



Response on the Criminal Justice Bill 2012

SUMMARY

- A. The Commission broadly welcomes the Criminal Justice Bill 2012, in particular the provisions relating to human trafficking. The provisions of the Bill relating to the sex offender register and the fingerprint and DNA retention framework are intended to ensure that both systems do not unduly interfere with an individual's right to private life.

- B. The Commission has reviewed the proposed procedure whereby individuals who have been placed on the sex offender register may apply to the Chief Constable or on refusal to the Crown Court to be removed from the register on grounds that they no longer pose a threat to the public. This procedure acknowledges the potential for rehabilitation whilst ensuring protection for the public. The Commission suggests a number of issues regarding procedural matters which the Committee may wish to consider.

- C. The Commission welcomes the proposed reforms of the fingerprint and DNA retention framework and encourages the Committee for Justice to consider in detail the proportionality of each aspect of the proposals, in particular we encourage the Committee to consider:
 - 1. Whether the indefinite retention of fingerprints and DNA profiles of all adults convicted of a recordable offence is fair and proportionate given the absence of a process whereby an individual can apply to have their fingerprint and DNA profile deleted.
 - 2. Whether provision for the retention of fingerprint and DNA profiles of individuals charged or arrested with a qualifying offence appropriately safeguards the presumption of innocence.

3. Whether the provisions of the Bill relating to children are proportionate and in line with Government's obligation contained within the Convention on the Rights of the Child to promote a child offender's sense of dignity and worth.
- D. The Commission welcomes the creation of a number of new offences relating to the trafficking of people for sexual and other forms of exploitation. The EU Directive and the UN Protocol on the Trafficking of Human Beings require a comprehensive approach to the issue of human trafficking. We encourage the Committee to keep this matter under review.

Introduction

1. The Northern Ireland Human Rights Commission ('the Commission') pursuant to Section 69 (4) of the Northern Ireland Act 1998 advises the Assembly whether a Bill is compatible with human rights.¹ In accordance with this function the following statutory advice is submitted to the Committee for Justice ('the Committee').
2. The Commission bases its position on the full range of internationally accepted human rights standards, including the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998* and the treaty obligations of the Council of Europe and United Nations systems. The relevant international treaties in this context include;
 - *The European Convention on Human Rights, 1950* ('ECHR') [UK ratification 1951];
 - *The International Covenant on Civil and Political Rights, 1966* ('ICCPR')[UK ratification 1976];
 - *The United Nations Convention on the Rights of the Child, 1989* ('UNCRC')[UK ratification 1991];
 - *The Convention on the Elimination of Discrimination Against Women* ('CEDAW) [UK ratification 1986]
3. The Northern Ireland Executive is subject to the obligations contained within these international treaties by virtue of the United Kingdom's ratification. The Commission, therefore, advises that the Committee scrutinises the proposed Bill for full compliance with international human rights standards.

Proportionality

4. In addition to introducing a number of new offences relating to human trafficking, this Bill will reform the framework for the notification requirements for sex offenders and the framework for the retention of DNA and fingerprints. The main issue under consideration in respect of both frameworks is whether the proposed amendments will ensure the degree of interference with an individual's right to private life will be proportionate. In this introduction the Commission sets out the rules governing permitted interferences with the right to private life.
5. An individuals' right to private life is protected by Article 17 of the ICCPR and by Article 8 of the ECHR. Article 8 of the ECHR states:

¹ *Northern Ireland Act 1998*, s.69 (4)

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

6. States are therefore permitted to interfere with the right to private life under certain prescribed conditions. Where Government intends to interfere with the right to private life it must ensure that the various conditions are in place. Through its jurisprudence the European Court has developed a three-part enquiry which Governments and legislators can adopt when determining if a particular measure is human rights compliant.² The aspects of this enquiry are:

- A. There must be a legal basis for the interference
- B. It must pursue a legitimate aim
- C. The limitation on the right must in all the circumstances be necessary in a democratic society – on an assessment of all relevant facts it must be proportionate

7. The most complicated aspect of the enquiry is the assessment of whether the measure is proportionate and necessary in a democratic society. This is the principal issue under consideration with respect to both the sex offender notification arrangements and the DNA retention framework.

8. In assessing the issue of proportionality the Committee must ensure that the reforms are grounded on a solid evidential basis which demonstrates that the measures will achieve the legitimate aims which they pursue without arbitrarily impacting on individuals' human rights.

Sex Offender CL 1 - 4

9. The Commission has reviewed the provisions of the Bill relating to the notification requirements placed on sex offenders. This is laid down in law and pursues the legitimate aim of protecting the public. The introduction of a procedure which will allow those under notification

² Klass v Germany, (App. 5029/71), 6 September 1978

requirements to apply to the Chief Constable, and if they are unsuccessful to the Crown Court, to have their notification requirements discharged on the grounds that they are no longer a danger to the public, appears to ensure that the interference with the individual's right to private life is proportionate.

10. In considering the proportionality of this measure it is important to note the risk posed to the public.³ The risk of harm to the public posed by sex offenders is significant and protective measures are required. International human rights law places various positive obligations on states to protect citizens from harm. There are specific obligations in respect of vulnerable groups. The UN Committee on the Elimination of Discrimination Against Women have made specific reference to states' obligation to protect women against sexual violence, the Committee in their General Recommendation No. 19 state:

*"States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention"*⁴

11. Furthermore the UNCRC at Article 34 places a specific duty on the State to protect children from all forms of sexual abuse and exploitation.
12. The need to protect the public must be balanced against the rights of the offender. The current rules, under which an offender sentenced to more than 30 months imprisonment for a relevant offence will be included on the register indefinitely runs contrary to Article 10 of the ICCPR, which states that the treatment of offenders should at least contemplate the possibility of rehabilitation. Furthermore the Supreme Court in the case of R and Thompson 2010 has ruled that the notification requirements represent a disproportionate interference with the offender's right to private life.⁵ The amendments contained within this Bill at clause 1 and Schedule 1 appear to address these two issues.

³ The Commission has consistently raised concerns regarding the effectiveness of arrangements for the treatment of sexual offenders. The availability of effective sex offender treatment programmes are essential to limiting the risk that a sex offender will pose on release.

⁴ General Recommendation No. 19 (11th session, 1992)

⁵ [2010] UKSC 17

13. The Commission advises that the Committee seek further information from the Department as to how the periods of time which must elapse before a review is permitted have been determined and what evidential basis informed this decision. The provisions with regard to the application process appear to comply with the applicants' right to a fair trial as protected by Article 14 of the ICCPR and Article 6 of the ECHR. The Committee may wish to seek information on what assistance will be available to an individual when preparing their application and what forms of evidence the Chief Constable or Crown Court would require.

Trafficking people for exploitation CL 5 – 6

14. The Commission notes the intention of clauses 5 and 6 of the Bill to implement EU Directive 2011/36/EU ('EU Directive'), compliance to which must be achieved by 6 April 2013.
15. Article 10(1) (b) of EU Directive requires the UK to establish jurisdiction over offences concerning trafficking in human beings ('THB') where the offender is a UK national, including where the exploitation occurs outside the UK. The Commission welcomes additions by the Bill of section 58A to the Sexual Offences Act 2003 and of subsections 3A, 4A and 4B to the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, which introduce liability for UK citizens who arrange or facilitate trafficking for the purposes of sexual exploitation or for other exploitation outside of the UK. The Commission welcomes that this extension of jurisdiction includes persons habitually resident in NI at the time of the offence and advises that the Executive must notify the European Commission of this aspect of the extension as required by Article 10(2) of the EU Directive.
16. Furthermore, Article 10(1) (a) of the EU Directive requires the UK to establish jurisdiction over offences concerning THB where the offence is committed 'in whole' within the UK. Similarly, Article 2 of the Council of Europe Convention on Action Against Trafficking in Human Beings states the scope of the Convention to apply to 'all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime'. In this regard, the Commission welcomes the amendments made by the Bill to section 4(2) of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, which extends the offence of trafficking for other exploitation to apply where a person arranges or facilitates the offence within the UK

without the need to demonstrate that the person held the belief that the victim was first trafficked into the UK.

17. Article 10(1) (a) of the EU Directive further requires the UK to establish jurisdiction over offences concerning THB where the offence is committed 'in part' within the UK. The Commission notes that sections 109 and 110 of the Protection of Freedoms Act 2012, which extend to England & Wales, contain provision that a non-UK national will be culpable for the offence of trafficking for sexual, labour and other exploitation under the legislation if 'any part of the arranging or facilitating takes place in the UK'. An equivalent level of jurisdiction has not been contained in the Criminal Justice Bill. By way of example, in the scenario whereby a non-UK national (who is not habitually resident in Northern Ireland), person 'A' whilst in Northern Ireland, arranges via email, telephone or other personal communication for the trafficking of person 'B' from State 1 ('India') to State 2 ('Lebanon'), it appears that person 'A' could be prosecuted in England & Wales but not in NI. The Commission advises the Committee that it may wish to seek clarification on the application, if any, of sections 109 and 110 in NI, and whether or not the outlined scenario is covered by the NI legislative framework.
18. The Commission also notes that the EU Directive requires further implementation before compliance is achieved, particularly in the areas of victims services, protections for the child, and measures to address demand and trusts that the NI Executive is mindful of these obligations which require fulfilment by 6 April 2013. The Commission also refers the Committee to its own scoping study published in 2009 in conjunction with the Equality Commission for NI and the Institute for Conflict Research on 'The Nature and Extent of Human Trafficking in Northern Ireland' which made a number of recommendations.
19. Finally, the Commission notes that the legislative framework which outlines offences concerning THB is particularly complex in NI and already involves reference to the Sexual Offences Act 2003, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, the Sexual Offences (Northern Ireland) Order 2008 and the Coroners and Justice Act 2009. These provisions are set to be accompanied by the Criminal Justice Bill and a potential Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill. The Commission therefore advises that the Committee may wish to consider either the introduction of a THB legislative guide or a single comprehensive piece of legislation to increase the accessibility and awareness of the crime.

Fingerprint and DNA Retention CL 7 and Schedules 3 & 4

20. The Commission welcomes the introduction of reforms to the legislative framework governing the retention of fingerprints and DNA to ensure compliance with the European Court of Human Rights ruling in the case of S and Marper v United Kingdom [2008] ECHR 1581. In this judgement the Court found that the degree of interference caused by the DNA retention framework with an individuals' right to private life was disproportionate to achieving the legitimate aim of crime prevention. Following an assessment of various aspects of the framework the Court found that the "blanket and indiscriminate nature of the power of retention" of the DNA data of persons suspected, but not convicted, of offences failed to strike a fair balance between the competing public interest of crime prevention, and the private interest of the individual.⁶
21. The Department has clearly been mindful of this judgement in developing these proposals. The Explanatory Memorandum to the Bill states that the Department is seeking "*a proportionate balance between the rights of the individual and the protection of the public.*" The Commission advise that the Committee give detailed consideration to whether the clauses of the Bill meet this objective. The Committee in particular may wish to consider;
- Whether the indefinite retention of DNA profiles of all adults convicted of a recordable offence is fair and proportionate given the absence of a process whereby an individual could apply to have their profile deleted.
 - Whether provision for the retention of DNA profiles of individuals charged or arrested with a qualifying offence appropriately safeguards the presumption of innocence.
 - Whether the provisions of the Bill relating to children are in compliance with the Convention on the Rights of the Child.

Persons convicted of a recordable offence

22. The fingerprints or DNA profile of an adult convicted of a recordable offence may be retained indefinitely (proposed Article 63F). The Commission advises that the indiscriminate nature of this approach may be considered disproportionate and the Committee may wish to consider whether periods of retention should be staggered depending on the seriousness of the offence. In addition the Committee may

⁶ S and Marper v United Kingdom [2008] ECHR 1581 See para 99

wish to consider whether individuals should be able to apply to have their fingerprints and DNA profile deleted under certain circumstances.

23. It is worth recalling that the definition of 'recordable offence' contained within the Northern Ireland Criminal Records (Recordable Offences) Regulations 1989 includes a wide range of offences.
24. The Committee will wish to consider whether this is a proportionate response. It should be noted that neither of the applicants in the S and Marper case had been convicted. Therefore the Court did not consider in detail the issue of the retention of DNA of those convicted of a criminal offence. The Court did refer to the Council of Europe Recommendation No. R(87)15, paragraph 8 of which states:

"Measures should be taken to ensure that the results of DNA analysis are deleted when it is no longer necessary to keep it for the purposes for which it was used. The results of DNA analysis and the information so derived may, however be retained where the individual concerned has been convicted of serious offences against the life, integrity or security of the persons."

25. The proposal that the DNA profiles of all persons convicted of a recordable offence appears to run contrary to this Recommendation, given that this would mean that those convicted of minor offences would also have their DNA retained. This could potentially result in a challenge to the amended framework on the grounds that it indiscriminately retains the DNA profiles of all adults who have been convicted of a recordable offence. In considering this issue the Court would consider the established practices throughout the members of the Council of Europe. The Committee may wish to consider the Court's ruling in W v Netherlands.⁷ In this case the Court found that the arrangements for the retention of convicted persons DNA records by the Dutch authorities were proportionate due to a number of factors, the Court noted that:

"DNA material can only be taken from persons convicted of an offence of a certain gravity, and that the DNA records can only be retained for a prescribed period of time that is dependent on the length of the statutory maximum sentence that can be imposed for the offence that has been committed"

⁷ Application no. 20689/08, 20 January 2009

26. The Commission therefore advises that the Committee investigate whether the Department considers that the current proposals comply with Recommendation No. R(87) 15 and if the Department are confident that a prospective challenge, on the grounds that the amended framework fails to distinguish between persons convicted of a recordable offence, would be unsuccessful. The Committee may wish to consider whether recordable offences should be further classified in light of their gravity. The proposed reforms to the fingerprint and DNA retention framework do not envisage individuals having a right to apply for the destruction of their fingerprints and DNA. In light of the procedure introduced allowing sex offenders to seek a discharge of their notification requirements the Commission considers that it would be good practice to provide for a similar provision in respect of the fingerprints and DNA framework.

A person arrested for or charged with a recordable offence

27. The Commission broadly welcomes the provisions of the Bill relating to the retention of DNA profiles of individuals who have been charged or arrested but not convicted of an offence. However advises that the Committee consider the circumstances in which a person who has been arrested but not charged may have their DNA retained.

28. Under the proposed new Article 63D(5) of the Police and Criminal Evidence (NI) Order 1989 the DNA profile of a person arrested for a qualifying offence may be retained for 3 years where prescribed circumstances apply and the consent of the Northern Ireland Commissioner for the Retention of Biometric Materials (NICRBM) has been given. The Commission notes that the 'circumstances' required to be present before the NICRBM may grant his/her consent are not defined in the Bill and will instead be defined by way of an Order of the Department. It is important that the arrangements in place to provide for the retention of an arrested person's DNA profile safeguard the presumption of innocence. The Joint Committee on Human Rights when considering the Protection of Freedoms Bill noted that:

"to continue the retention of biometric material on arrest in some cases may create a significant risk of incompatibility with the right to respect private life".

29. The Commission advises that the Committee invite the Department to define the circumstances in which an arrested persons' fingerprints and DNA profile may be retained within the Bill. The Committee may

also wish to request details of the evidential basis informing this approach.

30. The Chief Constable may apply to a District Judge for an order extending the retention period by 2 years. The person to whom the retained fingerprints and DNA profile belongs may appeal against such an order. The Bill and accompanying explanatory notes do not identify the grounds upon which an order may be sought or on which an appeal may be brought. The Commission advise that the Committee seek information in respect of this matter.

The Position of under 18s

31. The retention of biometric material taken from children raises particular human rights issues. These were considered by the Court in the S and Marper case, which was concerned at the stigmatising effects which retention of a child's DNA may have upon them. In its judgement the Court referred to the UNCRC, which was ratified by the UK in 1991. The UNCRC sets out the international standards for the protection of children's human rights, which are specific to children by virtue of their age and vulnerability.
32. The UNCRC states that the best interests of the child shall be a primary consideration in all decisions which affect the child. The UNCRC places specific obligations on states with respect to children involved in the criminal justice system:

*"1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. "*⁸

33. The Commission advises that the Committee considers both obligations placed on the state by virtue of the ECHR and the UNCRC in considering the aspects of this Bill relating to children.
34. The Bill distinguishes between children and adults in one respect, where a child is convicted of a first minor offence and is sentenced to less than 5 years in custody he/she will have his/her fingerprint and

⁸ Article 40

DNA profiles retained for 5 years plus the length of any custodial sentence imposed rather than indefinitely (see proposed Article 63B). On conviction of a further minor offence within the retention period a child will have their fingerprint and DNA profiles retained indefinitely. The provisions relating to retention on conviction, charge and arrest for a qualifying offence will apply to children as they do to adults.

35. In light of the emphasis placed on the stigmatising effect of DNA retention by the Court and the importance which the UNCRC places on promoting a child's sense of dignity and worth, the Commission considers that a strong evidence case demonstrating that this arrangement assists in the prevention of crime must exist. The Committee may wish to seek information from the Department on this matter.

Conclusion

36. This Bill contains a number of provisions which have the potential to promote and enhance human rights protections throughout the jurisdiction. The Commission welcomes the willingness of the Committee to consider and deal with complex human rights issues.
37. Reforms to both the sex offender register and the fingerprints and DNA retention framework are intended to ensure that both measures are proportionate. An assessment of proportionality is a complicated exercise. In this paper we have set out for the Committee a number of key issues to be conscious of in assessing the proportionality of this measure. We suggest a number of matters regarding the proposed reform of the fingerprint and DNA retention framework that require further consideration and would be pleased to provide the Committee with further information on any specific matter.
38. The provisions relating to human trafficking are welcome. The Commission wishes to see conclusive provisions for dealing with those engaged in human trafficking. To this end we seek clarification on the application of the proposed section 58A of the Sexual Offences Act 2003 to a non-UK national who is present in Northern Ireland but not habitually resident here who arranges or facilitates trafficking outside of the UK.