COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Consultation on Legislative Proposals for DNA/Fingerprint Retention

28 June 2011

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Seán Lynch
Ms Jennifer McCann
Mr Alban Maginness
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr Gary Dodds	)	
Mr David Hughes	)	Department of Justice
Mr Ian Kerr	)	

The Chairperson:
I now invite officials from the Department of Justice (DOJ) to outline the responses to the consultation on the legislative proposals for DNA and fingerprint retention and destruction.

Mr David Hughes (Department of Justice):
Thank you very much. We will discuss the legislation that has been proposed, and we will then go on to an overview of the responses that we have received to the public consultation. The

current law on the taking, retention, use and destruction of DNA and fingerprints is in the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE). Under PACE, the police may retain indefinitely the DNA sample, profile and fingerprints taken from a person arrested for a recordable offence, irrespective of whether that person is subsequently convicted. Material taken from a person in connection with an offence may not be used other than for purposes related to the prevention or detection of crime, the investigation of an offence or identification purposes.

In December 2008, the European Court of Human Rights found that, as in England and Wales, the blanket policy in Northern Ireland of retaining indefinitely the fingerprints and DNA of all people arrested but not convicted breached the right to private life under article 8 of the European Convention on Human Rights (ECHR). In making its judgement, the court noted that England, Wales and Northern Ireland were the only jurisdictions in the Council of Europe to allow the indefinite retention of the fingerprint and DNA material of any person of any age suspected of any recordable offence. The court found that such indefinite retention failed to strike a fair balance between the competing public and private interests involved and that that amounted to a disproportionate interference with the right to respect for private life. Our understanding is that the court's judgement chimed with some unease in other circles about the policy.

The Minister has made it clear that he wants to restore that balance between public and private rights and to move to protect the right of individuals to private life. In addition, as a signatory to the ECHR, the UK Government are obliged to abide by the final judgements of the court. PACE is a transferred matter in Northern Ireland; therefore, it is for the Assembly to put in place whatever corrected measures it considers appropriate to comply with its legal obligations to abide by the judgement.

A new regime that is broadly aligned to the current law in Scotland is proposed for Northern Ireland. That will replace the blanket and indefinite nature of our current scheme with a more time-limited approach. Scotland has a different system for the retention of fingerprints and DNA, and the European court drew specific attention to that in its judgement. Scottish law allows the DNA and fingerprints of non-convicted persons to be retained only if the arrestee is charged with a serious violent or sexual offence and even then for three years only, with the possibility of further extensions of two years on application by the police to the courts.

The proposals that we have just consulted on are for a new legislative framework for material taken under PACE where retention periods depend on a number of different factors, including the age of the individual concerned, the seriousness of the offence or alleged offence, whether a conviction is secured, and, for under-18s, whether it is a first conviction. I will run through those proposals more specifically. For those not convicted of minor offences, it is proposed that DNA and fingerprints will be destroyed immediately. Person arrested for but not charged with more serious offences will also have their material destroyed immediately, unless certain prescribed circumstances apply. Such circumstances are not yet determined, but the consultation paper flags up that they may include, for example, where the victim is under 18 at the time of the offence or where the victim was a vulnerable adult or as associated with the arrested person.

In cases where a person has been charged but not convicted of a serious offence, it is proposed that their fingerprints and DNA will be retained for three years, with the option of a single extension for two years on application to a court. We are proposing that adults convicted of a recordable offence will continue to have their fingerprints and DNA retained indefinitely.

Different arrangements will apply for those under 18 who are convicted of a first minor offence. In cases where a juvenile is convicted of a minor offence but does not receive a custodial sentence, fingerprints and DNA will be held for five years. Where a conviction involves a custodial sentence of less than five years, the material will be retained for five years plus the length of the sentence. Juveniles convicted of a serious offence or who receive a custodial sentence of five years or more will have their material held indefinitely, as will be the case if a juvenile is convicted of a second offence.

All DNA samples, which, in the majority of cases, are mouth swabs, will be destroyed as soon as a satisfactory DNA profile is derived from the sample and no later than six months from the date on which it was taken. In all cases, it is proposed that the DNA profile and fingerprints of any person arrested for a recordable offence may be subjected to a speculative search against the database before being destroyed. That will ensure that the police will secure further investigative leads for those who may have committed crimes in the past and who have left their DNA or fingerprints at the scene. The proposals mean that the fingerprints and DNA of a proportion of

unconvicted persons will be destroyed.

Public consultation on the retention proposals concluded on 7 June and attracted a total of 18 responses, of which 14 contained substantive comment. Unsurprisingly, a wide range of views was received. Generally, it would be fair to say that most respondents viewed the proposals favourably as providing a more balanced and proportionate approach to how biometric material from innocent people is dealt with. Some felt that the proposals did not go far enough, and others felt that they went too far. Only two respondents advocated the continuation of the current policy of retention.

The police have highlighted a possible adjustment. They felt that the proposal to allow the retention of DNA and fingerprints of only those charged but not convicted of serious offences set the bar too high and that the threshold should continue to be on arrest rather than on charge. On the other hand, some held the view that no material whatsoever should be retained from those who have not been convicted of a crime, irrespective of the nature of the alleged offence.

On specific proposals relating to children, again, a range of views was expressed. Some felt that retaining the material from under-18s who were charged but not convicted of a serious offence was not in their best interests and would have a stigmatising effect. Others went further by wholly opposing the taking, collation and retention of DNA and fingerprints from under-18s.

The challenge for the Department will be to propose a framework that strikes the right balance between the competing demands of public protection and individual rights. We believe that the proposals as a package deliver that important balance, although the Minister will wish to take some further time to fully consider issues arising from the consultation before coming to a final policy position.

There were also responses from consultees specifically seeking more detail about issues that are not yet determined; for instance, the nature of the special circumstances under which DNA may be retained when a person is arrested but not charged or the processes that will be required for the extension of retention in the courts. In response to our own questions in the consultation document, there were differing views on whether to have our own biometrics commissioner in

Northern Ireland or to use one who covers other jurisdictions. There were also views on whether the retention schedule should apply as equally to photographs as it does to DNA profiles and fingerprints.

I hope that that gives the Committee a general overview of what is a complex policy area. We are very happy to take any questions. Over the summer, we will be preparing further advice to the Minister based on the consultation responses and the consideration of issues raised, and, of course, the Committee's views will be important in that. We hope that that will allow for the introduction of legislative provisions in the autumn, subject to Executive approval.

The Chairperson:
Thank you, David. So, when the Minister is considering this, will he be looking at changing the proposals for the Northern Ireland framework where it is weaker in comparison with that in Scotland?

Mr Hughes:
Which particular —

The Chairperson:
I am talking about the category concerning the adult non-conviction of serious crime. In Scotland, you can have a two-year rolling extension, as opposed to the single two-year extension that the Department is proposing. Likewise, for 16- and 17-year-olds not convicted of serious crime, again, in Scotland there is another two-year rolling extension if the court grants it. Your proposal is for a single, one-off two-year period. Again, in Scotland under-18s not convicted of serious crime can have a two-year rolling extension as opposed to your single two-year extension.

Mr Hughes:
Yes, I think that the distinction between the Scottish system with the rolling extension and the original proposal to have the option of a single extension will need to be borne in mind as the policy is finalised, because, clearly, there is a difference. It would be quite important to find out whether that makes a difference and to find out about the experience in Scotland of rolling extensions and the degree to which they are used.

The Chairperson:

For the conviction of under-18s for minor crime, Scotland is going for indefinite retention. The Department's proposal for a first conviction is retention of only five years, and the second conviction would lead to indefinite retention. Why again is the Department's proposal weaker than the position in Scotland?

Mr Hughes:

It is about recognising that we have the opportunity to put in a framework that is aware of the distinction between the treatment of juveniles and adults. The court was critical of a blanket and indiscriminate framework on that point. So, we have the opportunity to look at this afresh for ourselves, and it has been felt that it is appropriate to recognise the different circumstances in which juveniles find themselves and to have a different approach to the retention of information on juveniles.

The Chairperson:

How will the Department take on the PSNI's response, which says that it does not support the proposal that material be retained only in cases where persons are charged but not convicted of serious offences? In the light of the PSNI response, which is pretty critical, will the Department reflect the changes to the proposals to take those comments into account?

Mr Hughes:

We expect that there will be continuing dialogue with the PSNI about that, because there are other ways of addressing the issues that it raised. In particular, the original proposals that the Department set out included the idea that there would be prescribed circumstances in which material taken from someone who is arrested but not necessarily charged could be kept. Those prescribed circumstances have not been defined, and it may be that looking at that element of the policy begins to address some of the issues that the PSNI is looking at.

The Chairperson:

Are the DNA proposals being taken forward in the compliance Bill? How will the Department take that issue forward?

Mr Hughes:

A couple of issues need to be addressed with some haste because of the issue of compliance. I know that there is an issue with calling the Bill a "compliance Bill". That is not for us; it is really for the draftsman. The intention is to bring forward the provisions very early in the autumn rather than later in the Assembly session and move it ahead quite quickly. I understand that other provisions on sex offenders can be treated in the same way.

Mr Wells:

About 11 years ago, I was involved in a traffic accident, and, as part of the investigation, all the various samples were taken from me. For two reasons, I had absolutely no objection to that and had no objection to their being retained. First, in the unlikely event of my being involved in a serious offence later in life, I would have been instantly detected as a result of my DNA. Secondly, as I knew that my sample had been retained, I would have jolly well made certain that I was not involved in any future event, which I assure you I was not.

I cannot see what all the fuss is about here. The European Court is not the European Commission or the European Community; it is a group of judges from European countries, including such well-known democracies as Azerbaijan, that dictates what we, as a Western democracy, do or do not do. Frankly, I think that anything that we can do to help the PSNI catch the criminal is a good thing and that, if you do not get involved in crime, you have nothing to fear from this system.

The issue was debated in the Commons yesterday, and one MP, quite rightly in my opinion, raised the issue of a rapist who was caught and given a 15-year sentence. He had been charged with but not convicted of a previous sexual offence, but his DNA had been retained. He was caught and imprisoned and was no longer a danger to women in that area because the DNA had been retained. Why on earth are we having this argument, which is like that about dancing on the head of a pin, when such an obvious tool, which is of use to the PSNI, should be retained, particularly in the circumstances that we face in Northern Ireland?

Mr Hughes:

We are in the position where the option of maintaining the current policy of blanket retention has, in fact, ceased to be an option.

Mr Wells:

It is not an option only because the European Court has told us so. Practically, it can be done.

Mr Hughes:

The UK Government are required, and colleagues will stop me if I get this wrong, to comply with the judgment of the court. As it is, the court has pointed out where the policy is in contravention of the European Convention on Human Rights. The Minister recognises that that is actually an important point to have been made, in that the policy transgresses article 8 on the right to private life. Therefore, to protect that right of individuals, the Minister is seeking to make a change to the retention policy.

Mr Wells:

Yes. However, there are variations on that policy between what we have and what is in Scotland and England. I would like to think that we would go as far as possible on the maintenance of DNA samples for as long as possible. Are there examples in Northern Ireland of when people have been convicted because a sample was retained? That could not happen now under the proposals.

Mr Hughes:

I do not have any specific examples of that.

Mr Wells:

I suspect, and, certainly, the English example indicates, that, yes, there are examples. They tend to be cases of sexual offences, which are extremely serious and, often, do not lead to convictions. A very small proportion of sexual offences cases actually end with convictions. Some people are charged, but many are reported and it goes no further. Therefore, if it meant that vulnerable people such as women and children were protected, I cannot see why we would not aim for the strongest possible retention. OK, we may have to obey the diktat from the European Court. Of

course, we could seek a derogation, if we wanted to. Equally, however, we should aim as far as possible to retain samples within that ruling. Why would you decide to scrap all samples and make the police's job as difficult as possible?

Mr Hughes:

It is worth reflecting that the court, in its judgment, pointed to the Scottish model as one that it recognised as having achieved the balance at which it aimed. A very important element of the development of policy proposals in Northern Ireland is that the Scots have a model that we can look at to see how it might be applied here.

The Chairperson:

Your proposals are weaker than the Scottish model.

Mr Hughes:

They are not precisely the same. They recognise the opportunity to make a differential, particularly with regard to juveniles.

The Chairperson:

By the time that you hope to bring forward legislation, will England have put its proposals in place?

Mr Gary Dodds (Department of Justice):

England's provisions are in the Protection of Freedoms Bill, which has just completed Committee Stage at Westminster. Its Report Stage is next. It is expected that the Bill will probably receive Royal Assent in January.

The Chairperson:

I am reluctant for us to produce a Bill if, ultimately, Westminster's Bill introduces a stricter regime and we have gone ahead of the game. Is it not better for us to ensure that our system is in line with what other jurisdictions propose? We certainly do want a system that is weaker than those of other jurisdictions.

Mr Hughes:

The commitment in the coalition's Programme for Government was to adopt the Scottish model. That is the position that the UK Government have taken in legislation for England and Wales. Therefore, they have indicated that they want to see a greater degree of consistency between England, Wales and Scotland. Effectively, by looking at the Scottish model, we are endeavouring to achieve a degree of consistency between all three jurisdictions. Although they may not all be absolutely identical, there is an appetite to achieve a greater degree of consistency than had been the case previously when England, Wales and Northern Ireland had indefinite retention and Scotland had retention of three years, after which there could be rolling two-year extensions.

Ms J McCann:

Thank you. I apologise for missing part of your presentation. I have a couple of questions on responses to the consultation that you received, particularly those from the Children's Law Centre and the Commissioner for Children and Young People. They have sought clarity that the proposals actually define juveniles as children who are as young as 10 and up to 18. I think that the Children's Law Centre was also concerned about taking DNA samples from children who are as young as 10. I just wanted some clarity on that. Does that happen at the moment? The Human Rights Commission is concerned because there is a lack of clarity on what the term "national security" means. Have you factored that in or taken it into consideration?

Mr Dodds:

In police and criminal evidence legislation in Northern Ireland, a juvenile is defined as anyone under the age of 18. As regards the retention framework, DNA and fingerprints are held for juveniles between the ages of 10 and 18.

Ms J McCann:

As young as 10?

Mr Dodds:

No samples for juveniles under the age of 10 are held on the database. Ten is the age of criminal responsibility.

Mr Hughes:

We can speak about what is possible under the legislation. We are not able to say precisely what is there, because it is an operational matter.

Ms J McCann:

Will there be some clarity on what the broad term "national security" means?

Mr Hughes:

The UK Government are putting in place specific provisions on the treatment of data that could be classed as issues of national security. That is not something that the Department of Justice or the Assembly have a role in, because it is an excepted matter and is out of our hands. I cannot comment on the definition of national security. How that legislation is cast and effected is probably something that falls to the Home Office. It is not something that we deal with.

Mr Dodds:

It would be very difficult to define national security. I am not sure —

Ms J McCann:

That is the point that the groups are making.

Mr Dodds:

— how legislation would define it. David said that it is an excepted matter, but there will be a biometric commissioner who will oversee the whole operation of national security determinations. Oversight arrangements will be in place for that.

Mr Hughes:

It is worth reiterating that that is describing a Home Office policy that we are aware of.

Ms J McCann:

The Human Rights Commission also referred to the lack of clarity on prescribed circumstances and early deletion procedures.

Mr Hughes:

Deletion processes and issues like that will end up being quite process driven and administrative, so we will need to work those through in due course. We flagged one or two examples of what those prescribed circumstances, under which material can be retained for someone who has been arrested but not charged, could be. We imagine that it would be instances in which the victim is a juvenile, is vulnerable or is known to the person who was arrested. It refers to victims who are in a vulnerable position, so it is being cast from a victim's perspective. There may be a particular reason why it is important that there is retention for those purposes. However, those are not set. It has been very useful to get the responses from consultees on those points.

Mr Dickson:

I will follow on from Mr Wells's point about the blanket destruction of fingerprints and DNA. You talked about a person being arrested but not charged with a serious offence unless prescribed circumstances apply. Could those prescribed circumstances include investigations into serious sexual assaults or the type of circumstance that Mr Wells referred to? Could those be set out as a prescribed circumstance?

Will you give us some idea of the scope and nature of the quantity of material that you might have to destroy at some stage?

Mr Hughes:

As I said, the prescribed circumstances have not been determined or finalised. I think that it will be very useful to bring a number of issues into the Minister's consideration. The point that was made about sexual assaults, where arrest may be relatively straightforward but charge may be very difficult, is one that we need to take away.

Mr Dodds:

It is very difficult to ascertain figures until the software modifications are made to the system. However, to give a ballpark figure, around 110,000 subject profiles are held on the DNA database. We reckon that around 30,000-plus profiles would have to be destroyed under the proposals. That includes profiles from people who have not been convicted, but there is also the historic destruction of material from people who have been convicted, such as those under 18.

Those would be destroyed only if a first offence were concerned, so, collectively, there are around 30,000-plus profiles. Around one million fingerprint sets from around 250,000 people are also held, and around 130,000 of those sets would have to be destroyed.

Mr Dickson:

Given the propensity for mistakes to be made, if you get to the point where legislation permits that destruction, what robust mechanisms will you put in place to ensure that the law is being complied with and that people have no concerns that their records are being retained, because the law does not permit retention? Equally, what mechanisms will be in place to assure society that it is being protected and that someone's records are not inadvertently deleted when they should have been retained?

Mr Hughes:

We are acutely conscious, as are the police and those in Forensic Science, of the need to ensure that any destruction programme is carried out incredibly carefully. That has always been very clear. It is also very important that any destruction programme in Northern Ireland is carried out to a standard that is recognised in other jurisdictions, thereby ensuring that there is no compromise.

The Chairperson:

OK, thank you members and officials.