ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTARY MEMORANDUM BY THE HOME OFFICE

The Home Office published an ECHR memorandum on introduction of the Anti-Social Behaviour, Crime and Policing Bill in the House of Commons on 9 May 2013. This further supplementary memorandum addresses the issues arising from Government amendments tabled on 27 June for Commons Committee Stage.

New clause 10: "Retention of personal samples that are or may be disclosable".

1. This new clause amends the Police and Criminal Evidence Act 1984 ("PACE") to provide that the requirement to destroy DNA and other samples that have been taken by the police under Part 5 of that Act, or which have been taken consensually in connection with the investigation of an offence, does not apply to a sample which is, or which may become, disclosable under the Criminal Procedure and Investigations Act 1996 ("the CPIA") or its attendant Code of Practice. Under section 63R(4) and (5) of PACE, prospectively inserted by the Protection of Freedoms Act 2012, a DNA sample must be destroyed as soon as a DNA profile has been derived from the sample, and in any event within 6 months of being taken, and any other sample must be destroyed within 6 months of being taken.

2. Equivalent amendments are also made to the Terrorism Act 2000.

3. This new clause will therefore have the effect that samples are treated consistently with DNA profiles, fingerprints and impressions of footwear, which under section 63U of PACE can similarly be retained if they are or may become disclosable under the CPIA.

4. The CPIA and its Code of Practice provide for the retention by the police of information and other material obtained in the course of a criminal investigation. The Code of Practice states that "material may be relevant to an investigation if it appears to an investigator… that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case" and paragraphs 5.8 and 5.9 provide for material to be retained at least until proceedings have completed, and in some cases, until a person is released from custody. In practice where DNA or fingerprint evidence is used in a case, copies of the DNA profiles or fingerprints from other persons of interest in a criminal investigation are normally considered to meet the test of relevance and included in the schedule of material disclosed to the defence. These case files are then retained in line with the time limits in the Code.

5. Section 63R of PACE already provides for samples to be retained if they might be needed as evidence in court, but this requires a court order for each sample and the police and CPS have argued this will be costly and bureaucratic. The new

clause protects samples from destruction as long as they are subject to the CPIA which protects evidence. Once this no longer applies, the samples will have to be destroyed.

6. The new clause further provides that samples which are retained by virtue of the fact that they are disclosable under the CPIA may only be used for the purposes of any proceedings for the offence in connection with which they were taken. In this way the safeguard currently provided by section 63R(11) of PACE is maintained.

7. In practice it is likely that only a small proportion of samples will need to be protected as evidence. The great majority of DNA samples which were held at the time of the enactment of the Protection of Freedoms Act have in fact already been destroyed, in anticipation of Part 1 of that Act being brought into force in October 2013.

ECHR Article 8

8. The Government accepts that this new clause clearly engages ECHR Article 8, which confers on everyone the right to respect for his private and family life. Article 8(2) prohibits interference by a public authority with the exercise of this right "except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others". In *S and Marper v United Kingdom* (2008) 48 EHRR 1169 it was held at paragraph 73 that the retention of cellular samples must of itself be regarded as interfering with the right to respect for the private lives of the individuals concerned.

9. The Government accordingly accepts that the amendment will be lawful only if it is in accordance with the law, in pursuit of a legitimate aim and is a proportionate means of achieving that aim. The Government is satisfied that the provisions will be "in accordance with the law" because they will be set out in primary legislation in detail. It relies on *Marper* as authority that retention for the purposes of the detection and prevention of crime pursues a legitimate aim (see paragraph 100), but also considers that retention of samples subject to the CPIA pursues the legitimate aim of protecting the rights and freedoms of others, as it will make material available to the defence which can exonerate as well as indicate guilt, and will assist the integrity of the criminal justice system.

10. For a number of reasons the Government is also satisfied that the proposed retention regime is proportionate.

11. It is important to note that samples which are retained because they are disclosable under the CPIA would be held only in case files, and neither the samples nor profiles derived from them would be searchable in the same way as the National DNA Database. The material would be retained not because of the likelihood that it could be matched against a future crime scene, or in reliance on statistics suggesting that people who have previously been arrested or convicted

for an offence are more likely to offend in future. Instead, the material would be retained solely because it might be needed for disclosure in criminal proceedings for the same offence in relation to which the material was obtained – for example, for use by a defendant or for the purposes of responding to a challenge by a defendant about the admissibility of evidence. Accordingly, the Government considers that to a great extent some of the concerns which led the Grand Chamber in *Marper* to conclude that there was not a fair balance between the competing public and private interests – namely the risk of stigmatisation and the perception that people whose data were retained were not being treated as innocent (see paragraph 122) – do not apply to the same extent here.

12. The Government further notes that the position in Scotland (cited with apparent approval in paragraphs 109 and 110 of *Marper*) does not require the destruction of samples in the same way as section 63R of PACE would do. In Scotland both DNA samples and DNA profiles are retained if a person is convicted and destroyed if they are not. The new clause adopts a more rigorous approach to sample destruction than this, as only DNA samples which may be needed for evidence in court are retained.

13. In conclusion, the Government is satisfied that the proposed amendment is proportionate and compatible with Article 8.

Home Office
28 June 2013