



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Criminal Justice Bill: DNA/Fingerprint
Retention Clauses — NICCY Briefing

4 October 2012

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 Alex Easton
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Patsy McGlone
Mr Jim Wells

Witnesses:

Mrs Patricia Lewsley-Mooney Northern Ireland Commissioner for Children and Young People
Ms Colette McIlvanna Northern Ireland Commissioner for Children and Young People

The Chairperson: I welcome Patricia Lewsley-Mooney, the Commissioner for Children and Young People, and Mairéad McCafferty, the chief executive of the Northern Ireland Commission for Children and Young People (NICCY). The meeting will be recorded by Hansard.

Mrs Patricia Lewsley-Mooney (Northern Ireland Commissioner for Children and Young People):

I thank the Committee for the opportunity to present the evidence concerning the aspects of the Criminal Justice Bill that relate specifically to the retention of fingerprints and DNA profiles. Unfortunately, Mairéad could not make it and is not with me today. With me is Colette McIlvanna, who is from my legal and casework team.

The Chairperson: Collette, you are very welcome.

Mrs Lewsley-Mooney: I will give a brief presentation and then open it to questions from members. As you may be aware, under the legislation that created my office, I have a mandate to keep under review the adequacy and effectiveness of law practice and services relating to children and the rights and best interests of children and young people by relevant authorities. In determining how to carry out the functions of my office, my paramount consideration is the rights of the child, and the work of my office is based on the United Nations Convention on the Rights of the Child (UNCRC).

The retention and destruction of the fingerprints and DNA of children and young people is an issue that I have been monitoring for some time. In 2007, I highlighted my concerns about DNA retention, particularly its indefinite retention. I asked the PSNI and the Policing Board to reconsider their position because I believed that it potentially contravened articles 16 and 40 of the UNCRC, which relate to children and young people's rights to privacy and freedom and to be presumed innocent until proven guilty.

In 2008, my office submitted joint evidence with the Children's Commissioners in England, Scotland and Wales to the UN Committee on the Rights of the Child, arguing that the indefinite retention of children's DNA contravened children's privacy rights under article 16 of the UNCRC. The UN committee shared this view, and in its concluding observations in November 2008, it recorded its concerns around the issue that data regarding children are being kept in the national DNA database, irrespective of whether the child is charged or found guilty. The committee then called on the Government to introduce stronger regulations for data protection in relation to legislation and practice where this potentially impacted on children and young people's right to privacy.

In June 2011, my office responded to the Department of Justice consultation on proposals for the retention and destruction of fingerprints and DNA in Northern Ireland. This response was forwarded previously. Many of the concerns that were identified in our response arose again in our analysis of this Bill. Indeed, it appears that very few of the issues that we raised were addressed in the Bill. In reviewing the Bill's proposals, I believe that insufficient consideration has been given to the potentially negative implications of retaining DNA profiles and fingerprints, particularly where these impact on a child or young person's privacy and safety or when it leads to them coming into contact with the criminal justice system.

In its evidence to the Committee for Justice on 28 June 2011, the Department of Justice confirmed that, under police and criminal evidence legislation, DNA and fingerprints are held for juveniles between the ages of 10 and 18. This means that children as young as 10 may be asked to give DNA samples and fingerprints and, according to the Bill, to give their consent to have these samples taken. Therefore, I am concerned that such young children will be required to provide DNA samples, and I am also concerned that it is unclear how that consent will be sought. The Department of Justice consultation on the retention of DNA data and fingerprints states that the proposals will differentiate between adults and minors to ensure that particular attention is paid to the protection of minors. However, the only difference in the Bill appears to relate to a first conviction for a minor offence. Where a young person has no previous convictions and they receive a custodial sentence of less than five years, it is proposed that the material may be retained for a further five years. Where the sentence exceeds five years, it is suggested that the material may be retained indefinitely. Furthermore, where a young person has a previous conviction for a minor offence and they are charged with or arrested for a minor offence, the Bill allows for the indefinite retention of DNA or fingerprints. The retention of a child or young person's DNA or fingerprints for this period of time for a conviction for a minor offence does not constitute a proportionate response. Children and young people should be afforded maximum protection under the law. However, five years without adding on the period of the custodial sentence is a considerable period for a child or young person's personal details to be retained by government. Therefore, I suggest that the Committee consider recommending a reduction in the period of retention of DNA and fingerprint material for young people who are convicted of a first, minor offence.

It is also of significant concern that the Bill includes a caution within the definition of an offence for which a person is convicted. That means that, in certain circumstances, if a child or young person has received a caution for a previous offence, their DNA or fingerprints could be retained indefinitely. Given that the purpose of a caution is to divert young people away from the criminal justice system, to include cautions under the definition of offences seems inappropriate and disproportionate.

If a child or young person is charged but not convicted of a serious offence and has no previous convictions, the Bill, as drafted, provides that their DNA or fingerprints may be retained for a period of three to five years. If a young person has been arrested but not charged, their DNA or fingerprints may be retained if prescribed circumstances apply. It will be important to ascertain what these circumstances may be, and, again, I would question whether this period of retention is proportionate. We have already heard from the Children's Law Centre that this issue is being addressed in the Bill. We welcome that. If a child or young person has not been convicted of or even charged with an offence, their DNA and fingerprints should not be retained. To do so is to seriously undermine the right to a presumption of innocence until proven guilty, thereby contravening article 40 of the UNCRC.

Research suggests that a disproportionate number of young people come into contact with the police and that it may be due to the fact that some are more likely to offend in their teenage years. Children and young people's lack of maturity should be taken into account and they should not be stigmatised by actions undertaken before they have reached adulthood. In my response to the Department's consultation, I suggested that consideration should be given to reviewing the retention of young people's DNA data and fingerprints once they reach 18, so that they might be given an opportunity to enter adulthood with a clean slate. This decision would, of course, be dependent on the seriousness

of the crimes committed and the number of offences for which they have been convicted. However, I recommend that particular consideration be given to this proposal where children or young people have been arrested for or charged with minor offences or have been convicted for the first, minor offence.

The proposal to grant an extension to the retention period for DNA and fingerprints will require very careful monitoring and regulation. If a court grants an extension for the retention of the DNA of a child or young person who has been charged but not convicted, this creates the impression that doubt and suspicion remain regarding their innocence, further stigmatising them. It also contravenes article 40 of the UNCRC. The Bill, as drafted, indicates that the person from whom the material was taken may appeal against an order to extend the retention period, so careful consideration should be given as to how a child or young person would be supported to undertake such an appeal. Appropriate and effective mechanisms should be put in place to enable them to pursue this.

The proposals in the Bill mean that many young people will enter the criminal justice system and be given a criminal record. I strongly believe that, wherever possible, the Government should actively seek to divert young people away from the criminal justice system, because contact with that system clearly has an adverse impact on young people's lives, potentially impacting on their physical, mental, emotional and social development, and creating significant challenges to their ability to reintegrate into society.

In conclusion, I believe it is crucial that the key human rights principles of proportionality, necessity and presumption of innocence strongly underpin the Bill's provisions regarding the retention and destruction of DNA profiles and fingerprints. While recognising the potential value of such material as intelligence and evidence tools, that has to be balanced against the extremely personal nature of the data. Consideration must be given to the potentially negative implications of retaining that information, particularly when it impacts on a child or young person's privacy and safety, and leads to their coming into contact with the criminal justice system. The special status of children and young people should be taken into account, and their protection should be identified as a key priority.

The Chairperson: Thank you very much, commissioner. Hopefully, members will not repeat some of the earlier arguments and you will be saved from an onslaught. I want to pick up on a couple of points. First, you highlighted the fact that you are concerned about this applying to 10-year-olds. If it is going to apply to children under 18, what is an appropriate age?

Mrs Lewsley-Mooney: I suppose you are getting into the argument about the age of criminal responsibility. We believe that 10 is far too young for this. How are you going to ask that child for permission? Are you saying that, at 10 years of age, the child understands the situation, what you are asking them and the permission that they are giving? You need to take that into consideration.

The Chairperson: The point I am trying to make is this: can you envisage us introducing a different age of 12 or 14 for this while 10 remains the age of criminal responsibility? My natural logic dictates to me that if 10 is the age of criminal responsibility, it is also the appropriate age for the retention of this information. Is there any justification for departing from that thinking?

Ms Colette McIlvanna (Northern Ireland Commissioner for Children and Young People): There are issues with asking a 10-year-old to consent to something as serious as having their DNA taken and potentially retained. We know, through research and experience, that a large proportion of young people at the top end of the spectrum who interact with the criminal justice system have their own needs because of learning disabilities or mental health difficulties. So, the capacity to consent is an issue not just for 10-year-olds but for 17-year-olds and 18-year-olds at the top end of the spectrum. That issue also needs to be addressed.

Mr A Maginness: Welcome back to the Assembly, commissioner. We heard from the Children's Law Centre. It seems, from your submission, that you are on all fours with what it is saying. Is that correct? In fact, you reflected what the chief commissioner of the Human Rights Commission said: this is about proportionality and getting the balance right.

In summary, just to make it very clear, children who have not been charged with any offence should not have their DNA or fingerprints retained.

Mrs Lewsley-Mooney: Yes. That is an absolute.

Mr A Maginness: That is an absolute as far as you are concerned. For those who have been cautioned, are you saying that there may be some circumstances where that could be retained?

Mrs Lewsley-Mooney: I think there would have to be exceptional circumstances, but we have the same concerns as previous speakers around cautions now being included in this. Our understanding is that a caution, particularly for a young person, is a route to ensure that they are diverted away from the justice system. So, to retain their DNA under any circumstances is, I suppose, a counterargument to that.

Mr A Maginness: Let us leave cautions and move on to people who have been charged and then convicted. Do you accept that their DNA and fingerprints should be retained?

Mrs Lewsley-Mooney: I think that, again, it has to be proportionate, depending on what the conviction is. If that is to be extended, young people need to be given an opportunity to appeal that decision and to be supported through the process so that they have a better understanding of why that is being done.

Mr A Maginness: Yes, and that reflects the position of the Human Rights Commission. I put it to the Children's Law Centre that there may be circumstances when the retention of DNA and fingerprints may be of assistance when either is discovered at a criminal locus. In that situation, the identification of those young people may be helpful in order to protect them. Have you any comment on that?

Mrs Lewsley-Mooney: My worry is that that is a presumption. The example that you gave was that this could have been an innocent young person caught up with people who were less than innocent.

Mr A Maginness: Yes.

Mrs Lewsley-Mooney: The issue then is that, if those DNA and fingerprints are retained, it may go to the opposite end of that, so they could be convicted.

Mr A Maginness: No, I was suggesting that that may well be a warning to the police. Here are youngsters who have found themselves in a vulnerable position where there are criminal elements intent on doing them harm and that they, in fact, may be rescued or assisted in that situation. That is the point I was making. It is probably an extreme situation; nonetheless, you have to take it into consideration as well.

Ms McIlvanna: We appreciate that it would be in extreme circumstances. I suppose what we are saying in our constant call for joined-up working in connection with children is that it should not be down to the police to make that link. The other services available to children through social services, family networks and schools should have identified that issue in advance of leaving it to when the horse has bolted and the police then have to DNA-swab a scene to find out whether a child is there. We would hope that there would be more early warning systems to allow that to pertain.

Mr Lynch: Commissioner, you outlined concerns in your opening statement. You said that very few of them had been addressed in the Bill. Do you think that the Bill has got the issue right in relation to the protection of children?

Mrs Lewsley-Mooney: No, we would have liked the Bill to have gone further than that, particularly, as was mentioned, on the issue of cautions, retention and the differences around the reasons why DNA and fingerprints would be kept. The other issue for us is around the presumption of innocence. I am afraid that at times that could be that, as I said with regard to article 40 of the UNCRC, the retention of the DNA would presume that they are going to be guilty in the future rather than innocent now and probably innocent in the future.

The Chairperson: In hindsight, we should have put you with the Children's Law Centre. However, thank you very much.

Ms Lewsley-Mooney: Thank you.