

## 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 19 November 2013 for Lords Committee Stage.

**New clause: “*Power to take further fingerprints or non-intimate samples*” and consequential amendments to Schedule 9 to the Bill.**

2. This new clause amends the Police and Criminal Evidence Act 1984 (“PACE”) to address a loophole whereby the police might be prevented from taking a person’s DNA or fingerprints during an investigation into an offence. PACE currently allows DNA sampling only once in an investigation. If an investigation comes to an end, then, unless the person in question has a previous conviction (or there are other grounds justifying retention) that person’s DNA and fingerprints must be deleted. However, sometimes the discovery of fresh evidence can lead to an investigation being resumed, and in particular the CPS has now introduced a new procedure, the *Victims’ Right to Review*, under which victims of crime can ask for reconsideration of an initial decision not to charge, to discontinue proceedings or to offer no evidence. If this is done and an investigation therefore resumes, there is no power to retake DNA as it has already been taken during the investigation. This new clause will allow the taking of fingerprints or DNA in an investigation if the previous prints, sample or profile taken during that investigation have been deleted. Consequential amendments to Schedule 9 to the Bill make corresponding provision to allow the police to require a person to attend a police station for the purpose of having their fingerprints or DNA taken.

3. The Government accepts that the taking of fingerprints and samples constitutes an interference with a person’s right to a private life under Article 8 of the ECHR. However, the interference will be prescribed by law and it is, in the Government’s view, necessary and proportionate for the prevention of disorder or crime and for the protection of the rights and freedoms of others to give the police these powers, taking into account in particular the substantial contribution fingerprints and DNA databases have made to the prevention and detection of crime. As the powers are permissive, it will be for the police to decide whether exercising the powers in an individual case can be justified in accordance with their duty under section 6 of the Human Rights Act 1998, and safeguards in the legislation will assist them in complying with this duty. In some cases, it will also be possible to justify the taking of samples and fingerprints in the interests of national security.

4. The interference with a person’s physical integrity involved in taking fingerprints and/or non-intimate sample is short-lived and, unless the person is not compliant, painless. While the use to which the data can be put could have a significant impact on a person if a speculative search of the national DNA or fingerprint database

matches the person with crime scene samples from other criminal offences, this stems from the fact of retaining the data rather than simply the taking of them.

5. Parliament has already approved the principle that it may be necessary and proportionate for the police to retain a person's fingerprints and DNA pending an investigation or proceedings (see section 63E of PACE). Where an investigation is halted and restarted, either because new evidence comes to light or as a consequence of an application of the *Victims' Right to Review* policy, the Government considers that it would be anomalous and contrary to the public interest if the resuming investigation was hampered because a person's fingerprints and DNA had been destroyed in the interim and could not be taken again. The power to re-sample a person will not apply, however, in cases where a person's DNA profile or sample were destroyed because the circumstances in which they were taken was unlawful, or they were taken on the occasion of an arrest that was unlawful or based on mistaken identity.

6. The inconvenience caused to a person required to attend a police station is limited by safeguards in Schedule 2A to PACE. Under the amendments in this Bill, the police will have to impose such a requirement within six months of the investigation being resumed. Moreover, existing provisions in paragraph 16 of that Schedule contain further protections, including the requirement that a person is (except in urgent cases authorised by a senior officer) given a period of at least seven days within which he must attend a police station.

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

***New clause: "Power to retain fingerprints or DNA profile in connection with different offence"***

8. The Protection of Freedoms Act 2012 introduced changes to the framework (set out in PACE) for the retention of fingerprints and DNA by the police in order to secure a better balance between the rights of those who have never been convicted of a criminal offence and the need to protect the public. The new retention regime came into force on 31 October 2013. It provides, broadly speaking, that material must be destroyed unless it can be retained under one of a number of specified powers.

9. The question as to whether a person should have their material retained should be determined by considering their entire criminal history. If a conviction in that history allows retention then it is important that a DNA profile or fingerprints can be retained regardless of whether the arrest for which the material was obtained was itself followed by a conviction. This particularly affects DNA sampling as normally only one DNA sample would be taken from a first arrest and none from any subsequent arrests, because it would incur unnecessary costs to obtain the same profile. However, the language in the primary legislation does not clearly achieve this. New section 63P of PACE as inserted by new clause *Power to retain fingerprints or DNA profile in connection with different offence* makes the position clear.

10. The Government accepts, following *S and Marper v United Kingdom* (2008) 48 EHRR 1169, that the retention of DNA profiles and fingerprints must of itself be regarded as interfering with the right to respect for the private lives of the individuals concerned. However, as before, the interference will be prescribed by law and is, in the Government's view, necessary and proportionate for the prevention of disorder or crime and for the protection of the rights and freedoms of others. The power to retain is permissive, and will be exercised by the police who are subject to the duties of public authorities under section 6 of the Human Rights Act 1998.

11. In reaching this conclusion, the Government is mindful that Parliament has already approved the principle that a person's fingerprints and DNA profiles can be retained for varying periods according to certain trigger events (e.g. conviction for a recordable offence; being charged with a qualifying (i.e. a serious) offence, being given a penalty notice, etc.). All that this amendment achieves is that the appropriate retention period will apply, regardless of whether the specific arrest which led to a person's DNA or fingerprints being taken led to such a trigger. This will prevent the police having to take a fresh sample or fingerprints when there is already in existence something that would otherwise, but for a technicality, be a satisfactory sample. To that extent, therefore, the amendment can be regarded as a human rights-enhancing measure, which will prevent unnecessary interferences with people's Article 8 rights.

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

**Home Office**  
**19 November 2013**