HOUSE OF LORDS

Select Committee on the Constitution

13th Report of Session 2009–10

Crime and Security Bill

Report

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Select Committee on the Constitution

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To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

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Crime and Security Bill

1. The Constitution Committee is appointed "to examine the constitutional implications of all public Bills coming before the House; and to keep under review the operation of the constitution". In carrying out the former function, we endeavour to identify questions of principle that arise from proposed legislation and which affect a principal part of the constitution.

2. This report draws to the attention of the House the provisions of the Crime and Security Bill, governing the retention and destruction of biometric material (especially as regards DNA profiles). In large part these provisions have been brought forward in response to the judgment of the European Court of Human Rights in *S and Marper v. United Kingdom*, in which the current system governing this area in England and Wales was condemned (Scotland has its own system, which was regarded by the European Court as complying with Convention rights).

3. We welcome the fact that the Government is seeking to reform the system that was found by the European Court to be in breach of Convention rights and, in particular, the fact that the Government is seeking to achieve this through primary legislation. (We were critical of the Government's earlier suggestion, in the Crime and Policing Bill in 2009, that this area of law should be changed through delegated legislation).[1] Further, there are particular aspects of the new provisions which we welcome, such as the rule that DNA samples (in contrast to DNA profiles) should be destroyed within six months.

4. However, we have two areas of concern. The first is the length of the period during which a DNA profile may be retained in respect of an individual who is arrested for (but not convicted of) a criminal offence. The Bill proposes a period of six years. In our 2009 report on *Surveillance: Citizens and the State*, we made the following recommendation:

> "We believe that DNA profiles should only be retained on the National DNA Database (NDNAD) where it can be shown that such retention is justified or deserved. We expect the Government to comply fully ... with the judgment of the European Court of Human Rights in *S and Marper v. United Kingdom*, and to ensure that the DNA profiles of people arrested for, or charged with, a recordable offence but not subsequently convicted are not retained on the NDNAD for an unlimited period of time."[2]

5. In February 2010, the Joint Committee on Human Rights published a lengthy analysis in which it argued persuasively that a six-year period of retention is a disproportionate interference with privacy rights under Article 8 ECHR in that it has not been shown by the Government to be necessary in the interests of the prevention of crime and the protection of the rights of others.[3] The Information Commissioner has submitted to us a written

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1 See our report, *Policing and Crime Bill*, 16th report (2008–09), HL Paper 128, paras 15–16.

2 Constitution Committee, *Surveillance: Citizens and the State*, 2nd report (2008–09), HL Paper 18, para 197.

3 Joint Committee on Human Rights, 12th report (2009–10), HL Paper 67.

memorandum[4] in which he makes the same argument: he has told us that in his view the Government's evidence does not support a "general retention period of anything like six years". The view of the Information Commissioner is that the cut-off point as regards those arrested for but not convicted of a recordable offence should be two years rather than six.[5] We note that in Scotland the position is that, in general, DNA material should be destroyed if individuals are not convicted (or if they are granted an absolute discharge), albeit that exceptions are made where individuals are charged in relation to certain sexual or violent offences, in which case DNA material may be retained for three years, extendable for a further two years if authorised by a judge. **We agree with the Joint Committee on Human Rights and the Information Commissioner that the six-year period provided for in the Bill is excessive and is liable to be ruled disproportionate**.

6. Our second area of concern relates to the absence of a full system of independent review and oversight of individual retention decisions. Both the JCHR and the Information Commissioner recommended that the Bill be amended in this regard. The Information Commissioner stated that even if a sound, evidence-based (i.e., two-year) retention system was established as a general rule, "there still need to be additional safeguards".[6] The JCHR, while acknowledging that the ECtHR in *S and Marper* "stopped short of requiring independent oversight as a prerequisite for any retention regime" (para 1.59) nonetheless recommended that the Bill be amended to include a statutory right of appeal to the Information Commissioner/Tribunal. **Again, we agree.**

4 See Appendix.

5 Ibid, para 2.10.

6 Ibid, para 3.4.

APPENDIX: MEMORANDUM BY THE INFORMATION COMMISSIONER—HIS VIEW OF THE HOME OFFICE PROPOSALS FOR THE RETENTION OF DNA PROFILES CONTAINED IN THE CRIME AND SECURITY BILL

1.0 Introduction

1.1 The Information Commissioner has responsibility for promoting and enforcing the Data Protection Act 1998 and the Freedom of Information Act 2000. He is independent from government and his mission is to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken.

1.2 The views expressed in this evidence replicate the content of a letter sent from the Information Commissioner to the Home Secretary on 15 February 2010.

2.0 Explanation of the Commissioner's views

2.1 In December 2008 the European Court of Human Rights (ECHR) ruled that the "blanket and indiscriminate" retention of DNA by the UK police constitutes a disproportionate interference with the right to respect for private life contrary to Article 8 of the European Convention on Human Rights. The ruling also engages a number of the provisions of the Data Protection Act 1998; in particular the First Principle which requires that personal data shall be obtained and further processed fairly and lawfully and the Third and Fifth Principles that personal data should be adequate, relevant, not excessive and kept for no longer than necessary.

2.2 In May 2009 the Home Office published a consultation paper entitled, "Keeping the right people on the DNA database" containing proposals for implementing the ECHR judgement and improving the governance and accountability around biometric data. The Commissioner responded to the consultation paper welcoming the evidence based approach adopted by the Home Office in developing the proposals but raising concerns about the reliability of that evidence.

2.3 The Home Office subsequently revised some of its proposals; in particular the length of the retention period for "non-convicted" adults was reduced from 12 to 6 years irrespective of the seriousness of the crime for which they had been arrested. These revisions are now included in the Crime and Security Bill.

2.4 The Commissioner recognises the value of DNA profiles to policing. He believes that there can be a justification made for the retention of DNA profiles of individuals arrested but not convicted in clearly defined and limited circumstances. He also accepts that the ECHR judgment does not prevent the police using DNA profiles to search against the DNA database in the period between arrest and any decision as to further action in the case where this is to aid the identification of the arrested individual and the detection of unsolved crimes.

2.5 The Commissioner welcomes the fact that the latest Home Office proposals in the Crime and Security Bill remain evidence based. However, he is concerned that the evidence for the 6 year retention period for "non-convicted" adults is still unreliable for reasons explained in detail below. He is also concerned about

inconsistencies in approach. In particular the proposed 6 year retention period for 16–17 year olds arrested for but not convicted of "serious crime sits oddly with the argument that the evidence does not support any such distinction between serious and minor crimes in the proposed 6 year retention period for "non-convicted" adults.

2.6 The Commissioner's concerns are informed by the latest views of Keith Soothill, Emeritus Professor of Social Research at Lancaster University and Brian Francis, Professor of Social Statistics at Lancaster University. Professors Soothill and Francis have previously produced research for the Commissioner in relation to the retention of criminal conviction information by the Police. They also produced a paper entitled "Keeping Innocent People on the DNA Database" in response to the Home Office consultation paper. Copies of their views on the latest Home Office research and proposals are attached as Appendices 1 and 2 to this paper (not printed).

2.7 The Commissioner's first concern is that Home Office research continues to use "arrest to arrest" as the basis for its analysis of risk. In the Commissioner's opinion the use of an "arrest to arrest" approach is likely to be distorted by factors that have little, if anything, to do with the guilt of an individual. His opinion is informed by the latest views of Professors Soothill and Francis who maintain that the present Home Office research does not provide measured evidence of what happens by the proposed 6 year point. They also maintain that comparing those who have been arrested with the general population is misleading as the police are more likely to re-arrest those who have already been arrested because they now have an arrest record and are on the Police National Computer (PNC).

2.8 To avoid this distortion and to ensure that the UK does not knowingly develop a system which is likely to encourage abuse the Commissioner believes that any new retention arrangements should have "arrest to conviction" as their basis rather than "arrest to arrest". As well as ensuring that the new arrangements are based on research that is as reliable as possible, this will also ensure that the courts, rather than the police, play a central role in determining the period of retention of entries on the DNA database.

2.9 The ECHR judgment makes clear that the right balance must be struck between the individual's right to respect for their private life and the legitimate interests of the State in preventing and detecting crime. Any interference with the right to respect for private life is only justified if the benefit to the prevention and detection of crime clearly outweighs that interference. Therefore the intrusion involved in the retention of a DNA profile of a "non-convicted" individual, which arguably increases with the time since their arrest, must be justified by a real and proportionate increase in the ability of the State to prevent and detect crime.

2.10 In the Commissioner's opinion this means that the cut off point to determine the "correct" retention period should not be at the point where the risk of re-arrest for arrested individuals becomes the same as that of the general population but at a point where the State's ability to prevent and detect crime is significantly enhanced to such an extent that it justifies the intrusion into private life. Setting aside concerns about whether the correct basis for judging retention is 'arrest to arrest' the research which leads to the present Home Office "estimated hazard curve" shows a significant narrowing around the 2 year mark. It is strongly arguable that this is the point where the interference no longer remains justifiable.

2.11 Although there is merit in establishing standard retention periods based on general evidence there will still need to be arrangements for the scrutiny of

retention in individual cases to help ensure that there is no breach of Article 8. For example, in a case where an individual is acquitted by the court there should be a mechanism for the court to rule on whether or not the individual's DNA profile is retained; such rulings could be made either on the initiative of the court or an application by the defence and in line with clearly defined criteria.

2.12 The Commissioner welcomes the fact that the Crime and Security Bill includes provisions placing a legal duty on the chief officer to remove and destroy the DNA records from the database in certain defined circumstances. The defined circumstances in the Bill include where it appears to the chief officer that the arrest was unlawful, the taking of the DNA sample was unlawful, the arrest was based on mistaken identity or there are other circumstances relating to the arrest or the alleged offence which mean it is appropriate to destroy the DNA sample and profile.

2.13 The Commissioner made his position on the removal of DNA records very clear in his response to the Home Office consultation paper. Whilst welcoming the proposed changes to the existing Exceptional Case Procedure outlined in that paper he said, amongst other things, that clear criteria for the removal of records should be set out in a statutory code of practice or in regulations and be subject to full and open public consultation.

2.14 He also said that the decision to remove a record should be a pro-active one by the police, not one that is only triggered by a complaint from the individual to whom the record relates. In addition there should be a right of appeal to an independent body against the chief officer's decision not to remove a record.

2.15 The Home Office summary of responses to the consultation paper made it clear that the Commissioner's views were shared by many other individuals and organisations. In particular there was "general dissatisfaction with the current (removal) process which was arbitrary, lacking transparency and subject to too much local discretion". The idea of placing the system on a statutory footing was welcomed and, as it was "considered that (as) judicial review was not an approach which many people would follow, a suitable course of appeal should be to an established lower court".

2.16 The recent House of Commons debate on the Crime and Security Bill also shows that the existing removal procedures are seen by some as varying "from one police force to another and the unfairness breeds discontent". The procedures are also described as "a postcode lottery" in which "some police forces refuse to remove any records at all once a case is closed and the person declared innocent, while others comply with 80 per cent of requests for deletion".

2.17 In the same debate the Home Secretary said, "we need to look at the system replace the post code lottery or any other type of lottery. It is not right, and we are suggesting that we amend that in the Bill". He also said that "the current arrangements…will change, in that we will set out in law the circumstances in which DNA must not be retained. In those circumstances it will be removed if the individual requests that but not in other circumstances, perhaps, because we cannot be absolutely prescriptive here, and we will need to define this".

2.18 Whist the provisions in the Bill address some of the concerns raised by the Commissioner in his response to the consultation paper he does not consider that they go far enough. The Commissioner welcomes the fact that the provisions include some defined circumstances under which DNA material will be destroyed. However, it is still his view that the development of these conditions should be

subject to full and open public consultation and that the agreed conditions should be laid down in a statutory code of practice.

2.19 The Commissioner also believes that the decision to remove a DNA record should be a pro-active one by the police not one that is triggered only by a complaint from the individual to whom the record relates. However, comments made by the Home Secretary in the recent House of Commons debate suggest that the decision to remove DNA in certain defined circumstances "will be made if the individual requests that but not in other circumstances" although the Home Secretary goes on to say that "we cannot be absolutely prescriptive here and we will need to define this".

2.20 This is an important matter because if, in the absence of any complaint from an individual, the police continue to retain DNA data in circumstances that clearly meet the defined conditions for removal, for example where the arrest was unlawful, that would be contrary to the requirements of the Data Protection Act 1998. Whether personal data are irrelevant, excessive or kept for longer than is necessary is not dependent on whether an application for removal of the data has been made. If for example an individual who has been arrested for a crime that it turns out was never committed succeeds in having his DNA removed there cannot be any justification for the police retaining DNA on others who might also have been arrested for the non-existent crime merely because they have not asked for removal.

2.21 The Bill makes no provisions for an independent appeal mechanism against a chief officer's decision under the proposed removal arrangements even though this was a key concern raised by many in response to the Home Office consultation. In the recent House of Commons debate on the Bill the Home Secretary said, "As the Bill proceeds through the House, we will need to pay attention to the question of whether there should be another authority to go to on appeal".

2.22 Whilst welcoming the Home Secretary's recognition of the importance of this issue, the Commissioner is concerned that the Bill does not actually contain any specific provisions for an appeal mechanism. He is also concerned that the Home Secretary still appears to regard the question of whether there is a need for an appeal system as something for discussion and debate rather than as a given.

2.23 The Commissioner is in no doubt that there should be an independent appeal mechanism included in the bill, perhaps to an "established lower court" as suggested in the summary of the Home Office consultation paper.. .

3.0 Conclusion

3.1 The Commissioner welcomes the Government's efforts to put the operation of the national DNA database on a sound legal basis. Retention of DNA profiles engages significant data protection concerns and these are heightened where the profiles relate to the un-convicted and those of little ongoing interest to the police.

3.2 He welcomes efforts to base continued retention on reliable evidence but remains concerned that the way this evidence is being interpreted at present does not provide an appropriate basis for the proposed retention periods.

3.3 As the ECHR has recognised, the retention of DNA on the un-convicted is an interference with their privacy. If there is to be such an interference there must be reliable and convincing evidence that retention contributes significantly to the prevention and detection of serious crime. The Commissioner does not consider

that the evidence presented supports a general retention period of anything like six years.

3.4 The Commissioner believes that even if sound evidence based retention periods are established as a general rule, there still need to be additional safeguards surrounding the decision to retain on acquittal, the proactive review of records subject to deletion and an appropriate appeal mechanism to protect against unwarranted decisions to retain records.

3.5 The Crime and Security Bill provides a major opportunity to ensure that the national DNA database not only continues to play an essential role in operational policing but does so in a way that incorporates the necessary privacy and data protection safeguards. The Commissioner urges the Government to revisit key provisions in the Bill to ensure that this important opportunity is not lost.

16 February 2010