Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Criminal Justice Bill: DOJ Briefing

28 June 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 Sydney Anderson
Mr Stewart Dickson
Mr Tom Elliott
Mr Seán Lynch
Mr Alban Maginness
Mr Patsy McGlone
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr David Hughes	Department of Justice
Mr Ian Kerr	Department of Justice
Ms Amanda Patterson	Department of Justice
Ms Debbie Pritchard	Department of Justice

The Chairperson: I welcome David Hughes, head of the policing policy and strategy division; Amanda Patterson from the criminal policy branch; Debbie Pritchard from the human trafficking branch; and Ian Kerr from the police powers and custody branch. The session will be recorded by Hansard and the transcript published in due course. I invite the officials to outline the principles in the Bill.

Mr David Hughes (Department of Justice): Thank you very much for the opportunity to brief the Committee on the Bill. The key features of the Bill have been brought to the Committee previously and will be familiar to members. There have been a number of changes to the Bill since the Committee last considered it, not least the inclusion of the human trafficking provisions. My colleagues will deal with various policy areas, and we will do our best to answer any questions. I intend to focus on the issues that are new and to which I would want to draw the Committee's attention.

Clauses 1 to 4 and schedule 1 cover sex offender notification issues. Paragraph 7 of schedule 1 now requires the Department to issue guidance on applications for review of indefinite notification. That responds to a concern raised by the Attorney General about the possible breach of convention rights if offenders with mental incapacity issues are required to make an application themselves. The guidance will allow for administrative solutions to that issue to be given a statutory backing and for general guidance to the police on the determination of applications.

The Attorney General also raised concerns about convention compatibility in relation to the proposed adjustment to the process for attaching notification to offenders who come to Northern Ireland with convictions for sexual offences from jurisdictions outside the UK. As a result, the new provision was limited to only those offenders with convictions from EEA states, the remainder to be subject to notification through the court order process, as at present. That is to protect against the automatic attachment of the requirements, with the associated criminal penalty if the requirement is breached, to those persons with a conviction from a country with a poor human rights record and suspect judicial practices. The Bill retains that amending provision, but Executive approval to introduce it was based on an agreement that further discussions would be held with the Attorney General and the Committee during the Bill's passage and that an amendment to the Bill would be brought forward to allow for a single enhanced process for attaching notification.

I turn to clauses 5 and 6 on human trafficking. The EU directive on trafficking in human beings will come into force in April 2013. The Department is required to legislate to amend the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 to introduce new offences to comply with the directive.

Clause 5 adds section 58A to the Sexual Offences Act 2003 and creates an offence where a person is trafficked for sexual exploitation anywhere outside the United Kingdom by British citizens, habitual residents of Northern Ireland and bodies incorporated under the law of a part of the UK. The offence will deal with the abuse of trafficked victims at all stages of their journey or ongoing travel. Clause 6 amends the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and creates a similar offence to allow for the prosecution of a person who has trafficked someone anywhere outside the United Kingdom for labour or other exploitation. It also amends the offence by removing the requirement for the victim to have previously been trafficked. Those amendments mean that an offence is committed where a United Kingdom resident, who has not previously been trafficked into the UK, is trafficked within the UK. They will provide for the prosecution of a UK national who has trafficked someone anywhere outside the UK; for example, if a UK national trafficked a person between Mexico and Brazil. The creation of those two offences received overwhelming support in the consultation on the EU directive that the Department carried out.

Suggestions for further legislative change have been put forward by Lord Morrow in a draft private Member's Bill, which he has shared with the Minister, and by others who responded to the recent consultation on the EU directive. Those broader issues are being considered in more detail, and the Minister will respond to Lord Morrow on the draft Bill and brief the Justice Committee on the issues as soon as possible. The priority at this stage is to make provision for the amendments to the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 to ensure that the law in Northern Ireland complies with the criminal aspects in the EU directive and that we meet the deadline for its implementation in April 2013.

I turn to clause 7 and schedules 2 and 3. As mentioned in the paper provided to the Committee, the changes to the biometric provisions replicate late amendments to the Protection of Freedoms Act 2012 and reflect discussions and correspondence with parties and the Attorney General's office. Originally, the intention was to destroy all DNA samples once a profile had been generated or after six months. However, the Crown Prosecution Service had concerns that, in a limited number of cases each year, it would be necessary to retain individual samples in order to deal with any subsequent challenge by the defence to the comparison made between the DNA of the individual and that found at the crime scene. It was concerned that, without such retention, it would be unable to withstand such a challenge and acquittals on technical grounds might result. The Protection of Freedoms Act 2012 was amended accordingly, and, having consulted the Public Prosecution Service and Forensic Science Northern Ireland, we have made a corresponding change to the Bill.

We are also assessing the relative merits of having applications to retain material in prescribed circumstances referred to the courts rather than the biometric commissioner. We have a bit of work to do with the police in trying to establish the likely number of applications per annum, which we would need to have a clearer picture of before approaching the Lord Chief Justice if we decide to go down the courts route.

On the suggestion of the Attorney General, the Bill now provides that, if material taken unlawfully or on the basis of mistaken identity has potential evidential value, it may be retained for the duration of the associated investigation or proceedings. The effect of the illegality will be considered by the court as part of its decision on the admissibility of evidence. The Attorney General was concerned that the requirement in the Bill to automatically destroy such material went beyond the normal rules of

evidence. So, rather than being prescriptive in the Bill, we have agreed to leave any such decision to the courts. Sub-paragraph 63B(3)(a) makes the destruction requirements subordinate to article 63C.

Again at the suggestion of the Attorney General, the Bill now accommodates cases where biometric material from one individual may be probative against another; for example, where a co-accused has said that he was with the person to whom the biometric material relates at the relevant time, and the biometric evidence is subsequently linked to the crime scene.

Finally, we have removed the requirement to destroy impressions of footwear. As the Attorney General observed, it is not at all clear that article 8 rights are engaged in respect of footwear impressions, and the jurisprudence of the European Court imposes no obligation in that regard.

That is what I have to say by way of introduction. I am happy to answer questions.

The Chairperson: Thank you. I do not intend to go into too much detail, because, obviously, we are going to have a lot of scrutiny work to go through on each of the bits of legislation. A lot of arguments have been raised before in previous Committee sessions. They will be available, and no doubt we will draw upon them when we look at this. I will ask a general question. A previous point raised related to the process for the sexual offences register, particularly around the appeal to the Chief Constable and then to the court, as opposed to an appeal to the Chief Constable and then judicially review the Chief Constable. I see that, in the legislation, we are remaining with the original position. Will you outline why you feel that it is necessary to retain that position? What has England done in respect of that?

Ms Amanda Patterson (Department of Justice): On the process in England and Wales, the remedial order has been debated in the House of Commons and is awaiting debate in the House of Lords. Given the recommendation of the Joint Committee on Human Rights in Westminster, which said that not having a court process would not resolve the incompatibility, the Home Office has inserted a process for appeal to the Magistrates' Court in England and Wales. That means that all three UK jurisdictions are now proposing to have a court process, albeit in different forms and different courts. That is the main reason why it is still included in the Northern Ireland process.

The Chairperson: OK. On the human trafficking aspect of the Bill, are we taking a minimal approach to applying the EU directive? Some concerns already seem to be being raised that more could be done.

Ms Debbie Pritchard (Department of Justice): What we are concentrating on, and our priority at the moment, is to ensure that we comply with the criminal aspects of the EU directive, but, in the consultation on the EU directive and in Lord Morrow's Bill, other suggestions have been made in relation to legislation. We are now starting to go through those, and we will provide further advice to the Minister and come back to the Committee when we have had a chance to analyse what people have said.

Mr McCartney: As the Chair said, we have had some of this discussion, and, no doubt, we will have it in the future. I just want to focus on the DNA strand and to give our position, which, I feel, the Department needs to address as we take the legislation through the various stages. There are a number of issues. One of them is that, as this is now proposed and, indeed, as it is now in situ, we believe that the size of the database is of a disproportionate scale. We also believe that the presumption of innocence is undermined by the proposals that are now tabled in front of us. Thirdly, we are not satisfied that the fact that this had to be introduced in respect of divergence from the European convention has been addressed properly. I am not asking you to comment today, but that will certainly be part of the commentary as we take the Bill forward.

My understanding is that, at present, the database is 10 times greater than that in the United States of America and five times above the European average. We need an explanation of why that is the case in order to convince us that it is the right thing to do.

Last September, the issue of presumption of innocence was raised. Basil McCrea asked a question on the issue that the legislation states that, irrespective of someone being found innocent in court, their DNA will be retained. The answer was that sufficient suspicion of an individual is sufficient reason to retain DNA in those circumstances. That undermines the principle of presumption of innocence.

On the matter of the divergence, which part of the judgement brought us to this? The court ruled that there was disproportionate interference and that it could not be regarded as necessary in a democratic society. What part of the ruling and the legislation is necessary to protect us? Those are the broad principles from which we will approach this.

Mr Hughes: In the context of looking at the principles of the Bill, it is very useful to hear the principles of objection to the way in which the Bill has been cast. Clearly, those may be some of the key grounds upon which the discussion may be taken forward.

Mr McCartney: How many people in this jurisdiction are currently on the database? Across England, Scotland, Wales and the North, it is estimated that one in five of the people on the database has no convictions. That seems to be a very high proportion.

Mr Hughes: You mentioned the statistics on the equivalent database in the United States.

Mr McCartney: From research, my understanding is that it is 10 times greater than in the United States and five times above the European average. Indeed, there is the staggering statistic that it is 50 times bigger than the French equivalent.

Mr Hughes: Is that based on absolute numbers or is it a proportion?

Mr McCartney: It is a proportion.

Mr Hughes: The point that you make about the number of individuals on the database against whom there is no conviction shows precisely why the changes are needed. You have identified one of the key points that the European Court made. The European Court also pointed the UK Government to the example in Scotland of a proportionate approach, and we have discussed a number of times how what we have here might compare with the Scottish model rather than an absolute model.

Mr McCartney: As this reads, I do not see anything that will reduce that ratio of one in five. My reading of the legislation does not instil in me that there will be a reduction of the one-in-five proportion. In essence, people with no record find the frame in which they are kept on the database is that, as you said last September in answer to Basil McCrea, there is sufficient suspicion.

Mr Ian Kerr (Department of Justice): The standards that will be applied under the new framework will be applied to legacy material — people who are already on the database. A deletion instruction will be issued in parallel with the coming into force of the legislation that will provide for that material, which, presumably, makes up the fifth that you are talking about, to be removed from the database in accordance with the new provisions.

Mr Hughes: The framework that is contained in the legislation would not only be applied going forward but would be applied to the existing database. There is no doubt that there would have to be a reduction in the number of people on the database against whom there is no conviction.

Mr McCartney: That is precisely the point that I am making. I do not see how it is laid out that that will be the case. I will make a broad point, because I know that we will come back to this and that today is maybe not the time for discussion. If we enact a piece of legislation, someone may take a case to the European Court, resulting in the finding that it is not regarded as necessary in a democratic society. We have to satisfy ourselves that someone would not win that case. We are here because someone has already won the case. So, we have to satisfy ourselves that we are not being asked to support legislation that could bring you back to the same position.

Mr Kerr: But, if we are designing legislative provisions around the model that is in place in Scotland, which the European Court directed us to as a satisfactory approach, it gives us a good starting point.

Mr McGlone: I have just a small point, although it might not be small to those it concerns. In regard to recordable offences and the retention of the likes of fingerprints and DNA profiles, are we talking about all offences for which a person has been convicted? I am thinking of people who, for a variety of reasons, have not been able to pay fines and have been convicted on the foot of that. Is the intention to retain their fingerprints and DNA profile and the likes for whatever period of time?

Mr Kerr: If the offence in question is one that carries a custodial sentence, it would be a recordable offence.

Mr McGlone: In other words, what we are saying is that if someone has not paid their fines — probably, as in most cases, because they have fallen on hard times — and wound up in prison for a day or two, it is a recordable offence and, therefore, their DNA and fingerprints are retained.

Mr Kerr: The legislation will provide for them to be retained.

Mr McGlone: Does that mean that the DNA profile and fingerprints will be retained?

Mr Kerr: The police will be able to retain them under the terms of the legislation. That is what I am saying.

Mr McGlone: Sorry —

Mr Kerr: The legislation is enabling, not prescriptive. It does not say, "The police shall retain them", it says, "The police may retain them". So, there is discretion there.

Mr McGlone: Is it down to the individual police officer to determine whether that discretion is used?

Mr Kerr: No, the material will be taken and will be retained. It is open to anyone, under the existing arrangements and those that we propose to put in place, to apply to the police to have their material removed from the database. The police would consider whether to do that on the basis of the application. Our intention is to put the onus for that on the individual rather than on the police.

Mr McGlone: But, the ultimate determination lies with the police.

Mr Kerr: Yes, as long as the police are operating within the legislative framework.

Mr Lynch: Mr McCartney, Raymond, covered most of what I wanted to ask. I will take up two points with you. The first is about the biometric commissioner. When you were here back in September, the majority of the Committee said that the decisions should be taken by the courts. This is going to be a fully funded, special commissioner. Why do you not drop that idea and allow the courts to decide? The courts decide on the innocence or guilt of a person.

Mr Kerr: Much will depend on the volume of cases that we are likely to see, and that is something that we are still trying to establish in discussion with the police. We need to have the precise terms of the prescribed circumstances defined, and then we need to look at the likely volume of offences per annum to establish the pool from which the applications would be made in order to give us some sort of indication of numbers. If it makes sense, given the numbers concerned, for the applications to be considered by the courts, that would be an avenue that we would pursue. We have no objection in principle to it.

If, on the other hand, we are looking at a large number of cases per annum, the Lord Chief Justice might be reluctant to impose that sort of burden on the courts, and it might make better sense for us to establish an office. However, there may be options other than establishing a brand new office open to us. There may be capacity within or underneath the existing justice umbrella. Someone already known to us and operating within that umbrella might be able to undertake the task, providing there was no conflict of interest between their current role and the role that we were proposing for them and, of course, providing that they were prepared to take on the task.

Mr Lynch: So, this is not fully decided upon yet.

Mr Kerr: Not yet. We agreed with the Minister that we would introduce the Bill as drafted but will continue to explore this question. If we are satisfied that there is merit in putting it the way of the courts and the courts agree to take it on, we will table an amendment to that effect.

Mr Lynch: Last September, one of the officials raised the potential for a legal challenge on photographs retained by the PSNI. Why do you not provide a remedy in the Bill? Why retain photographs if a European ruling has said that DNA and fingerprints should be destroyed?

Mr Kerr: The Marper judgement, to which we were responding, did not include photographs in the same category. Photographs are not searchable in any meaningful sense in the way that DNA and fingerprints are, so they are not seen as representing the same intrusion to a person's privacy in that sense. It has been our understanding that the police have taken their own legal advice on the photograph question and were moving to put in place an administrative solution to that.

Mr Elliott: Thank you, folks. Does the proposal deal with only the European legislation, or does it go further than is required in the European directives?

Mr Kerr: Which proposal in particular?

Mr Elliott: The Criminal Justice Bill.

Mr Kerr: Several European issues are involved.

Mr Hughes: To which of the three parts — the DNA part, the sex offender notification part or the human trafficking part — are you referring? They respond differently to different things, although they are grouped together.

Mr Elliott: Let us take the DNA part first.

Mr Kerr: That is a response to a ruling in the European Court that the existing framework was not complaint with the European Convention on Human Rights (ECHR). The court helpfully pointed us in the direction of the Scottish model, on which both we and England and Wales have based our response to that ruling. On the DNA side, we are responding to a judgement in the European Court of Human Rights.

Mr Elliott: I know that, but I am trying to establish whether it is going much further than what was required in that judgement. For example, is the Scottish model much more strict in its regime than might be required from the European convention?

Mr Kerr: I do not think so. Basically —

Mr Hughes: It is not precisely the same, and it could be argued that, in one or two places, it goes further — stricter is not necessarily the right word — and that, in other places, it does not go quite as far. It is not the same, but it takes on board the critical elements that the court judgement made — that the existing policy made no distinction and was not proportionate. So, it is a framework that does make distinctions and is proportionate.

Mr Kerr: Essentially, the court criticised the indefinite retention of material from people who had not been convicted. It looked to Scotland and saw that Scotland already had arrangements in place that satisfied the point that it was objecting to. That was as much as it said, so we have not had a view on to what extent the rest of the Scottish model and our models are compliant with it. We have taken that in good faith, if you like.

The Chairperson: I appreciate the fact that some members were not here when we initially looked at this, but we will go through it at the scrutiny stage. I will want to look at our models compared with those in Scotland. We recognise that there are European Court rulings, and we need to find ways to comply with those. It is a question of how we do that and finding some differences that there might be. I will not prolong things, because we will look at this in some detail. Thank you very much for coming.