Anti-social Behaviour, Crime and Policing Bill

Fact Sheet: Retention of samples (clause 130)

Background

1. The Police and Criminal Evidence Act 1984 (PACE), as amended by the Protection of Freedoms Act 2012 ("PoFA"),[1] currently requires both DNA and 'any other' samples taken from arrested persons or volunteers (but not crime scene samples) to be destroyed within six months of being taken. This covers all biological material – not just that processed to produce DNA profiles (i.e. records on the DNA database), but also blood, semen, urine, saliva, hair and skin swabs. These are taken for purposes such as testing for drug and alcohol use, violent and sexual contact between suspects and victims, and exposure to chemicals such as those associated with explosives, firearms, or drug production.

2. The reason for the introduction of this requirement to destroy samples within six months was to rule out the possibility of further analysis being carried out in future to derive genetic information from samples, and to reassure the public about the way in which samples are used. It was applied to all samples, not just those taken to produce DNA profiles, because any sample containing cells could in theory be used to produce genetic information.

3. 7.7 million samples taken to produce DNA profiles have been destroyed as part of the implementation of the changes made to PACE by the PoFA. However, work on implementation has revealed significant problems. If samples are destroyed within six months they will not be available for use in court proceedings – which is the very purpose of taking and analysing the "non-DNA" samples. It is difficult to meet arguments about samples if they are made after the sample has been destroyed. For example, a defendant might argue in court that his state of mind had been affected because he had taken a prescription drug. With no sample taken at the time of the offence remaining, it would be difficult to rebut this argument.

4. It may also not be possible to identify and process relevant samples within a six month window. Police forces may take a number of samples during an investigation but not process all of them until Crown Prosecution Service ("CPS") advice has been received about which are most relevant to the presentation of a case in court. Forces cannot send all samples which might be relevant to laboratories in advance of CPS advice as this would be financially prohibitive.

5. Finally, as PACE currently stands, whether the person consents to the supply of the sample is irrelevant – it must still be destroyed; in

[1] New section 63R of PACE has not yet been brought into force.

contrast, samples taken from one person to get material from another person can be retained. The result of this is that samples taken from victims (e.g. of rape or other sexual assault) which relate to the victim themselves must be destroyed, whereas samples taken from the victim which relate to the offender do not. This could threaten the work of sexual assault referral centres, in particular where a victim initially does not wish to involve the police but later changes their mind.

6. The Criminal Procedure and Investigations Act 1996 ("CPIA") states that evidence which may be needed as evidence in court or for disclosure must be preserved for specified periods. However PACE currently states that though this applies to DNA profiles and fingerprints it does not apply to DNA and other samples.

7. The provisions in PACE, as amended, provide a limited power to retain samples; forces may apply to a District Judge for an order to retain the sample for a further twelve months if this is likely to be needed for disclosure to a defendant, or to respond to a challenge by a defendant. It was envisaged at the time PoFA was drafted that this would be used in only a few cases where there is an issue of DNA profiles being derived from material which mixes several peoples' DNA. However, obtaining a court order to preserve other types of sample, as described, would be very costly and bureaucratic for both the police and the courts.

Retention of samples

8. Clause 130 of the Bill remedies this situation by removing the requirement to destroy samples if they fall under CPIA or its associated Code – i.e. if they may be needed as evidence in court. It contains safeguards against any other possible use by stating that once CPIA no longer applies the sample must be destroyed, and a sample retained under CPIA may not be used other than for the purposes of any proceedings for the offence in connection with which it was taken. This implements the original purpose of the changes made by the PoFA – to rule out the possibility of further analysis being carried out in future to derive genetic information – while avoiding the difficulties described above. Clause 130 applies these rules both to samples taken under PACE and those taken under powers in the Terrorism Act 2000.

Home Office
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