Northern Ireland Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT (Hansard)

Sex Offender Notification Requirements: Final Policy Proposals

17 November 2011

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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 Seán Lynch
Mr Alban Maginness
Mr Peter Weir

Witnesses:
Mr Gareth Johnston) Department of Justice
Ms Amanda Patterson)

The Chairperson:

I welcome the officials from the Department of Justice (DOJ): Gareth Johnston, deputy director of criminal justice policy and legislation; and Amanda Patterson, head of the public protection unit. This session will be recorded by Hansard. Members will be keen to quiz you on this particular issue. I hand over to Amanda: it is a pleasant surprise that it is not Gareth.

Ms Amanda Patterson (Department of Justice):

Thank you. The paper provides the Committee with details of the proposals to amend the law on sex offender notification. The Department is presenting the proposals to the Committee prior to the Minister's seeking approval from Executive colleagues to proceed with legislation.

I do not want to go into the background in too much detail, because it is in the paper that members have, and you have had previous papers on the subject. However, I would like to make one or two points about the fundamentals of sex offender notification. First, sex offender notification is attached to a conviction for a sexual offence by statute. It is not an order of the court nor is it a sanction; it is a consequence for most sex offenders who have been convicted. The periods of notification change. The shortest period of notification is two years for a caution, and goes up to an indefinite period of notification for more serious offences with custodial sentences of 30 months or more. At that point, an offender is obliged to notify personal details to the police for an indefinite period. The court does not order the notification or decide on the period of notification. The responsibility of the court is purely to pass on to the offender the fact that he is now subject to notification requirements. Everything else is set by statute in the Sexual Offences Act 2003.

The first item in the paper is the indefinite notification period. I will quickly summarise the issues for your consideration. First, there is the response to a judgement of the Supreme Court. One aspect of sex offender legislation is incompatible with our human rights obligations, in particular article 8 of the European Convention on Human Rights (ECHR), which deals with the right to a private life. The proposal is for a review mechanism for indefinite periods of notification. As you will know from reading the paper, the proposal arises from a judgement of the Supreme Court. The judgement related to a legal challenge brought by two sex offenders in England and Wales, one of whom was a juvenile when he was convicted, who alleged that the indefinite nature of the notification requirements was disproportionate to the aim of protecting the public, in that they had no opportunity to review whether those notification requirements continued to be necessary. The case was appealed by the Home Secretary all the way to the Supreme Court, and it was upheld by that court. There is now an obligation on all jurisdictions in the UK to address that judgement. The proposals in your paper, therefore, look to respond to that judgement. The questions for consideration are whether the proposals make the law compatible with article 8 while continuing to assist with the overall objective of protecting the public and whether the balance is right.

The policy objective is to have compatible law that continues to aid public protection. In support of that policy objective, the proposals contain a number of elements. I will quickly go through the major ones. The proposals only allow offenders to make an application for a review of their notification requirements. There is no ability to have those notification requirements

automatically removed; it is purely to give them an opportunity to apply for their removal after a very lengthy period in the community. The proposal is that they should not be able to make an application until 15 years after they have been released from prison.

The proposals provide the police with a clear test for determining the application, and they include a list of specific factors that have to be taken into account. The proposals also set a lengthy further review period in cases where the initial application has not been successful, and they allow an unsuccessful applicant to make an application to the court for a further determination of the application on the same basis as the police would have done. That is the first issue to be considered today. All key stakeholders have already been consulted and are generally supportive of the proposal.

The second proposal is an amendment to the law to allow the ending of notification to be extended to a number of offences. The amendment is necessary as a result of changes to the law on sexual offences brought about by the Sexual Offences (Northern Ireland) Order 2008. The change should have been made at the time, but it was not, and there is now an omission in the law. I have no particular issues to highlight around that amendment. It is consequential on another change to the law. The only thing to say is that the numbers that this would have an impact on are likely to be exceedingly small.

The other two provisions are to strengthen the law around notification. The first is about attaching notification requirements to offenders who have been convicted outside the UK. At the moment, as the paper states, that procedure involves an application to the court by the police and requires that a notification order be granted before notification requirements can be put in place. The proposal is that that should be repealed and that offenders from outside the UK should be automatically subject to notification once they have been in Northern Ireland for a specific period. The policy was consulted on previously, but it had to be withdrawn because of the Supreme Court judgement in the case to which I have just referred. We are now able to revisit the issue and, hopefully, include it in the proposals for a Bill. It will largely harmonise the arrangements for notification on a cross-border basis. Sex offenders who travel from Ireland to Northern Ireland will find themselves automatically subject to notification after they have spent a certain amount of time here. They will be aware of that, hopefully, through arrangements put in place by the Garda Síochána and the PSNI.

Lastly is the amendment to the law to strengthen the use of sexual offences prevention orders. Again, there are details of that in the paper. It was largely designed to give agencies a wider scope to manage offenders in the community who pose particular risks. It would allow the agencies to apply to the court and allow the court to grant positive conditions on an offender's behaviour rather than the current position, which is just to grant prohibitions on an offender's behaviour.

All the proposals are interlinked. They offer a more focused and targeted package to make the notification arrangements as effective as possible in helping to manage risk in the community. Basically, they are designed to make the best use of resources for risk management. It might also be worth mentioning that they will be helped later by other policy proposals in the consultation document to strengthen the law on notification. They can be progressed by secondary legislation and will be brought to the Committee at a later date.

I hope that that short introduction was helpful. I am happy to take any questions or points of clarification.

The Chairperson:

Amanda, thank you very much. I want to run through a couple of points. I will not repeat the commentary on the issue; that has been well rehearsed. I want to get straight to comparisons of our proposals with those in other jurisdictions, starting with the review mechanism. You mentioned that the provision that the Chief Constable can consider other information would cover the specific areas of consideration of victim impact assessments and other offences that were highlighted in the English and Welsh model, but your paper states that you will now consider just mentioning those two areas. Do you intend to specifically mention those two areas in the way that they have been highlighted in the English and Welsh model?

Ms Patterson:

The proposals that we aim to put forward include the consideration of offences committed outside the United Kingdom if there is a reason to do that; for example, if the behaviour since then indicated a risk of sexual harm. That has been included, which is the same as the additional proposal for England and Wales. We have not come to the conclusion that the addition of information from victims adds a great deal to the scheme. There are concerns that doing that would lead to re-victimisation, if we are talking about asking a victim to participate in something

when the offence happened some 15 or 20 years ago, or even longer. As far as the benefit to the assessment process is concerned — the factors are all about assisting the police to assess the risk in order to determine the application — our view is that the balance was out of kilter. There is a chance that there would be too much concern about what the effect would be on the victim and not enough benefit to the assessment of risk. So, at the moment, we do not envisage including that particular aspect in the list of factors.

The Chairperson:

I am keen to hear more on that thought process, because I do not know if I subscribe to that view of the re-victimisation issue. If you were made a victim and you found that there had been a change when, previously, an offender remained indefinitely on the register, I think that you would ask why you were not told about it. I am pretty sure that that will run contrary to our inquiry into victims and witnesses of crime and the need for them to be central to the process. I am not sure if I am with you on the point about including the victims in the process.

The other issue is the decision-making body. The police will be assisted by agencies. In England and Wales, there is a statutory duty on those agencies to provide relevant information. Why are we not placing a statutory duty on them?

Ms Patterson:

It is really because of the slightly different arrangements in Northern Ireland. Under our public protection arrangements, there is only one agency rather than the 42 in England and Wales. The police and other agencies involved, which have all been party to the proposals in the consultation process, were of the general belief that there was really no need to put a statutory duty on agencies that are already under a statutory duty to work together and assess the risk for those offenders. That is how the process works, so it would probably be unnecessary to put yet another statutory duty on them.

The Chairperson:

But it would not cause them any inconvenience if there was one since they do it anyway.

Ms Patterson:

It may not. The difference is that the detail is more complex. I do not have the detail in front of me, but, in England and Wales, the multi-agency public protection arrangements (MAPPA) are

divided into two. You have the three main agencies that form the responsible authority in each of the 40-odd districts; that is, police, probation and prisons. Outside of that, there are duty-to-co-operate agencies involved in the arrangements. In Northern Ireland, all of the agencies have the same statutory duty. The original legislation was drawn up in a different way. To include a duty now would be to put a statutory duty on —

The Chairperson:

— a statutory duty.

Ms Patterson:

Yes, and it would be putting a duty on agencies that are under different Ministers, and so on. That is why it has not been done at this stage, but it is something that you may want to look at.

The Chairperson:

OK. Let us turn to the court process. I looked back through the consultation document at the proposal that the police should carry out the review and that any appeal should be made to the courts, which will have to go through the same processes and base their decisions on the same criteria. The reason for that, as outlined in your consultation document, is the need to comply with article 6 of the European Convention on Human Rights, including the right to a fair and public hearing before an independent and impartial tribunal. I am keen to know why we have to do that when, in England and Wales, the police take the decision and you can only judicially review their decision.

Ms Patterson:

I think that we went through that point before when we discussed the difference in the way in which human rights obligations apply to the law in Northern Ireland and the way in which they apply to primary legislation going through Parliament, and the need to show that we are competent to legislate for the matter in Northern Ireland. The other point to bear in mind is that England and Wales have now had the report of the Joint Committee on Human Rights. The Committee has advised that it is likely, I think, that the proposals put forward by the Home Office will, in its view, make the law compatible with the Supreme Court judgement. I do not know what the answer is, but it looks as though that is going to have to be addressed again.

Mr Johnston:

Interestingly, the Joint Committee, which comprises MPs and peers, has commended the model put forward in Northern Ireland as one that meets the requirements.

The Chairperson:

That is reassuring. If article 6 requires the right to a fair and public hearing that is independent and impartial, and, therefore, the court provides that, why include the police in the first place? Clearly, the inference is that, if you use only the police, you are not going to comply with article 6. Why, then, use the police?

Ms Patterson:

One reason is that that will prevent all cases having to go to the court, because the police can carry out an initial review, and one would assume that a number of cases will be discharged from notification requirements at that stage. If the police did not carry out that initial review, all cases would have to go to the court, which would be time-consuming and costly. I would also put forward the argument that the police are best placed to make the decision in the first place. The three jurisdictions in the UK have all reached the conclusion that the police are better placed than anyone else to decide whether the arrangements are necessary in the interests of public protection and whether they still need to have the information and the tie with the sex offender in order to protect the public. Those are the two elements and the two reasons for that.

The Chairperson:

Surely if an offender goes to the trouble of making an appeal to the police after 15 years and the police review the case, refuse the appeal and keep the offender on the register, the offender knows that he can automatically go to the court. Surely he will go to the trouble of taking it to the court if he has already appealed to the police. The argument that to go the police first will minimise the number of people who go to the court —

Ms Patterson:

It would —

The Chairperson:

I do not know.

Ms Patterson:

It will minimise the numbers in so far as those who are successful will not go to the courts. It depends on how many are going to be discharged — I do not know how many that will be — but it will have that effect. If I remember rightly, there are approximately 300 offenders in the community at the minute who are subject to indefinite notification. Of course, they will not come on stream all at once; they will do so over the next 15 years. However, there will be a percentage of those people who will not be required to continue, one would imagine.

Mr Weir:

Has there been any estimate of the cost of taking the matter to court? I wonder whether the potential of an appeal, coupled with the fact that it would cost a certain amount to take the matter to court, would act as a deterrent or a filter mechanism.

Ms Patterson:

We have discussed that with the Courts and Tribunals Service. Because the police act as that filter, there is not considered to be any substantial difference or any cost to have to bear in mind, but, of course, those costs would increase if that filter system were not in place.

The Chairperson:

Have you taken legal advice on this model's compliance with article 6? Is that just internal to your Department? Did you go to the Departmental Solicitor's Office (DSO) for advice?

Mr Johnston:

The DSO is our lead adviser on this matter. Obviously, as Bills come to the Assembly, the Attorney General's advice is sought on competence in the normal course of things.

Mr Weir:

We will have to form an opinion on that, although not necessarily today. Would it possible to make that advice available to us? I appreciate that some of it may be confidential.

Mr Johnston:

The legal advice that we have had internally is, essentially, that those are the steps that would be necessary —

Mr Weir:

I appreciate that, but I am just asking whether it would be possible to make that available to the Committee.

Mr Johnston:

It is not the usual course that we would follow. I can certainly look at it. I wonder whether you have a specific question in mind.

Mr Weir:

I am just a bit curious about it. I appreciate that the Committee's hands are, to a large extent, tied, but it has to give an opinion on this. If the guidance or legal advice is pushing you in a particular direction, it may be broadly useful to see it, or a synopsis of it at least.

The Chairperson:

As I am learning, legal people always err on the side of caution. So, it is a question of whether the legal advice is that you may get away with having only a judicial review mechanism, but, to be 100% certain, by doing it in this way, you will not be vulnerable to any challenge.

Mr Weir:

It might say that you do not have a leg to stand on if you go down that route. I just want to get a flavour of the advice.

Mr Johnston:

The advice was more fundamental than that; it was that this was a necessary part of the process. Of course, I will address the issue when I go back to the Department. However, it would be open to the Committee to look to the Assembly's legal advisers, Chairman, if you felt that it would be useful for the Committee to have an independent legal opinion on what was necessary to comply with the Supreme Court judgement and the ECHR.

Ms Patterson:

A further point is that the police would, I think, find it unhelpful to be left without the courts' involvement. That would leave the police as the last port of call, and all of their decisions would be up for judicial review.

Mr Weir:

That is true up to a point. By the same token, the judicial review is a much higher hurdle to overcome because it is in a different sphere.

The Chairperson:

My reading of the commentary is that the argument that has been made is that, as you said, the police are best placed to take a decision on this. Why, then, should the courts make a decision? If the police are best placed to make the decision, then judicially review the process that they have followed, because it is the process that will be looked at as opposed to the decision. It is a matter of weighing that up, but the Assembly may obviously be more curtailed by the European Convention on Human Rights than Westminster is. I think that that is what some of us, as a Committee, will have to consider.

Mr Johnston:

The report by the Joint Committee on Human Rights is useful in that respect. It has access to legal advice in Parliament and is certainly coming to the view that an independent tribunal needs to be part of the process.

Ms Patterson:

There should be a response from the Government to the Joint Committee report before Christmas. It will then become clearer whether a court process will be included in the proposals.

The Chairperson:

OK. Members have no other questions, so thank you very much for coming along.