

**Equality and
Human Rights
Commission**

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Equality and Human Rights Commission Parliamentary Briefing

Crime and Security Bill

Commons Second Reading

18 January 2010

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Who we are and what we do

The Equality and Human Rights Commission (the Commission), established on the 1st October 2007, is working to eliminate discrimination, reduce inequality, protect human rights and to build good relations, ensuring that everyone has a fair chance to participate in society.

Our approach to equality, opportunity and human rights builds on the achievements of our predecessors, the Equal Opportunities Commission (EOC), the Commission for Racial Equality (CRE) and the Disability Rights Commission (DRC). We are here for the 60 million people of Britain and Parliament has set us the task of:

- Protecting and promoting equality
- Protecting and promoting human rights
- Ensuring good relations

The Commission's position on the Bill

The Commission broadly welcomes the Crime and Security Bill, which proposes a range of measures that impact on the criminal justice system. In particular, we welcome measures that seek to reduce information requirements for police stops and searches. However we are concerned that the Government's proposals on the national DNA database fail to go far enough to give full effect to the judgment of the European Court of Human Rights (ECtHR) in the case of *S and Marper v United Kingdom* (2008) and may remain in breach of Article 8.

The Commission also welcomes proposals on Domestic Violence Protection Notices and, in principle, we support the creation of additional

powers for the police to take fingerprints and DNA samples from people who have been convicted of serious violent and sexual offences.

A strategic priority for the Commission is to secure improvement in the criminal justice system so that systemic discrimination is removed and respect for human rights is better promoted. The courts, police, probation and prison services are all part of this system.

Beyond the scope of this Bill, the Commission is looking at how the police deal with protected groups and is working with the National Offender Management Service to tackle discrimination and promote equality.

We are also looking at how the rights of people with mental health conditions or learning disabilities are met by the criminal justice system, the treatment of Muslim prisoners, achieving proportionate effects within the system, and at patterns of local provision and good practice for women who are exposed to violence.

Police powers: stop and search

The Commission has a longstanding interest in stop and search. There are approximately a million stop and searches every year in England and Wales, mostly under the PACE Act 1984 which requires 'reasonable grounds for suspicion'. This specifically must not be based on generalisations, for example, on grounds of race or appearance, or people's past record, but only on suspicious behaviour or matching a specific witness description.

In 2007-08, Asian people were 2½ times more likely than White people to be stopped and searched, per head of population, and Black people 7½ times, above the norm for the past 15 years.

The Bill contains provisions to reduce the reporting requirements on the police when they stop and search individuals.

The Commission broadly welcomes the proposals to remove the name, address and vehicle details from the stop and search record form. We understand this is being done to reduce bureaucracy following the Flanagan report, but we support this on the grounds of equality and human rights principles.

The original proposal in Lord Macpherson's report published in 1999 was that a record form should be completed as a means of accountability and a way of monitoring ethnicity against other factors in stop and search. Personal details of the individual stopped were not necessary to this purpose. These details have been added, with police officers routinely checking names against the Police National Computer, none of which is within the statutory purpose of stop and search.

Many in the police service have more recently cited the length of the form as a reason to reconsider record keeping. However, the Commission has pointed out that the extent of information gathered has been driven by the police and the Government. Statutory authority is only to ask for, but not require, provision of these personal details.

The Bill therefore appears to return information recording back to its originally recommended role and extent.

The Commission understands that the requirement to record ethnicity under Code A of the Policing and Crime Evidence Act 1984 (PACE) has statutory authority equal to being enshrined in the Act itself. We do however welcome the new provision to strengthen this reporting requirement by including it on the face of the Bill.

Furthermore, we would welcome a commitment from the Government to give its continued support to the National Policing Improvement Agency's (NPIA) programme to roll out a 'best practice' package progressively to forces through 2010. We are confident this will foster good relations between communities and the police and reduce race inequalities in the use of the power.

National DNA database

The Bill establishes various time limits for the retention of DNA samples, profiles and fingerprints taken under PACE Act 1984 and anti-terror legislation. These provisions seek to address the European Court of Human Rights' judgment in *S and Marper v United Kingdom*.

The Bill also introduces new powers to take samples and fingerprints from people convicted of crimes domestically and abroad, and powers to compel individuals to attend a police station to be sampled.

The Commission recognises the DNA database as an important crime-solving tool and acknowledges that the Government's proposals are more proportionate than the current system in that they:

- aim to treat DNA samples differently from profiles and fingerprints
- take some account of the need to treat profiles and fingerprints of those convicted of offences differently from those who are acquitted (or not charged);
- take some account of the seriousness of the offence;
- take some account of the unique situation of children; and
- take account of the unique situation of those who have given their DNA voluntarily.

However, the Commission still thinks that the Government has interpreted the judgment too narrowly and that the proposals do not go far enough to give full effect to the judgment. The Commission thinks that some aspects of the proposals lack the necessary level of proportion to be lawfully justified.

The ECHR's ruling emphasised that the United Kingdom has a narrow margin of appreciation when it comes to determining permissible limits on the interference with private life in this sphere. In particular, it considered that any state claiming a pioneer role in the development of new technologies (as the UK does) bears special responsibility for striking the right balance.

The Commission believes that if some of the proposals become law the Government is likely to be in breach of Article 8 of the Convention and be acting unlawfully.

In particular, the proposal to retain DNA profiles taken from adults for 6 years when they are not convicted of a crime is likely to be unlawful according to advice obtained by the Commission from a leading counsel.

The Council of Europe's Committee of Ministers, which oversees implementation of the Court's judgments, has also questioned how this and other proposals take into account factors that the Court found to be relevant in determining the proportionality of the interference with private life. Key factors are the gravity of the offence that the individual was originally suspected of committing, and the interests deriving from the presumption of innocence.

The Commission is also concerned about the lack of a mechanism for independent review of the justification for retaining samples in individual cases. The Committee of Ministers shares this concern¹.

In relation to retention periods for DNA profiles, the Commission's view is that the starting point ought to be that profiles are destroyed when a final decision has been made in a particular case, subject to limited exceptions. This aligns with the Council of Europe's guidance on the use of DNA within the framework of the criminal justice system² that the ECHR relied on heavily. The limited circumstances can be summarised as follows:

- there has been a conviction;
- the conviction concerns a serious criminal offence against the life, integrity and security of a person;
- the storage period is strictly limited;
- the storage is defined and regulated by law; and
- the storage is subject to control by parliament or an independent supervisory body.

Decisions taken about retaining DNA profiles should also be subject to independent review.

The Commission recognises that this presumption may be displaced in certain limited circumstances, but wishes to emphasise that the current proposals are too distant from these basic principles to be proportionate.

Equality impact of the DNA database proposals

- Race disproportionality

The equality impact assessment (EIA) carried out on the DNA provisions of the Bill suggests that there is no variable equality impact and that the proposals are unlikely to increase the proportion of ethnic minority groups represented on the database.

¹http://www.coe.int/t/DGHL/MONITORING/EXECUTION/Reports/Current/United_Kingdom_en.pdf

² Committee of Ministers Recommendation No. R (92) 1, paragraph 8, and the related Explanatory Memorandum: referred to in paragraphs 43 and 44 of the Court's judgment in *S and Marper v United Kingdom*.

It is suggested that the race disproportionality will be slightly reduced by reducing the period of time that DNA profiles from individuals who are not convicted are kept, as there is evidence which tends to show that a greater degree of over-representation exists at earlier stages of the process, (for example, arrest), than at later stages, (for example, conviction).

While this is likely to be true, the EIA does read as an afterthought to proposals that have already been decided upon. The EIA did not involve external consultation with affected groups or demonstrate any consideration of alternative retention periods.

- Retention period

Reducing retention periods further, as the Commission advocates, is likely to reduce the over-representation further. This is particularly important as proposed new powers to take samples from the convicted population and to destroy samples given voluntarily are likely to have a counterbalancing effect.

While the ECHR noted that the retention of private data of an individual not convicted cannot be equated with the voicing of suspicion, it recognised the role that perception has to play and it would be unrealistic not to recognise the consequences of particular racial groups entertaining particular perceptions.

The Commission thinks that the unaddressed over-representation, in respect of innocent individuals, could contravene Article 14 of the Convention, which guarantees the rights and freedoms specified in the Convention, including the right to a private life, without discrimination. The disproportionality therefore also requires justification from the Government.

The available information indicates that the database holds the DNA of about a third of all black men and about three-quarters of all young black men (aged 16 to 34) resident in the UK. Black men are four times more likely to be on the database than white men.

There is some evidence to suggest that black (and also Asian) defendants are less likely to be convicted than white defendants. Therefore if profiles were retained only of those convicted, the proportion that relate to black people would be lower.

The Home Office's own research indicates that black people have lower lifetime offending rates than their white counterparts.³ The stigma of such extreme over-representation for one racial group has unknown, but possibly serious, social consequences making justification a crucial issue.

Vulnerable people such as children (as young as 10) or people with mental illnesses are again over-represented on the database. DNA samples can be taken if one is sectioned under the Mental Health Act 1983 and (materially) black people are also 44 per cent more likely to be sectioned than their white counterparts.⁴

The proportion of Asian people on the database is increasing beyond their proportion to the general population. There are also suggestions that Muslims are over-represented in arrests for terrorism-related offences.

Domestic Violence

The Commission broadly supports the Government's proposal to introduce Domestic Violence Protection Notices/Orders or 'GO' notices/orders.

- Domestic violence as a human rights issue

The Government has made progress in tackling domestic violence over the last ten years, with a range of initiatives such as Specialist Domestic Violence Courts and Independent Domestic Violence Advisors. Although there is some evidence that the levels of domestic violence may have fallen⁵, it remains widespread and continues to have a significant impact on the lives of many victims.

It is a major cause of death and disability for women⁶ and can lead to physical and mental health problems⁷ and reduced economic potential⁸.

³ Sharp, C. and Budd, T. 2003. 'Minority ethnic groups and crime: Findings from the Offending, Crime and Justice Survey 2003'. Home Office

⁴ Black Mental Health UK

⁵ The Government's response to the Home Affairs Committee's report on Domestic Violence, Forced Marriage and "Honour"-Based Violence refers to a 65% decrease in the number of incidents of domestic violence reported in the British Crime Survey between 1995 and 2007/08

⁶ WHO, 2005, Multi-country Study on Women's Health and Domestic Violence against women

Domestic violence also has an impact on children living in households where it is occurring including reduced educational attainment; increased involvement in anti-social behaviour and street and playground violence⁹. Domestic violence is a common feature in the households of children who die as a result of maltreatment¹⁰.

The Commission recognises domestic violence as a form of violence against women within the United Nations definition which is 'gender-based violence directed against a woman because she is a woman or that affects women disproportionately'. Although men are also victims of domestic violence, women are disproportionately affected in terms of overall numbers and in terms of the frequency, severity and consequences of violence.

Domestic violence is increasingly recognised as both an issue of gender inequality and a human rights abuse. The State's positive obligation to protect women and children from violence within the home was highlighted by a European Court of Human Rights ruling in June 2009. It ruled against Turkey in a domestic homicide case, finding that the State had failed to prosecute adequately a man who repeatedly attacked his wife, and eventually shot and killed his mother-in-law.

- 'GO' orders

In June 2008 the House of Commons Home Affairs Committee published the report of its inquiry into Domestic Violence, Forced Marriage and "Honour"-Based Violence. It recommended the introduction of GO orders, which have been used in a number of European countries to give victims of domestic violence time and space to consider their options without pressure from the alleged perpetrator.

In its response to the report, the Government said it would keep GO orders under review as part of learning from good practice in other countries. The orders have now been brought forward as part of the Crime and Security Bill.

⁷ Walby, S, 2004, The Cost of Domestic Violence, published by DTI

⁸ Ending Violence against women: from words to action, Study of the Secretary-General, 9 October 2006 http://www.un.org/womenwatch/daw/Violence_against_women/launch/english/v.a.w-exeEuse.pdf

⁹ London Safeguarding Children Board, 2008, Safeguarding Children Abused through Domestic Violence

¹⁰ Humphreys and Stanley, 2006, Domestic Violence and Child Protection: Directions for Good Practice

GO orders have already been introduced in Austria, Switzerland, Germany and Poland, all of which are signatories to the Convention for the Protection of Human Rights and Fundamental Freedoms. In all of these countries the legislation enables the police to exclude the alleged perpetrator of domestic violence from the home although the length of the exclusion and the degree to which the victim can influence the decision varies.

There is a potential problem with perpetrators breaching the order although breach rates in Austria, which is considered by the Council of Europe as a model of best practice, are low at only 3%. The problem of breaching also applies to existing protective injunctions within Britain and requires a robust response from the police and courts.

An evaluation of GO orders in Austria found that they were generally supported by victims and were effective if linked to support and help for the victim. Most victims said that their situation had improved in follow up interviews a year later.

The introduction of GO orders in Britain would help the police to protect victims of domestic violence more effectively. They would ensure the immediate safety of victims and provide an opportunity for them to access specialist support to help them to plan their futures. This would address situations where the police believe that domestic violence has taken place and is at risk of being repeated but where the quality of evidence may not be sufficient to secure a conviction.

In these cases the onus is currently on victims to apply for an injunction but they may not have the emotional or financial resources to do so. In cases where the perpetrator is charged, a GO order would remove the reliance on bail conditions to prevent the perpetrator returning to the home. GO orders should reduce the number of victims forced to flee their homes because of domestic violence. This is often an extremely disruptive and expensive 'solution' which can damage children's schooling, result in victims losing their homes, friends and communities and place unnecessary burdens on the voluntary sector and homelessness services.

- Concerns about GO notices/orders

These potential benefits need to be set against the potential negative impact of GO orders on alleged perpetrators who would be deprived of

access to their home, initially for 48 hours through a Domestic Violence Protection Notice (DVPN). This period could be extended from 2-4 weeks if a magistrate's court issues a Domestic Violence Protection Order (DVPO).

There are also concerns that GO orders would undermine the right to a fair hearing and leave alleged perpetrators exposed to false allegations. Concerns that false allegations are common are not supported by evidence. For example a US study of more than 2000 divorce cases found that less than 2% involved false allegations of abuse¹¹. In reality, victims are more likely to under report domestic violence than they are to exaggerate.

The Commission is unclear as to the relationship between Domestic Violence Notices and Orders and other non molestation orders, in particular orders under Part 4 of the Family Law Act 1996 and the Domestic Violence, Crime and Victims Act 2004. In particular the Commission notes that under the current provisions there appear to be no penalties or provision for determination of breach of the DVPO or DVPN. The Commission would suggest to would be helpful to clarify these issues on the face of this legislation or in the explanatory notes.

- Safeguards

The proposals in the Crime and Security Bill would enable the police to issue a DVPN where they have reasonable grounds for believing that domestic violence has taken place or been threatened and that a DVPN is needed to protect the victim. A DVPN could only be issued by an officer ranked superintendent or above.

A DVPN must be followed by a police application for a Domestic Violence Protection Order (DVPO). The application must be heard within 48 hours of the DVPN. The alleged perpetrator would be notified of the hearing and would have the opportunity to oppose the order.

In making a DVPO, the court would need to be satisfied that on the balance of probabilities domestic violence has been committed or

¹¹ Thoennes and Tjaden 1991, from *Mothering Through Domestic Violence*, L Radford and M Hester, 2006

threatened by the alleged perpetrator and that a DVPO would be needed to protect the victim.

The Commission believes that the relatively short length of the DVPN (48 hours), the requirement for the police to obtain a DVPO at court within 48 hours and the opportunity for the alleged perpetrator to make their case in court against a DVPO provide safeguards that limit the negative impact on alleged perpetrators.

The Commission considers that provision should be made to enable the police to accompany the person subject to a domestic violence notice or order to return to the premises for a short period for the purposes of collecting essential personal items. In addition in the pilot scheme the Commission would welcome consideration of support available to both the person subject to such a notice or order, and the person such a notice or order seeks to protect.

In addition, the Commission is reassured that the Government intends to pilot the new orders in two police force areas which will enable their impact on both victims and alleged perpetrators to be evaluated.

Anti-social behaviour orders

The Bill contains provisions requiring a family circumstances assessment to be carried out when an application for an anti-social behaviour order (ASBO) is made. The Bill makes a further provision about the circumstances in which the court must make a parenting order on breach of an ASBO.

Community safety agencies with powers to issue ASBOs are subject to public sector duties, in respect of race, gender and disability. As such, they are required to pay due regard to those who are victims of anti-social behaviour as well as the perpetrators.

Any report on family circumstances must also pay due regard to promoting equality and eliminating discrimination and harassment in relation to both the victim(s) and the perpetrator(s).

In August 2008, the Commission made submissions to the UN Committee on the Rights of the Child, in which we made reference to the issue of ASBOs. The submission highlighted four areas of concern:

1. The early criminalisation of children and young people. We raised concerns that ASBOs are overwhelmingly being given to children,

when the intention had initially been for them to be focussed on adults. A survey of 54 Youth Offending Teams suggested that one in three children is unable to fully comprehend the conditions of their order because of learning or communication difficulties. Also, preliminary findings of the British instituted for Brain Injured Children suggested that many as 1 in 3 of all ASBOs issued to people aged under 17 years were to children with a diagnosed mental disorder or accepted learning difficulty.

2. Naming and shaming-privacy rights.
3. The disproportionate use against ethnic minority children.
4. A lack of effective procedural safeguards and absence of fair hearing, due to blurring of the distinction between criminal and civil proceedings.

January 2010