Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Final Legislative Proposals for the Retention and Destruction of DNA and Fingerprints in Northern Ireland

8 September 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 Basil McCrea
Mr Alban Maginness
Mr Peter Weir

Witnesses:

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

The Chairperson:

I welcome David Hughes, who is deputy director of the policing policy and strategy division, and Alan Tipping, Ian Kerr and Gary Dodds, who are from the police powers and custody branch. This session will be recorded by Hansard. David, welcome back to the Committee. I will hand over to you at this stage to outline the proposals.

Mr David Hughes (Department of Justice):

Thank you for the opportunity to brief the Committee today on the final legislative proposals for the retention and destruction of DNA and fingerprints. The Minister has had an opportunity to consider carefully the responses to the consultation and the views expressed by Committee members during the previous oral evidence session. He is satisfied that, as a package, the new framework will achieve the desired balance between the individual's right to privacy and protection of the wider public. Key components of the new framework were appended to the paper submitted to the Committee in preparation for this session, which I hope members found helpful. I am conscious that we have been before the Committee and its predecessor on several occasions as the proposals have been developed, so, unless it would be helpful, I do not propose to rehearse the background to the issue; rather I will focus on the final policy decisions that have been taken since we last briefed you just before the summer recess.

A particular aspect of the retention framework to which we have given further consideration is the threshold at which material from unconvicted persons may be retained. Under our proposals, DNA and fingerprints taken from persons charged but not convicted of a serious offence would be held for a minimum period of three years with the option of a single extension of two years on application to a court. Material from persons arrested but not charged with a serious offence would be destroyed unless certain prescribed circumstances apply.

The PSNI has expressed the view that the threshold at charge might be too high and that it should be on arrest, regardless of whether the person is subsequently charged. In effect, that would enable the material taken from all persons arrested in connection with a serious offence, whether charged or not, to be retained for a time-bound period. The Minister has looked carefully at the concerns raised by the police in that regard, and although he is minded to keep the threshold at charge, which would keep us in sync with other UK jurisdictions, he has agreed to look at widening the range of circumstances in which the threshold may be set aside. We touched on that at the June briefing.

The consultation paper gave some indication of the type of cases that could apply; for example, where the victim is aged under 18 at the time of the alleged offence or where the victim is a vulnerable adult or is associated with the arrested person. In general, those may be classed as

cases where it is more likely that charge and conviction would be particularly difficult to secure. We asked the police to identify other circumstances that might apply, and they have suggested that cases involving alleged offences under the Sexual Offences Act 2003 and the Sexual Offences (Northern Ireland) Order 2008, along with violent offences, including, as a minimum, domestic assaults and any assaults on children, might also fall within the catchment.

Our intention is that the Bill will contain an Order-making power to enable us to set out the range of prescribed circumstances in subordinate legislation, which would facilitate revision of the list as required. We will also want to ensure that provision is made for effective oversight of the police's exercise of those arrangements.

A further aspect to the policy proposals to which the Minister has given careful consideration is the position of photographs. The judgement by the European Court of Human Rights (ECHR) did not rule on photographs, nor is there at present any other authoritative opinion, but it seemed appropriate that we should look into whether to include them now as part of our proposed retention framework.

We think it likely that, if the current practice of retaining indefinitely photographs of persons taken on arrest were to remain unchanged, the police would face legal challenge at some point. The police share that concern and view and are developing a system for the proportionate control and retention of photographs that would be capable of withstanding such a challenge. On balance, it is our view that photographs cannot be treated in precisely the same manner as DNA and fingerprints. The record of photographs is not searchable in the same way, so their retention does not involve the same degree of intrusion as the retention of searchable data. We have concluded that photographs should not form part of our proposed framework unless there is an authoritative judicial ruling to the contrary. That would maintain parity with the position on photographs in England and Wales.

The Minister considered the proposed retention regime for the conviction of under-18s, which differs from the Scottish model in its treatment of those convicted of a single minor offence. He concluded that we should maintain this distinction, which he agreed responds to the spirit of the European Court judgement in its criticism of a system of retention that takes no account of age.

That is also consistent with the general approach to the treatment of young people in the criminal justice system.

The Minister has also agreed that we should provide only for a single two-year extension for the retention of DNA or fingerprints of those charged with but not convicted of a qualifying offence. Chairman, at the June briefing, you observed that that also contrasted with the Scottish approach, which provided for such extensions on a rolling basis. The provision was introduced in Scotland in January 2007. We have been advised by officials in the Scottish Government that, since that time, no extensions have been applied for. Although that may suggest that any provision for extension is unnecessary, we are inclined to proceed with the proposal on the basis that there may as yet be unforeseen circumstances in which it would be prudent to retain material for an additional two years.

Although the European judgement pointed to the Scottish retention model as an exemplar, we are not obliged to follow precisely its detail. There are aspects of our proposed framework, some of which I have touched on, where we go further than the Scots in liberalising the regime; conversely, there are aspects of our proposals that are arguably stronger.

Broadening the range of prescribed circumstances would create a wider scope for the PSNI to retain material than that which is provided to police in England, Wales and Scotland. In cases where a decision has been made not to continue with proceedings, our proposals would allow a search against the database for links to other crimes before the destruction of biometric material and for any evidential value yielded to be retained until the outcome of those proceedings is known. Furthermore, our proposals would allow the indefinite retention of material from those charged with but not convicted of a minor offence if the person has a previous conviction for a recordable offence, unless that was a conviction for a single minor under-18 offence and the associated retention period has expired. In Scotland, such material is destroyed regardless of previous convictions.

Where our proposals differ from the Scottish model, we consider that the rationale is defensible and that the proposals, taken as a whole, are balanced. They differentiate between those who are convicted and those who are not, between minor and serious offences, and between

adult and juvenile offenders. Within the parameters of the European Court judgement, we have responded to the concerns of the police and, we hope, struck the right balance between the competing demands of public protection and the civil liberties of individuals.

We are very happy to answer any questions that Committee members may have on any aspect of the proposals.

The Chairperson:

Thank you very much, David. Could you decide to implement the Scottish proposals with regard to the two-year rolling extensions as opposed to the two-year rolling extension? Where you have gone further in liberalising the Scottish model, if we changed that to reflect the Westminster model, would that still be in compliance with the European Court ruling?

Mr Hughes:

We would expect that, as regards the regimes that currently exist in Scotland and are being introduced in England and Wales, both jurisdictions believe that they would be compliant with the ECHR judgement. Therefore, we would argue that by sitting somewhere between those two, we are in the same place.

The Chairperson:

So, Scotland will indefinitely keep the DNA of under-18s convicted of minor crime, whereas Westminster does what you propose for Northern Ireland, which is that it would be retained for five years after the first conviction and indefinitely after a second conviction. We could retain it indefinitely, as is done in the Scottish model. There is nothing in the European Court judgement to stop us doing that.

Mr Hughes:

The European Court did not make a judgement on the Scottish model. That may well be significant because the Court pointed to the Scottish model as being a good one, but it did not start from the position of addressing that particular feature. I am not suggesting for a moment that the European Court could have looked at the treatment of data on juveniles in the Scottish model and said whether it is or is not compliant; it was not asked that question. However, it did

recognise that a blanket and indiscriminate approach was inappropriate. It was very positive about making a distinction between different categories of offence and between juveniles and adults.

The Chairperson:

The PSNI has concerns about the change of threshold from arrest to charge. When will the prescribed circumstances be brought in? There will be primary legislation and then the circumstances will be prescribed in detail through subordinate legislation. When will that subordinate legislation be available?

Mr Alan Tipping (Department of Justice):

It will have to be choreographed to fit with the commencement of the primary provisions. The Order will be brought in in parallel with the commencement of the provisions so that there is no gap.

Mr Weir:

Thank you for your useful briefing. From what you have said, it seems that we are left with a situation in which the ruling gives us a framework that we need to work within but in which there is also some flexibility. Indeed, that is reflected in the slightly different approaches that were taken by Scotland and England, while we have been left with a mix-and-match system.

One of the variations mentioned is that Scotland has rolling extensions whereas we are limited to a single extension. What was the thinking behind the decision to go for a single extension? I appreciate that those cases may be exceptional, and you said that an extension has not yet been sought in Scotland, but I wonder whether the Scottish system allows that wee bit more flexibility. Is there a danger that, by going for a single two-year extension, we could find ourselves in an unforeseen circumstance with our hands tied?

Mr Hughes:

Although no one is arguing that a rolling extension might not at some point prove useful — the Scots may well use it one day — we are looking at safeguards and the protection of the rights of the individual. On balance, within the whole package, it seemed appropriate to have a single

extension and to place a limit on the length of time that data could be kept.

Mr Weir:

My concern is that there may be circumstances in which a rolling extension would be valuable. Is there a concern that, in a few years, we may reach a stage whereby we are, to some extent, shutting the stable door after the horse has bolted? We could be left with a profile case and the realisation that we would have been better retaining the DNA. We would then have to react to change the legislation, having lost the DNA in that circumstance.

Mr Hughes:

The difficulty is that one has to come down somewhere, and the same argument could be applied to indefinite retention. It is a case of finding the right balance between retaining the DNA beyond a period and properly destroying the DNA at a given point. I entirely understand the point that you make. It is a fine balance and a fine argument, particularly when we do not actually know whether it would ever be used. However, if we are legislating to protect the rights of individuals following the European Court judgement, erring on the side of a single extension rather than a rolling one seems appropriate.

Mr Weir:

The other issue that was raised was the retention of photographs, and you indicated why that issue is different. You are waiting for a definitive situation or one in which we are overtaken by events such as a court ruling or something of that nature. From what you have said, you seem to be adopting a wait-and-see position. You also mentioned that you would be looking separately at drawing up arrangements for the retention of photographs that are different to the arrangements for the retention of DNA. Would the intention be to make a policy change in that area or do you envisage that forming part of legislation?

Mr Hughes:

It has not been made necessary for us to legislate in that area. It is not us who look at how photographs are handled operationally; it is the police. They know that they have to treat that data correctly, because they expect that it could be challenged. It is better to be in a position of strength and to be able to say, "Even though we are being challenged, this is how we are dealing

with the matter. Our approach seems to be proportionate". It is not that they are not thinking about it or not dealing with it. We are endeavouring, through this legislation, to address a particular issue that has been brought to our attention by the European Court of Human Rights. The issues around the retention of photographs are somewhat different, and the same rights issues are not raised.

Mr Weir:

I want us to be clear in our own minds. It is clear that, at present, the issue is being dealt with on an operational policy-type basis by the police. At this stage, does the Department have a direct input into that or is it being left to the police to decide their own operational policy, with the caveat that, if something emerges in a court, you may be forced to take a particular line of action?

Mr Gary Dodds (Department of Justice):

No. It is for the police to get their own house in order on the issue of photographs. They recognise that, as David said, there is the potential for a legal challenge when it comes to photographs.

Mr Weir:

The police will respond if they have what they believe to be a fairly defensible position if there is a legal challenge in future.

Mr Dodds:

Yes.

Mr B McCrea:

Is there still a presumption of innocence before conviction? I want you to make the argument to me about why you should retain the fingerprints and DNA of a person who is charged but not convicted.

Mr Hughes:

The threshold for charge is such that, in order to assist the investigation and prevention of crime, there is a case for retaining that kind of data.

Mr B McCrea:

What if the case has been before the courts and the individual is found to be innocent? You are taking a contrary view that there is a danger and that you must retain the information.

Mr Hughes:

It is a question of balancing the protection of the public in that there was, at some point prior to acquittal, for example, sufficient suspicion of an individual.

Mr Tipping:

That information is, obviously, time-bound. It is kept for a discrete time period, after which it is destroyed.

Mr B McCrea:

Yes, but there is a fundamental position in law, I would have thought, that a person is innocent until proven guilty. You are saying, "Yes, but not really." You are going to retain that information. You have made a distinction between arrested but not charged and charged but not convicted. There is a separation between the police investigation and the courts. The courts rule on the evidence presented as to whether a person is innocent or not innocent. If the courts say that a person is innocent, I have to say that, in the defence of that person, that seems strange to me. There should be some form of appeal; that is what I wanted to say to you. If there are good reasons, surely there ought to be a way to challenge such a decision so that that person can say, "I am innocent and that information should be taken off my record." Is there an opportunity for people to appeal such a decision?

Mr Tipping:

Not that specific decision, but, obviously, if the material was taken unlawfully, for example, there is an appeal mechanism. The other point to bear in mind is that we are now rowing back from a situation in which all DNA is retained across the board. We are trying to strike the appropriate balance between the freedom of the individual and wider public safety. As David said, if a case has proceeded to charge and prosecution, obviously there is a weight of evidence against the persons concerned, albeit that the courts do not find them guilty.

Mr B McCrea:

I will move on, but I want to make my position clear that the courts decide, not you or anybody else. I have an issue with this subject, but I have made my point clear.

I want to make a point about the issue of photographs, which was picked up earlier. It was interesting that, in delivering your submission, you used slightly different language than that which is in the written version. I think that there will be a challenge, as do the police. I would like to know why you think that photographic evidence is different from DNA evidence.

Mr Hughes:

The fundamental difference is that a DNA database is searchable. A DNA sample can produce a profile. That profile can be searched against a database so that somebody can be identified from it. That is not the case with photographs. One does not take a photograph, put that data into a computer and precisely the same person pops up because the same photograph is kept on a database. Photographs have a slightly different function in record-keeping and investigation.

Mr B McCrea:

Well, of course, when you show your passport as you go through border control, your photograph can be searched on the computer. Therefore, it can be done. You said in your submission that the police are concerned about it and are taking action to put their house in order. I am not quite sure, but I believe that those were the words that Gary used. I find it strange that you or, at least, the police have more or less accepted that there is an issue. There is a problem. If it is brought before the European Court, the result will be the same. Having raised the issue, you should have taken the opportunity to deal with it appropriately. As far as I am concerned, it is an assault on civil liberties. We will talk about it another time.

Ms J McCann:

Some of my points have already been covered. I want to raise another point. I know that the consultation is specific. Is there any sense that, because we have policing and justice powers now, we will look at the overall reliability of DNA evidence in cases? The Criminal Justice Inspection's report, dated 17 June 2009, criticised severely the storage and use of DNA and its

reliability in some high-profile legal cases. Will all of that be factored into the consultation or will it look only at one particular issue?

Mr Hughes:

We are bringing forward those particular issues around retention in order to legislate for and address the retention issue. It may well be very useful for the Committee and others to know the way in which DNA and DNA profiling are used. I have no doubt that the police and Forensic Science would be more than happy to brief you on the wider issues. However, those issues will not be caught in this legislation and work.

Ms J McCann:

Like Basil, I would like to come back to that issue.

Mr Dickson:

I believe that what we have in front of us is a proportionate response to where we were in respect of the indefinite retention of records. In particular, I welcome the reduction and the difference between us and Scotland with regard to minor crime by under-18s. I share some of Basil's concerns. It is particularly important that under-18s should not be stigmatised completely and have their lives ruined due to the fact that records will be retained indefinitely. Therefore, I welcome that aspect.

I also agree with Peter Weir. I suppose that this is the balance between Basil McCrea and Peter Weir's positions. If the failure to retain records, particularly if someone is charged but not convicted of a serious crime, were to lead us to a situation where someone is subsequently discovered to have committed a crime and we had their records but had destroyed them, we would be in a very difficult position today. Undoubtedly, there would be public outcry about why we had failed to retain those particular records. Therefore, this is a proportionate response. I welcome the differences that have been created between Northern Ireland's model and that of Scotland in particular. However, I share Mr McCrea's concerns about photographs. We need to come back to that area. Despite the fact that police have recognised that they have housekeeping to do in that area, it may well be that legislation and the European Court will overtake that.

Mr A Maginness:

As I understand the Marper case, the substance of the ruling was that the blanket and indiscriminate nature of the power of retention was the real issue. That is the matter that was being addressed.

However, the response by the Department in the way that it has dealt with and addressed this matter has been a minimalist approach rather than a maximalist approach as regards trying to embrace what the court was saying. The ordinary citizen would deeply resent having their fingerprints taken and their DNA samples kept, even for a limited period, if they were charged and not convicted. That is the natural reaction of the ordinary citizen who regards his liberty and his freedoms as important. This approach is too minimalist in the way that it deals with the approach of the court. I would like your response to that.

Mr Hughes:

There are two points that I want to respond to. First, you have exactly identified the fundamental point of the judgement, but, helpfully, the court also made the observation that the Scottish model was a good model within the UK. It is helpful that it pointed us in that direction so that we can look at that as a starting point.

Secondly, coming back to a point that Mr Dickson made, although protecting individual liberty and individual rights is important — in fact, it is fundamentally important to the point of the court — if that goes further than achieving a balance, there is a very serious risk attached. I am trying to recall precisely when the blanket retention policy was introduced — maybe colleagues will remind me — but it was done so on the back of instances, or an instance, where a terrible crime was committed by somebody who had been identified previously and whose profile had been destroyed. The public are also very upset when that happens.

So, yes, each individual would want to be assured that they would be treated right, but society and the public at large also want to be sure that there is the correct mechanism and procedure to protect society more widely. So, there is a balance to be struck. We are all acutely conscious that almost everyone around the table could strike it in a slightly different way, but what we have is probably as close to the right balance as a starting point for the legislative process as we can get.

Mr A Maginness:

Thank you very much.

The Chairperson:

I suspect that we will not get agreement around this table. I would have no problem with indefinite retention for all categories. I resent the fact that the court interfered in the way that it did by making its judgement. However, it has raised the issue of the blanket process that was being applied and pointed to the Scottish model as a good exemplar. We can be stronger than that, but it is clear that the Committee is not going be able to get agreement on that. On the one hand you have individual rights, but on the other you have the greater right of the protection of wider society, which is being undermined by the changes that are being proposed. However, we have to comply with the European Court.

This matter has to go before the Executive. We will allow it to run its course and see how the legislation comes out. There is certainly a divergent range of opinions around this table. If members do not require any more briefing, I will not suggest trying to get a Committee position on this, because I do not think that we will get one. We will allow it to go before the Executive and see how it comes out. I thank the officials for coming along.