility rests with the Senior Investigating Officer (SIO) of the case, as described by City of London Police: "anything post-conviction, for something serious, has to be the property of our SIO… If we were to review the property that we've got, we would consult the SIO" (Lekamwattage, 2018).

It is therefore the decision of one investigator, not an expert in post-trial processes, with neither legal nor forensic science training. There is also no apparent monitoring or oversight of such decisions. It is clear from the account of police representatives that material is more likely to be considered relevant if it was used in court:

> "For everything post-conviction, how important is it? Is it relevant and is there any requirement to retain it? The stuff that is [relevant], will be kept for the duration of that sentence; the stuff that isn't will be disposed of if there's no legal right to retain it…. it's all done on a case-by-case basis. It would be led by: 'what have we done with that item in the course of this investigation? Have we exhausted what we need to do for the purposes, is there a requirement to hold on?" (Lekamwattage, 2018).

Post-conviction, a successful appeal will most likely require fresh evidence (Roberts 2017),[8] which may well be found in unused trial evidence *if* it has been kept. The decision on what is relevant and what should be kept, therefore, is critical to the work of the Court of Appeal.

The third most commonly cited policy, 'Forensics 21', was guidance originally issued by the forerunner of the College of Policing, the National Policing Improvement Agency (NPIA). This guidance was identified in 2016 as needing replacement (Home Office 2016: recommendation 3) and indeed, is superseded by the NPCC guidelines. 'Forensics21' sets out guidance on the retention, storage and destruction of material, which has been submitted to a Forensic Service Provider (FSP). In so doing, it reminds investigators of the powers afforded to them by CPIA, MoPI and the Police and Criminal Evidence Act 1984 (PACE): Section 22(1) of PACE states: "anything which has been seized by a constable or taken away by a constable following a requirement made by virtue of section 19 or 20 above may be retained so long as is necessary in all the circumstances". The use of the word 'may' invests authorities with the power to retain anything seized for a criminal investigation but does not go so far as to impose seizure as a requirement – which would have been achieved by the word 'shall'. Without this s.22 power, lawful owners could demand the return of an item used in a criminal prosecution and forces may use their discretion about the return of items, as the Director of Forensic Services, City of London Police described:

[8] Research on the Court of Criminal Appeal demonstrates that as a proportion of successful appeals, 'fresh evidence' are far more prevalent than so-called 'procedural error' appeals.

> "we do return some exhibits to victims' families if they want them and it's appropriate for us to do so, with the caveat that they might be blood-stained, for example. We offer to clean them first but sometimes they want them as they are" (Alexander, 2018).

The least commonly cited, yet current policy, is the '*NPCC Guidance Regarding the Storage, Retention and Destruction of Records and Materials that have been Seized for Forensic Examination*' Version 2.1. Just two forces – Staffordshire and North Wales – referred to this policy. The National Police Chiefs' Council (NPCC**)** provides co-ordination, at a senior level, for operations and reform with a key function: the national operational implementation of standards and policy as set by the College of Policing and Government. NPCC 2.1 provides guidance for police forces and independent forensic science providers (FSPs) and covers records and materials (information and physical exhibits). It helpfully states that the guidance covers material and information recovered/seized by Law Enforcement Agencies as a result of investigation into criminal investigations, submitted to and retained by FSP, as well as those retained within law enforcement property stores. The Guidance refers to PACE (1984), CPIA (1996), the Human Tissue Act (2004), MoPI, the Protection of Freedoms Act (2012), Regulation of Investigatory Powers Act (2000), Data Protection Act (2000) and Police Reform Act (2002).

In a complementary survey sent to relevant actors within the criminal justice system, a former senior police officer reported "I doubt that there's ever been a case where exhibits are kept properly", while an experienced legal executive who works exclusively in criminal defence work described retention post-conviction as "…very hit and miss, very haphazard and varies drastically from police force to police force". A civilian employee of a major police force described his own expectations of finding property safely stored within retention period guidelines as "variable". A highly experienced solicitor described giving up on one murder case when blood-stained clothing, shoes and other material that could have been subjected to new DNA techniques could not be found, while another highly experienced solicitor said: "In my experience, [storage of material is] pretty inconsistent. Overall, the pattern is that it's just not available… sometimes the record keeping is so poor that, even if it should exist people just can't find [exhibits]." A scientist specialising in cold-case reviews with extensive experience of working with many forces commented: "I get the impression that, if cases were identified,

even homicides, the exhibits aren't kept… in sex offences, not a chance. I get the impression that they [police forces] are all doing something slightly different."

Scientific Material and the Forensic Archive

The retention of scientific material nationally changed following the closure of the Forensic Science Service (FSS). Concern that archives would be fragmented upon closure of the FSS led to the House of Commons Science and Technology Committee recommending in 2011, that "the existing archives must physically remain as a single, accessible resource" and that "there may be benefits in developing the FSS's archives further into a comprehensive national resource" (House of Commons 2011: paras 159 & 160). The Government were eventually persuaded to create a new facility, the Forensic Archive Ltd (FAL), as the storage solution to forensic files and scientific exhibits, which had to be kept in accordance with national policy.[9] Material held across various FSS laboratories and stores was brought together in vast hangars in the Midlands:

> "There was a lot of material moved very quickly – between five and six million case-files – so we had the existing site and we had to move all the material from the laboratories, and we had another site in Birmingham… We had to set up lots of brackets and shelves, we have five massive walk-in -24 [centigrade] freezers here" (Fendley, 2018).

These items, generally, only extended to that which can be described as the scientific 'artefacts' generated during lab work: slides, swabs, tapings, DNA extracts and the important 'forensic file' ('case-file') in which scientists recorded their endeavours. Bulky items such as clothing, shoes, weapons etc., had mostly been returned to be kept in police property stores, albeit several surprises included several skulls and other body parts including shod feet. In addition to case files and samples, the archive also holds supporting material such as validation and verification records relating to FSS scientific methods and techniques:

[9] FAL is technically the same company as the FSS which underwent a name change to better reflect current activities. It also carries additional company responsibilities around issues such as pensions and assets.

> "As we were winding the FSS down, in order to cause the least problems for the criminal justice system, we were also looking at putting the archive together and building that up, not just for the materials but also the infrastructure around it, because we were dismantling the FSS infrastructure" (Fendley, 2018).

The Government were urged to extend the transition period, with concerns across a range of issues, not least the security of these archived case-files and exhibits dating back to the 1930s. The closure of the FSS was however implemented at speed, with warnings unheeded, and in March 2012, the FSS closed its doors. The creation of FAL meant that *most* of the holdings at the FSS transferred across to FAL but one scientist interviewed maintained a more "orderly transition" would have avoided problems such as some police forces (presumably due to an absence of clear direction from ministers) deciding to take back historic material for fear of it being lost, only to lose it themselves:

> "My issue is that the forces can just ask for those [FSS] files, because they're their materials now, and they can get them and do what they like with them… I know of at least three cases, and I'm cross about this, where the particular forces involved have requested the files and they've lost them" (Anon, 2018).

A review by the House of Commons Science and Technology Committee in 2013 learned that some of the FSS databases and collections appeared to have been lost even before they had reached the archive,: "[the] 10,000 record Chorley analytical glass database [had] been lost to the forensic community" and "the FSS reference collections such as hair types, wood types etc are apparently no longer either available or organised." (House of Commons, 2013: para 94). Similarly, a literature database, to be preserved by the Forensic Science Society, could not be accessed at the Home Office and data and references went missing (*ibid*). Other FSS collections were donated to alternate organisations; the firearms reference collection, for example, was sent to the Government-funded National Ballistics Intelligence Service.

Calls for all scientific material, created by commercial FSPs in the post-FSS era, to also be held securely and centrally at FAL, also went unheeded. In 2011, the House of Commons Science and Technology Committee had recommended that FSPs be allowed to send this material to FAL (which they then called the 'National Forensic Archives') but the Home Office did not consider it "appropriate during the transition to design a completely new archiving system

encompassing material from private FSPs" (Home Office 2011: para 23). Instead, the Home Office placed the burden on police forces to archive their forensic files and materials, for which, arguably, they had neither the expertise nor budget, and until NPCC 2.1, no national policy for this new police role.

Until February 2019, no new material was therefore added to the archive. However, this plan to only house exhibits existing when created, became untenable when the administrators of a bankrupt private provider of digital forensic services, attempted to 'sell' back to police and security services, the files held by the company. The collapse of FTS (Forensic Telecommunications Services) in 2017, with debts of more than £1million, thus required emergency measures be adopted (Armitage, 2017):

> "That was a bit of a crisis: it happened very rapidly and forces weren't aware. The first thing they knew was that the liquidator had seized all the material. Because it was digitised, it just looked like computer hardware and it might be worth some money. We've ended up with that material and we're cataloguing it and adding it to our archive" (Fendley, 2018).

The material saved from destruction includes not only that classified under national retention guidance but also company infrastructure:

> "if a case was being looked at that had been worked on ten years ago say, I would want to see records that showed the methods used had been properly validated and the staff properly trained. So, those records need to be kept… and, since then, we've had the near closure of Key Forensics. That was kept from liquidation by the police forces propping it up while they found a buyer. There were quite a lot of meetings and one was about transferring the material to FAL. Again, when it comes down to it, there isn't really another solution" (Fendley, 2018).

The sale of highly sensitive forensic digital files could not be permitted, and so the FAL has been rebadged as the 'archive of last resort', i.e., where a private provider has no other means of keeping their archives secure upon leaving the forensic market (an eventuality that has occurred now on several occasions), they can be deposited with the FAL. It remains unclear what other archiving solutions may be acceptable before the 'last resort' is indeed resorted to,

for instance, could a FSP merely exit the forensic market, but their parent company retain archives when continuing to operate in non-forensic markets? Could this parent company subsume such archives, and how is their provenance then monitored? If companies take-over other providers (again, a not infrequent occurrence), does this always include the safe transition of existing archives? Is a secure chain of custody of archives between companies ensured? The last twenty years have seen a variety of specialist FSPs whittled down to three big players (Eurofins, Cellmark and Key Forensics) conducting the bulk of both defence and prosecution scientific work, complemented by a few small, independent practitioners. However, the forensic science 'market' remains unstable and precarious, with very little 'profit' to be made, with even the big three warning of financial dire straits. Thus, the FSPs need to ensure that they are operating as efficiently and cost-effectively as possible:

> "When the FSS closed, private providers… thought more sensibly about 'what do we do with all this stuff?' because they had to pay for space to put it in or people to manage it… So, now what happens is there is quite a keen requirement to try and get rid of it as possible because the alternative is we have to keep it and pay for storage" (Millington, 2018).

The appointment of the Forensic Science Regulator has standardised operations for those firms, which can afford the high cost of accreditation, so some FSPs:

> "have a standard operating procedure that deals with the return, retention and destruction of items and materials that come to us. So, today, we have a process that's incredibly detailed about what happens to all the exhibits and what happens to all the material" (Turner, 2018).

The historic practice of returning physical items to police forces (clothing, weapons etc.) post-examination, has thus expanded since the FSS closure to include the bulk of material created by scientists based at commercial FSPs. The additional burden placed on forces, to safeguard all forensic material in addition to property without additional funding, has created difficulties for cash-strapped forces: "If you take our current force-level store, we've got an entire room, 5m x 20m, full of fridges and freezers (and Surrey's a reasonably modest-sized force) … [with] a whole team of people running it" (Stephens, 2018). This material also requires an audit trail

to evidence appropriate handling.[10] According to NPCC guidelines FSPs should retain DNA extracts and case-files but a lack of clarity has led to reports of inappropriate destruction of even this potentially vital material. Indeed there is worrying anecdotal evidence, six years after the system was implemented, of a lack of clarity on the complex issue of who keeps what, by scientists:

> "One particular force, when they were asked what they were doing with all their materials, a high-up individual said: 'oh, our provider keeps them', and, actually, we don't. I don't know what they're doing. That's a genuine thing that made the hair stand up on the back of my neck… That's why I've been very nervous about what the force is doing with this material" (Anon, 2018)

Senior police staff reported evidence of inappropriate destruction of material by FSPs contrary to guidance: "Often items that ought not have been stored have been and items that we fully expected to be stored have been destroyed. It makes cold case investigation difficult and miscarriage of justice cases impossible to progress" (Alexander, 2018). More clarity and oversight is thus required to ensure that FSPs are aware of their responsibilities and adhering to rules on retention and destruction.

For cases that were investigated pre-2012, access to the FAL is severely restricted. Police forces and other Government investigating bodies[11] can obtain material relating to their own cases, whilst the Crown Prosecution Service, the CCRC and the National Database Unit can access all archived material. Coroners are permitted to access material relating to cases under their jurisdiction. Private individuals – appellants and defence solicitors, for example – cannot access the archive, beyond making a 'subject access request', under data protection law. This will only oblige the FAL to disclose materials directly relating to the subject, without any data on other individuals, thus a very partial disclosure may take place. In order to obtain all the materials relating to their conviction, the FAL must refer the individual to the original investigating police force as the 'owner' and controller of the material. Additionally, FAL does

[10] The storage of material is a complex process requiring appropriate handling. The continuous deep-freeze of items for 30 years, for example, requires an audit trail evidencing regular and routine thermometer checks; systems must be in place to avoid an accusation of contamination in storage.

[11] Including HM Revenue & Customs (HMRC), Serious Organised Crime Agency (SOCA) and replacement bodies and the Independent Police Complaints Commission (IPCC).

not provide any scientific advice or support for cold cases or historic reviews of convicted cases, nor will it:

> "provide a list of all material held in relation to a case or make recommendations on potential avenues of additional scientific work. Forces should request the pertinent case-files to review themselves (or ask their current forensic provider to do so) and then contact the archive to dispatch the required items" (FAL, 2018).

Where the FSS was a dynamic centre for scientific endeavour, FAL is a museum, which has no remit beyond cataloguing and containment:

> "the Government must recognize the additional costs being incurred by public bodies in obtaining external scientific advice to support requests for archived material. There would be merit in FAL employing scientific experts to provide that service if overall public savings could be made and the CJS better served." (House of Commons 2013: para 99)

Following efficiencies made during the cataloguing and destruction process, the annual budget for FAL has halved from £1.95 million in 2012 to £1million in 2016. The archive employs just seven archivists and a manager working on one site. However, there remains evidence of some concern around who should be paying for the FAL.[12] The safe retention of historic material is clearly valued, with the House of Commons Science and Technology Committee specifically referencing the need to investigate and remedy miscarriages of justice as one important justification:

> "The archives are important for a number of reasons, including cold case reviews (unsolved crimes where the investigation trail has gone cold) and investigating potential miscarriages of justice. Keeping materials and samples enables forensic scientists to re-examine materials from old unsolved crimes using new forensic

[12] The 2016 Review recommended that FAL should continue to be funded by the Home Office but noted "a recognised principle" that the primary users of a service could be expected to pay for the service they receive. Police forces might therefore be required to contribute in future (Home Office, 2016: p6).

> methods. The Criminal Cases Review Commission (CCRC) has stated that 'there is no time limit on miscarriages of justice' and that 'with continued advances in scientific techniques, it is impossible to say that a conviction which appears safe today may appear less so in ten or twenty years'" (House of Commons, 2011: para 92).

Despite this, the Home Office Review of FAL in April 2016 concluded that, by 2021, "the costs of maintaining and running FAL will no longer represent value for money." (Home Office, 2016: 5) suggesting that by that time:

> "all of the material FAL holds with retention periods of 3 and 7 years would have been destroyed. This would be an opportune date at which to consider an alternative provider to archive and provide access to the remaining case files and material with 30-year retention periods" (*ibid*).

Even by 2021, however, the "diminished" archive will still be substantial: two thirds of a million case-files (plus any additional archives added as a 'last resort'). A Government assessment of costs should also consider wider implications to the criminal justice system of closing the FAL. A tempting solution may be to order the return all remaining material at FAL to the original investigating forces, which are already storing post-2012 material. Yet there is a surprising lack of awareness around this possibility and police forces interviewed for this research have not been consulted yet on the potential impact "we work on a four-year medium-term financial plan and we haven't made provision [for the intake of any additional material] in our current plan" (Stephens, 2018). In fact, all police staff interviewed for this research were unaware:

> "and that's interesting, specifically when you're considering the Forensic Science Regulator's requirement for forces to be accredited in their handling of evidential materials, a quality standard we have to have wrapped up by 2020. Within that there's going to be some handling and probably storage requirements [for 'live' investigations] coming out of that. I can imagine that placing an additional burden on policing" (Bayliss, 2018).

That burden could be increased significantly if a decision to order repatriation of pre-2012 material was additionally imposed on already overstretched forces:

> "my view is that, if the FAL was to be closed, the Forensic Regulator should get involved at that point and effectively have an audit of the facilities available at the police forces… There are guidelines for accreditation for different evidence types, so, if we make a national decision to close the archive, we should have the same framework in place. [Forces] would have to demonstrate they have suitable facilities and checks and balances in place to do it properly. Otherwise, we're just pushing responsibility and not really… policing it" (Millington, 2018).

There thus remain significant concerns about the police capacity to retain forensic materials, and scientists interviewed for this research said a forensic case file would "never" be released in original format to investigating forces in the FSS era. They are now. Key swabs and samples would "never" be returned to police forces. They are now. The FSS had the 'luxury' of having few pressures on storage (and business demands to save costs and increase profits) and, at a time of paper-based indexing, while there were a few high-profile failings, by and large, practitioners report confidence that items held at the FSS would be found at the FSS. Scientists tended to keep case materials, and there was confidence that material deposited with the FSS scientists would be retained safely, in appropriate conditions – confidence not shared by those searching for the items returned to police forces. While the FAL has nearly completed barcode cataloguing which has brought the archiving of scientific material created pre-2012 into the 21st century. However, the safekeeping of scientific material created post-2012 presents a disjointed landscape. The long-term viability of the FAL depends upon the frequent (every 5 years) renewal of the service-level agreement between FAL and the Home Office, which currently runs until 2022. This renewal cannot presently be assured (particularly as the lease on the Birmingham premises due for renewal in 2021 may increase costs and alter cost-efficiency calculations).

Issues Arising from Confusion Regarding Retention

Guidance on policy for the retention of materials is best found in NPCC version 2.1, yet information supplied by forces shows a picture of confusion across England and Wales, with forces following *ad hoc* in-house policies, or outdated guidance with other aims in mind. There is woeful ignorance of the current guidance that should be followed which: "has not been widely enough articulated and, with all of the plethora [of guidance], how on earth is someone going to wade through the pertinent points of that in terms of retention…" (Bayliss 2018).

It is of significant concern that ten forces (nearly a quarter) reported they *only* comply with MoPI, imposing a significantly longer period of retention on forces, which will create an unintended archive problem. Yet it is not simply the time burden, which is concerning here: to apply MoPI to decision-making around the retention of physical material post-conviction in case of an appeal, is clearly misguided. The purpose of MoPI seems to have been lost on police administrators answering this FOI request. An additional eight forces responded to say they use a combination of MoPI and CPIA. Again, this confusion is worrying: different guidance and codes of practices, written for different purposes, are being conflated and confused, running the risk of officers being unclear as to the responsibilities placed upon them and, unwittingly perhaps, destroying a wrongly convicted person's chance of challenging their conviction.

In the most serious category of offences, NPCC 2.1 (and Forensics21) direct police forces and forensic science providers to keep material for a 30-year period before review. However, the CPIA direction is until the time of prisoner's release, a significant distinction given the increase in sentencing, which began with Schedule 21 to the Criminal Justice Act 2003.[13] The CPIA is relevant to a central question: distinguishing material from paper-based information, as opposed to MoPI, which, in both spirit and wording, covers *information* gathered for intelligence purposes and not physical material. The adherence to MoPI by half of the forces exposes a fundamental misapplication of guidance never intended to assist the CACD. In addition, MoPI asks for a judgement of a case on the grounds of public protection or violence. The former demands retention for 100 years whilst the latter only 10 years and an extra layer of unnecessary confusion demanding an individual's discernment when considering how long to retain, for example, a prisoner's jumper or victim's clothing.

Twelve forces referred to Forensics21 as their guidance despite the Home Office identifying in 2016 that this should be replaced, which it was in 2018 (Home Office, 2016: Recommendation 3). The Forensics21 policy is confusing as it also includes timeframes for Forensic Science Providers, which fall short of CPIA requirements and, in turn, are not in line with NPCC 2.1.

[13] "A comparison of tariff lengths imposed by judges and then endorsed by the Lord Chief Justice before the 2003 Act came into force with the period shortly afterwards suggest that tariffs then increased by at least 20% or so… What significantly drove up sentences thereafter was the decision by [then Home Secretary] Jack Straw to increase the tariff for murder with a knife from its previous 15 years to the 25-year minimum. This has affected sentence length across the board, with consequential increases in tariff lengths" (Samuels, 2018).

Four forces[14] reported that the decision on what material to keep and for how long was on a case-by-case basis. For example, the City of London Police retains material in the most serious category of cases for 50-100 years, more than the current 30-year policy but justified this in interview by virtue of their adequate storage space. Leicestershire said they keep material for only six years with no obvious rationale for the time-frame; Merseyside makes a distinction between evidence which has been used at trial, which it keeps for 100 years (exceeding requirements set down under NPCC 2.1) and unused material, gathered during the investigation, which is reviewed on a case-by-case basis with encouragement to return material to owners for reasons of space. Warwickshire & West Mercia's policy is baffling: digital forensics are kept for 100 years, DNA profiles for 30 years but all other material is either not covered in their response or is destroyed after six months.

Problems with this national picture fall into two key groups: firstly, the policy of archiving retained material held by commercial FSPs in the event of the exit of the FSP from the market-place remains unclear; secondly, the bulk of items generated by scientific work post-2012 are now returned to the investigating force. The greatest criticism from those working within the criminal justice system has been of in-force stores, which have repeatedly failed to retain property securely and now have the additional burden of responsibility for scientific samples requiring specialist storage. There also appears to be a lack of planning around the future running of the FAL and a worrying lack of any oversight of retention/storage of materials by investigating forces.

Resolving retention issues

The 'system' for retaining, storing, and accessing material for post-conviction challenges to convictions, needs to be uniform, transparent, robust and impartial.[15] NPCC 2.1 has started the process of creating such a system, and should be disseminated widely to all forces. For the system to be successful, the following questions need clear answers, with little room for discretionary decision-making. The system should also be included into HM Inspectorate of Constabulary audits, which should now extend to include police property and scientific stores and ensure that forces are following NPCC 2.1 as a minimum retention policy. Results from these audits should inform the Home Office in its 2022 review of the Forensic Archive.

[14] Cleveland, Lancashire, Northamptonshire and Staffordshire

[15] The issues surrounding the disclosure of materials post-conviction is dealt with comprehensively by the authors in: McCartney & Shorter (2019) and is thus not dealt with here.

What should be retained?

Physical size, ownership and the value of an item, among other things, preclude the retention of *all* possible materials involved in a police investigation, While some forces have reported keeping bulky and expensive items such as a car, scaffolding poles, and even a shed for more than a decade in police storage, these reports are exceptional.[16] Equally, items of sentimental value are a difficult area for an officer trying to balance the needs of the victim or family, alongside criminal justice requirements and clear national guidelines are required to avoid confusion. Practical steps could and should be taken if an item is to be returned: forensic taping or swabbing which effectively lifts any evidential value onto a smaller, more easily managed item which could be retained for future testing: "There are going to be cases where, for example a watch has a thumbprint but the victim wants that watch back. If you've lifted the print, there's no reason why you can't give it back" (Bayliss, 2018).

Although thoughtful compromises are needed when balancing the needs of different parties it should also be noted that it is impossible for any accurate prediction to be made about what material might usefully be retained for a new scientific technique, which has not yet been discovered. The retention of material post-conviction is paramount for anybody striving to have their wrongful conviction overturned, who may need to rely upon new scientific techniques or interpretation. It is also essential for any cold case reviews that need to be undertaken. As a matter of principal all material must be retained, rather than a subjective and partial decision being made by the investigating officer as to what might be deemed 'relevant':

> "In the future, we're going to have more people in prison, or not in prison, because the testing that's been done is so restricted… it's imperative you keep everything because you might need to test it and it was never looked at to start with because the strategy was wrong…. or technology and interpretation move on… it's more important now than it's ever been (Millington, 2018).

NPCC 2.1 recommends storage for 30 years, 7 years and 3 years in cases of major crime, serious crime and volume crime respectively. While this benefits from being a clear policy, it should be amended to reflect the increase in sentencing severity which has occurred over the

[16] Constabularies of Wiltshire, City of London Police and Surrey.

past decade and update policy to reflect this, so that all material in a life sentence case should be retained during the life of the sentenced person, or 30 years, whichever is longer. Interviewees pointed to the benefit of this "simplified landscape" (Bayliss, 2018), claiming that trained archivists with a detailed knowledge of the national guidance, could then advise police officers with a specialist knowledge of an individual case, which may influence what should be kept. Prisoners and their legal representatives should not have to second-guess the capricious practices of individual forces: "The key is to preserve the integrity of evidence for the greater public good. That's paramount because… if material isn't stored correctly… confidence in the system will drop" (Bayliss, 2018).

In addition, while not dealt with directly here, there are ongoing issues in England and Wales with the retention policy for audio recordings of Crown Court proceedings. A policy on retaining recordings of proceedings should mirror the minimum retention period for physical and scientific material set-out in NPCC 2.1 (or subsequent versions), and trial transcripts should be made freely available in cases where a miscarriage of justice is alleged.

Where should materials be retained?

The current storage landscape within police forces is disjointed, inadequately resourced and, at times, poorly managed. The most frequently reported concern during this research was forces' ability to store and safeguard material post-conviction, a role expanded post-2012 to include scientific material without additional budget. When the FAL was created robust cataloguing began: "I had to bring in additional staff with an additional grant from the Home Office. That took a year; to barcode all the paper records and the majority of the material, but not the slides, which we're still going through." (Fendley 2018). Now this investment has been made, it would be a retrograde step to split up this barcoded, catalogued collection. An orderly transition to a post-FAL era, must be prioritised, with careful consultation of police forces, scientists and interested parties. That consultation should also consider property stores within police forces to assess whether the stores, candidly described by police staff as "creaking" and "bursting at the seams" (Stephens 2018) are sustainable. The Home Office should also begin a period of consultation over the future of the FAL and consider whether the archive should be expanded to include scientific material from post-2012 cases removing responsibility from forces. A scoping exercise should consider whether property and scientific stores, managed by dedicated archivists, should be created on a national, regional or force basis.

Conclusion

The police retention and storage of material, post-conviction, is an opaque, unaudited landscape, which is not fit for purpose. Research into the adherence to guidelines has revealed a woeful picture, with just two forces citing the current guidance, which were written for this specific purpose by the NPCC, providing clarity for all forces nationally. Some forces have a policy to destroy material before these time periods expire, others keep material for 100 years (incurring an unnecessary storage burden). Still others keep material for the length of the sentence and others decide what to keep on a case-by-case basis. The variation in retention practices demands the need for the adoption, monitoring and enforcement of the uniform national policy, NPCC 2.1. Respondents may not have been aware of this new guidance, given its novelty at the time of the FOI request, though the correct reporting by two forces suggests they should have been. NPCC 2.1 is an immensely helpful document to police forces and FSPs. More should be done now to promote effective dissemination to all forces, ensuring that every member of staff who may need to decide what should be retained post-conviction is appropriately informed and trained.

The retention of scientific material has also changed following the closure of the FSS, adding to confusion. The long-term viability of the FAL is unclear yet the justification for ensuring all material is retained is clear:

> "The past is the past and people didn't know about advances in forensics. It's been a lack of knowledge and understanding that has led to things not being kept but we're in the position now, and I feel really strongly about this, where we should be keeping a lot of this stuff for the future" (Turner, 2018).

A successful appeal against wrongful conviction will most often demand fresh evidence, which may be derived from previous unused material, re-investigation of material with new techniques or reappraisal in the light of new understanding. The same applies to the re-investigation of cold cases. None of this will be possible without material being obtained at the outset from crime scene, victims and suspects, unconstrained by the narrow presumptive strategies encouraged by the economy-centred streamlined forensic reporting (see McCartney 2019; Edmond *et al* 2018). Further, the reluctance by profit-driven FSPs to provide costly storage, coupled with a duty on police forces to become the storage solution for post-2012 cases, may impede the criminal justice system in ensuring (delayed) justice.

As well as ensuring that there is proper auditing of retention and storage by police forces, to ensure oversight and transparency, sanctions for improper retention and storage should be considered as part of this regulatory regime. Currently the only means to identify breaches of a Code of Practice is via the Independent Office for Police Conduct[17] or via the Court of Appeal, though an appeal based on the destruction of relevant material which, arguably, should have been retained post-conviction, has never been pursued. This is plainly unsatisfactory and justice demands that we accept that ultimately retention of materials is fundamental to the fair operation of our criminal justice system:

> "It's about the integrity of our system that we should do it (properly). If we accept that miscarriages of justices occur – because otherwise what's the point of the CCRC - those mistakes need to be thoroughly investigated. Therefore, it's a cost that we should incur, no matter what" (Maddocks, 2018).

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Table 1. Interviewees.

Name	Postion held	Date of interview
Alexander, Tracy	Director of Forensic Services, City of London Police	May 2018
Bayliss, Helen	Head of Quality Services, Surrey Police	May 2018
Berlin, Sally	Director of Casework Operations, Criminal Cases Review Commission	May 2018
Christopher, Stephen	Senior Lecturer, Criminal Investigations, De Monteforte University	March 2018
Devitt, John	Senior Policing Oversight Specialist and former Senior Detective	June 2018
Eady, Dennis	Professor of Law, Cardiff Law School	April 2018
Fenley, Alison	Executive Director, Forensic Archive Ltd	May 2018
Lekamwattage, Gihan	City of London Police Crime Scene Manager	April 2018
Maddocks, Glyn	Defence solicitor	April 2018
McDonagh Matthew	Barrister	June 2018
Merchant, Maslen	Legal Executive, Hadgkiss, Hughes & Beale	April 2018
Millington, Joanne	Senior Forensic Scientist, Millington Hingley Ltd	April 2018
Newby, Mark	Quality Solicitors	April 2018
Samuels, John	QC, Retired Circuit Judge.	July 2018
Stephens, Gavin	Chief Constable, Surrey & Sussex Police	May 2018
Thomas, Des	Honorary Visiting Professor, School of Law & Ethics, Cardiff University	April 2018
Turner, Cathy	Scientific Adviser on Cold Cases at Eurofins Forensic Services	April 2018
Anonymous	Forensic manager, Metropolitan Police	May 2018

Table 2: Summary of National Retention Policies

National Policy	Guidance for:	Definition of Evidence Type	Retention period
CPIA	Police Forces	All material & objects where relevant	All convicted crimes: till prisoner is released from custody or on completion of Appeal or CCRC review if released.
MoPI	Police Forces	Police records & information only	Group 1[1] (public protection) offences - 100th year of age of prisoner; Group 2 (other violent, sexual or serious) offences - reviewed after 10 years; Group 3 (all other) offences – reviewed after 3 years
Forensics21	Police Forces	Information & material Objects	All crime types: Forces are referred to follow CPIA
Forensics 21	Forensic Service Providers	All case material	Major Crime[2] – 30 years Serious Crime[3] – 7 years Volume Crime[4] – 3 years
NPCC V2.1	Police & FSPs	All case material	Major Crime – 30 years Serious Crime – 6 years Volume Crime – 3 years

[1] College of Policing (2018)

[2] Major crime: Actual or suspected murder; Manslaughter; Other homicide; Terrorism; Kidnap where a threat to life or risk of significant harm exists; Blackmail; Product contamination; Rape by a stranger which forms part of a series; Armed robbery with significant aggravating factors. (Leicestershire Constabulary, 2011).

[3] Serious crime: conduct which (a) involves the use of violence, results in substantial financial gain or is conducted by a large number of persons in pursuit of a common purpose or (b) the offence or one of the offences is an offence for which a person who has attained the age of twenty-one and has no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more (College of Policing, 2018).

[4]Volume crime: any crime which, through its sheer volume, has a significant impact on the community and the ability of the local police to tackle it. Volume crime often includes priority crimes such as street robbery, burglary and vehicle-related criminality, but can also apply to criminal damage or assaults (College of Policing, 2018).

Table 3: Summary of FOI Responses Tabulated by Force and Policy

Force	CPIA	MoPI	Forensics21	NPCC2.1	Own Policy
Avon & Somerset		x			
Bedfordshire		x			
Cambridgeshire		x			
Cheshire					Tier 1&2 10 years Tier 3 100 years
City of London					Volume crime cases: 7 years (unconvicted) or 10 years (convicted) Serious offences: 50-100 years regardless of conviction status.
Cleveland		x			Labs return all material to force. SIO decides on case by case basis what to retain in line with MoPI & PACE.
Cumbria	x	x			
Derbyshire	x	x			25 years retention if life sentence. Duration of appeal if in progress.
Devon & Cornwall		x			
Dorset	x	x			
Durham		x			
Dyfed-Powys			x		
Essex		x			
Gloucestershire	x	x			
Greater Manchester	x	x			
Gwent	x				
Hampshire		x			
Hertfordshire			x		
Humberside	x		x		
Kent	x	x	x		
Lancashire		x			Physical evidence retained on a "case by case basis". Evidence Related Property Policy & Scientific Support Policy both refer & are both under review.
Leicestershire			x		Generally, 6 years
Lincolnshire		x	x		
Merseyside					Physical material used in evidence retained for length of sentence as minimum. Unused material disposed of or retained according OIC "Currently officers are encouraged to authorise such items to be either returned to the owner or disposed of.

Force	CPIA	MoPI	Forensics21	NPCC2.1	Own Policy
					The rationale for this action, is that storage space is finite."
Metropolitan Police	x				
Norfolk	x				
North Yorkshire	x		x		Material sent to Forensic Service Providers are returned to the force, except those which are perishable/body fluids/bio hazard which are destroyed after 6 months & DNA extracts which are retained by the lab.
Northamptonshire			x		Homicide: case by case. Defence agreement in writing. DNA & Blood Swabs & fingerprints: 30 years Rape: 7 years Others: case by case
Northumbria	x	x			
North Wales				x	
Nottinghamshire	x	x			
South Wales	x				
South Yorkshire	x		x		See North Yorkshire.
Staffordshire		x	x	x	SIO[5] discretion on a case by case basis.
Suffolk	x				
Surrey Police	x				
Sussex	x	x	x		+ DNA & Protection of Freedoms Act.
Thames Valley Police		x			
Warwickshire					DNA extracts retained 30 yrs; Road traffic toxicology & post PCR (DNA) lab products & biohazard exhibits – 6 mths All data (digital forensics) is stored for 100 years.
West Mercia					As for Warwickshire.
West Midlands					Length of sentence or maybe longer for murder.
West Yorkshire	x		x		See North Yorkshire.
Wiltshire	x	x			
Total	**20**	**22**	**12**	**2**	

[5] Senior Investigating Officer; the individual who led the original investigation.