Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

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

4 October 2012

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Alex Easton
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Patsy McGlone
Mr Jim Wells

Witnesses:

Mr Colin Caughey	Northern Ireland Human Rights Commission
Professor Michael O'Flaherty	Northern Ireland Human Rights Commission

The Chairperson: I welcome to the meeting the chief commissioner, Michael O'Flaherty, and Colin Caughey, a policy worker from the Northern Ireland Human Rights Commission (NIRHC). Again, this evidence session will be recorded by Hansard and the transcript published in due course. I will hand over to you to make your initial comments.

Professor Michael O'Flaherty (Northern Ireland Human Rights Commission): Thank you very much, Mr Chairman. It is a great pleasure to be here. This is my first time in front of the Committee, and we are grateful for the invitation.

Given that this is my first time before you, I will briefly mention that the Northern Ireland Human Rights Commission is a statutory body with a duty to reflect to you not liberal or illiberal positions but what the human rights standards that bind the United Kingdom say to the various dimensions of your work. In that regard, the sole basis for our comments today are the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child, all of which have been ratified by the United Kingdom and which, therefore, bind the state.

My second preliminary observation is that there is much in the Bill to welcome. In broad terms, it is good legislation. It is good in that it will strengthen the criminal justice system in respecting victims' rights. There are two dimensions of the Bill that we will not talk about today — you have not asked us to speak to them — but I would just like to flag them up in general terms. We strongly support the elements of the Bill that deal with the combat of human trafficking. That is a major advance in law, and we think that strengthening criminal accountability for trafficking is one of the Bill's important achievements. Although we think that more is needed to deal with human trafficking, what is in the Bill is important.

Secondly, we welcome the provisions on the denotification procedure for sex offenders, because, again, we think that the drafters have come up with a good balance between the stability and safety of the community, the rights of victims and the rights of people who have spent sentences.

I will now turn to the issue of DNA profiles and fingerprints. I will not say anything about children, because the Children's Law Centre covered that, and I do not think that I have much to add beyond what you discussed back and forth. Let me focus on adults. In my comments, I will distinguish between convicted adults and unconvicted adults, because the issues for each are different.

First, where convicted adults are concerned, the proposal in the Bill is for the presumption of indefinite retention of DNA data and fingerprints. That really is unnecessary. I think that it is important to keep that in mind. That part of the Bill is about correcting a situation in the United Kingdom on the basis of the Marper case in Strasbourg, which dealt with unconvicted persons. In other words, anything that the Bill does on the business of convicted persons is not an implementation of the Strasbourg judgement but a choice by you to go further. In going further, I suggest that the Bill is going too far, because of the indefinite retention dimension.

The European Court of Human Rights has been very clear on that in a number of cases, one of which was a Dutch case from 2009. In that case, it ruled that, when you are talking about convicted persons, you have to demonstrate the application of the principle of proportionality in each case where such data are retained. In other words, of course it is legitimate to retain that stuff, but for that to be done, you have to exhibit a proportionate action in light of the convicted person's right to privacy.

I will just illustrate that point. Think of the difference between the woman who has been locked up for not paying her television licence and the multiple murderer. Is anyone, for one minute, suggesting that the data-retention rule should be the same for the TV licence person and the murderer? That would seem to me to be a very strange situation. In other words, it would not be proportionate. We are not asking that such data not be retained; we are not saying that the solution to indefinite retention is no retention. That would not be compatible with proper justice and policing. We are asking that there be a clear, straightforward process whereby an aggrieved person can make a complaint to a court. That is missing from the Bill right now. There is no mention of it in the Bill, but we have investigated it. The current situation is that if you are unhappy with the retention of your data, you can apply to the Chief Constable, who can then, through an internal police administrative procedure, determine whether they will be retained. Judicial review is the only appeal to what the Chief Constable may or may not decide, based on an entirely internal administrative process. It is also one of the least efficient and most expensive ways to get justice, so we are saying that a simple procedure of applying to a lower court should be there as the safeguard. That is our concern about convicted persons.

There is a general presumption in the Bill for the destruction of unconvicted persons' data. That is good. It means that the initial basis and attitude of the state as reflected in the Bill is that if you are unconvicted, we do not have any business holding on to your private information, such as your DNA profile and fingerprints. However, we have concerns, because the presumption of retention is set aside if there are certain prescribed circumstances that mean that the material should be held. You discussed that just a moment ago. Again, we do not challenge that. We accept that there will be certain circumstances in the interests of public safety and public order under which even the data of unconvicted persons can be retained. That is not at issue, nor is the idea that the Bill would set out the prescribed circumstances. The problem, however, is that it does not set them out. As we heard a few moments ago, that is to be left to an order that is to be drafted by the Department. That means that you, in determining on this Bill, do not know whether it will violate human rights in its application, because you do not know what the prescribed circumstances are. Some of them may be entirely acceptable from a human rights point of view, and others could putatively raise problems of a violation of human rights. That is what we are concerned about.

Again, the correction would not be difficult. It is not about abandoning the Bill; it is just about insisting that the prescribed circumstances are listed in it so that you will know what you are allowing when you approve it.

By the way, when I talk about human rights, the two that are uppermost in my mind that need to be protected are the rights of privacy and the presumption of innocence.

We have a secondary concern about the role that is to be played in the determination for the retention of DNA material or information or identity material. That is about the role that the biometric commissioner will play. We have no problem with the appointment of a biometric commissioner, as it could make for a more efficient operation of the state, given that we cannot go to the courtroom every

single time. However, we need guarantees in the legislation that the biometric commissioner will carry out his or her responsibilities in a manner that is compliant with the human rights obligations of the United Kingdom. We assume that the office holder would do so, but we think that there should be a statutory statement to that effect.

I will leave my introduction there. We had a few points to make on children, but, if you will allow me, I will leave those be. Paddy Kelly has spoken very clearly on the situation of children, and the Children's Commissioner is following us, so we thought that perhaps the best use of your time would be if you engaged with us about adults. Thank you.

The Chairperson: Are there any circumstances under which you believe that the indefinite retention of DNA is appropriate?

Professor O'Flaherty: Of course. It is appropriate when, in the case of a convicted person, an appropriate authority such as a court considers that it should be retained in the interests of public safety, for example.

The Chairperson: Does that mean indefinitely?

Professor O'Flaherty: Yes, but the individual should always have the opportunity — and we are saying that it should be in a court — to check that that is still a proportionate restraint on their human rights. Likewise, we are not saying that an unconvicted person's DNA material should never be held. Again, there will be certain prescribed circumstances where that makes sense. However, our concern is that we need to articulate the prescribed circumstances, and we need to clarify the process by which a person can challenge that.

The Chairperson: I have heard the comment that judicial review is the expensive way of doing things, but is that not ultimately a policing decision? If the Chief Constable decides on the issue, should it not be a matter of challenging the process that he has followed, rather than having the courts deal with it?

Professor O'Flaherty: This is not written up anywhere, so we had to investigate it, and if I misstate it, I express regret in advance, but I think that I have the gist of it. There is a practice among Chief Constables of the United Kingdom that this is administratively organised as an internal police matter, meaning that you can apply to a chief constable to have your material destroyed. That chief constable, applying criteria that I have not had access to, will then make a determination on whether the material will be destroyed. My understanding is that there have been a few instances of that happening in Northern Ireland. I am not aware of a single case where an aggrieved person came out of that and then went to the court. I do not have that information. Our sense is that it has not happened, but I stand to be corrected if that is not accurate.

We just want a simpler, more straightforward procedure. We want a procedure whereby the court or, in the first instance, the biometric commissioner — that would be OK — has a clear, well-publicised and laid out step-by-step process through which the aggrieved person can make a petition that will be assessed according to clear criteria so that an answer comes down. Based on that answer, if it continues to be negative, the person should have a route not into the High Court but into a lower court, where the costs are lower and the whole proceeding is more efficient, straightforward and speedy.

The Chairperson: Earlier, you made a comment about a person who had a conviction for not paying a TV licence and a murderer. Can you show me where in the Bill they are both treated the same?

Professor O'Flaherty: Well, they are both convicted persons.

Mr Colin Caughey (Northern Ireland Human Rights Commission): They would both be considered as having committed a recordable offence.

The Chairperson: Yes, but is there a proportionate approach to the retention of DNA in both cases?

Professor O'Flaherty: There is no proportion. Under the current provisions, the DNA information on both persons will be retained indefinitely.

Mr McGlone: Thank you for your presentation. For a non-legal person, it is very useful to hear the issue explained in that way. You are drawing a distinction between those who are convicted and

those who are not; is that right? I presume that you are saying that the retention of the DNA of those who are convicted should be graded according to the gravity of the offence for which they may initially have been convicted and their potential to reoffend. Is that where you are going?

Professor O'Flaherty: I will ask Colin to answer your question in detail. By way of introduction, I will say that we simply recognise that there is a qualitative difference between a convicted person and a non-convicted person. We recognise that it would be unreasonable to demand of modern-day policing that it should destroy its entire potential evidentiary base in the case of someone who has previously offended. With your permission, Colin will go into more detail on that.

Mr Caughey: We have taken into account the Council of Europe Committee of Ministers recommendation R(92)1 to which Mr Maginness referred earlier, which states that retentions are permitted only:

> *"where the individual concerned has been convicted of serious offences against the life, integrity or security of persons".*

On that basis, we suggested that the Department should consider a graduated length of retention according to the seriousness of the offence, possibly with indefinite retention in the case of a serious offence. We have also suggested that, were that to be investigated and it was felt that it was not appropriate, there should be the possibility of a right of an individual who is subject to indefinite retention to apply to the court or another body.

Mr McGlone: I just want to be clear about the circumstances where there has not been a conviction. What are you saying in that case?

Mr Caughey: Where there has not been a conviction, we are saying that the basis on which samples can be retained needs to be clearly laid out in the Bill.

Mr A Maginness: I want to follow up on the latter point. You have referred to this as "prescribed circumstances". You are not here as a potential legislator, but in your view, or the commission's view, could you outline what you might consider to be reasonable terms for prescribed circumstances. Have you any assistance to give us in relation to that?

Professor O'Flaherty: Mr Clayton, who spoke to you before us, read out to you some of the examples that were delivered by the Department. Some of those are entirely acceptable.

Where a case is proceeding and where there may be intimidation of witnesses, and so forth, meaning that someone had to be let go unconvicted but there is a sense that they are still very much a suspect in the ongoing criminal investigation, that would be an eminently acceptable prescribed circumstance.

If I give you examples of unacceptable circumstances, I would not like to suggest for an instant that the Department is considering imposing those. For example, some kind of an ethnic profiling prescribed circumstance, whereby we will in future keep the evidence of all persons of an ethnicity because of some spurious notion that that ethnicity is more likely than another to commit a crime, would be intolerable. I am not suggesting for one moment that anyone is considering such a thing, but until you enumerate those circumstances, you run a risk that in some future time something unpleasant of that nature could at least be allowed to happen.

Mr A Maginness: Have you parameters for the Department in relation to prescribed circumstances? I understand the one where there is continuing investigation or a trial taking place.

Professor O'Flaherty: The parameters can be derived from the international standards, one of which is presumption of innocence. So, any prescribed circumstance that would impute to an innocent person some suggestion of guilt would be unacceptable. Any parameter that engaged in such a violation of the principle of non-discrimination as ethnic profiling would be unacceptable. We can derive, from across the treaties that the UK has ratified, a number of walls around that, but the fact that they exist does not mean that leaving vagueness in the Bill is a healthy way to proceed.

The best guidance for human rights compliance we can give, the better and the more likely it is that we will avoid yet another case of going to Strasbourg, finding the UK in violation and, eventually, seeing a new Bill in front of you because it has to be brought into compliance.

Mr A Maginness: I already explained that if I were an innocent person, and DNA and fingerprints were taken from me, I would feel very resentful and stigmatised. My understanding of stigmatisation is that I would feel as if I have been branded and identified as somebody who committed some crime. I would feel very resentful about that. That will fester with any individual. With some people it may not. Mr Wells said that it does not faze him —

Mr Wells: Not in the least.

Mr A Maginness: But it may faze other people. Have you any views on stigmatisation? As I understand it, the word "stigma" is a marking out of a person.

Professor O'Flaherty: I will ask Colin to speak on stigmatisation in a moment, but I did not use that word because I do not think that that is the issue. The issue is that your DNA profile is your private property. It is who you are. Unless you have committed a crime or there is some other reasonable reason for the state for interfere, and we are not challenging that, in normal circumstances your DNA profile belongs to you and it is nobody else's business. That is the essence of the right to privacy.

It is the same as your house. We recognise that the police, in certain circumstances, have every entitlement to come into your house, but they do not have an open invitation to go in and out your front door. Colin will give you a more technical answer.

Mr Caughey: Stigmatisation is an individualised matter and it is about how the fact that their DNA is retained is interpreted by the individual. That is why we highlighted in our statement that there should be a right for an individual to apply to the courts. If that individual fears that the retention of their DNA profile and fingerprints is hampering their enjoyment of life and they feel stigmatised by it, they have that option. Those who have no difficulty with it will not exercise their right to apply to the courts, but those who feel stigmatised would have that facility open to them.

Mr McCartney: Michael said that at times there may be people who are not convicted until there are additional witnesses. Should there be provision for someone charged and acquitted of a serious offence so, therefore, that scenario of intimidation or if they have been through a jury trial or, you know?

Professor O'Flaherty: I am not quite sure of the situation for somebody charged, tried and acquitted. Colin, do you know?

Mr McCartney: The legislation states:

"charged with ... but ... not convicted of"

So, not convicted of —

Professor O'Flaherty: That is the same as acquitted.

Mr McCartney: "Acquitted" would give a sense that there has been a trial. "Not convicted of" could mean that there is not sufficient evidence, so you are released before it goes to trial.

Mr Caughey: In those circumstances, under the Bill, they would be permitted to retain the evidence for three years. We have looked into the proportionality of that. The UK Government provided evidence to the Committee of Ministers, following on from S and Marper, but I am not sure whether this Committee looked at that. The Committee of Ministers met last week. That evidence set out the basis upon which that is considered to be proportionate, and the Committee of Ministers effectively agreed with the Government research and has taken it on board. The evidence shows that the higher propensity for reoffending among those arrested but not convicted of a serious offence was present for three years, and then they had the equivalent propensity to that of Joe Public. On the basis of that Committee of Ministers ruling, it appears that that is proportionate.

Mr McCartney: The second point is that it can be retained for a period of three years, with an extension of two years available on application to the courts. You can use different words like "stigma" or "no entry when not required". You can have a scenario in which a person is acquitted, their DNA is

retained for three years, and then an application is made to retain their DNA. If that is granted, in many ways, in the eyes of a whole lot of people, that person could be nearly guilty.

Professor O'Flaherty: The problem is that there are very few absolute rights in human rights. Most rights are subject to limitation. The European Court, or, at least, the Committee of Ministers and the framework of the European Convention, suggest to us that holding the DNA of such persons for a limited number of years is proportionate and, therefore, is not a violation of rights, so we as a commission are not able to encourage you or suggest to you that there is any human rights argument to take a different approach on that.

Mr McCartney: I have a final point. Your written submission stated that perhaps the Committee might seek information from the Department as to how the retention of DNA material assists in the prevention of crime. Maybe we should ask the Department to outline how many cases have been solved because DNA was already in the possession of the investigators.

Mr Wells: I go back to my situation. DNA, fingerprinting, photographs — the whole works. As it happened, when the case got to court, it was a minor conviction. How are my human rights impinged? Why should I be feeling stigmatised by the fact that police still retain my DNA? What am I supposed to feel burdened about that I have not realised?

Professor O'Flaherty: First, are you the convicted person?

Mr Wells: I am, yes.

Professor O'Flaherty: So you have a criminal conviction —

Mr Wells: A very minor one.

Professor O'Flaherty: Your DNA material is being retained indefinitely?

Mr Wells: Quite rightly so, yes.

Professor O'Flaherty: If you were ever to be of the view, which you clearly never will, that that is not an appropriate action, you could apply to the Chief Constable.

Mr Wells: Why would I want to do that?

Professor O'Flaherty: It is entirely up to you. It is your human right.

Mr Wells: I would want to do it if I thought that I was likely to commit another crime. I would not want my DNA held in any databank because I would be likely to get caught, but why would anyone who is not intending to commit a crime be remotely worried about whether the DNA is collected and retained?

Professor O'Flaherty: I do not have to answer that question, Mr Wells, because we are simply suggesting that retention of DNA is perfectly acceptable in many circumstances but that there are certain circumstances in which a properly vested regulatory body of the state should make the consideration, on application of the person, of whether there is no longer a social need to retain it.

Mr Wells: What you do have to answer, as the commissioner, is why anyone's human rights would be impinged by the fact that their DNA is retained after a crime.

Professor O'Flaherty: We are here to reflect to you not our opinions but what the international treaties that the UK has ratified say and what the regulatory bodies, such as the European Court, adjudicate under those bodies. In the S and Marper case, they gave clear guidance to the United Kingdom that it has to change its law. We are here as officers of the law to reflect it back to you, no more.

Mr Wells: At the time of my car accident, I applied for a British passport, as is my right. As part of that process, my photograph was taken. That has been retained by the authorities in the passport office and will be retained ad infinitum. As I keep applying, they will retain other photographs of me. What is the difference, as far as my human rights are concerned, between that and my DNA?

Professor O'Flaherty: In the context of a passport, there is a clear public order requirement to know who the bearer of a passport is, and the most reliable way of doing that is measuring a face against the picture.

Mr Wells: My picture looks nothing like me. It makes me look like a 17-year-old. I look wonderful, but we age, as you know.

Professor O'Flaherty: With regard to DNA and the criminal context, the public need to retain it will vary according to various circumstances and criteria, such as your likelihood of committing another offence and your involvement in an ongoing trial like the one that we discussed earlier. We are not suggesting that it need not, or should not, be retained. We are simply saying it is wrong to take an absolutist approach that fails to distinguish between the likes of yourself or the woman who did not pay her TV licence — and there are such people in jail in Northern Ireland, as you know — and a murderer. It does not seem to be a proportionate approach of the state to treat that person and a murderer in exactly the same way.

Mr Wells: As I have no intention of committing any further crime, I do not have to worry about what is retained. However, if I were thinking of committing a crime, I would be straight in to ask for it to be destroyed. That is the problem. Law-abiding citizens will not avail themselves of this, but the person who has something to hide will. You cannot answer that, and I understand that.

You also said that, in the eyes of the public, there would be a stigma attached to having a two-year extension to the retention of DNA.

Professor O'Flaherty: Those were not my words.

Mr Wells: They were the words of Mr McCartney.

Mr McCartney: They were not mine either.

Mr Wells: Somebody certainly said it. For the benefit of the record, an honourable Member suggested that it would stigmatise someone in the eyes of the public to have the two-year extension. Who would actually know that the application for an extension had been made? My understanding is that it would be an entirely private issue.

Professor O'Flaherty: We are not raising any issues or concerns about the matter of three years with a two-year extension.

Mr Wells: Who knows whose DNA is retained apart from the individual and the police? Who actually knows that?

Mr Caughey: The applications are made to a district judge. Whether they are taken in closed hearing is not clear from the Bill. That is from what I have been able to investigate so far. If they are in closed hearing, ultimately, it would not be public.

Mr Wells: How could there be a public stigma if nobody, apart from you and the authorities, knew that there was either the original retention of the DNA or an extension?

Mr Caughey: If it is a closed hearing — we are not certain at this point whether it would be — it would be a private matter, but the state would hold that information.

Professor O'Flaherty: Also, we, as the Human Rights Commission, are not competent to get involved in psychological speculation. That is just not our competence.

Mr Wells: I am speechless.

The Chairperson: That is a first.

Mr A Maginness: It is the first time in your life.

Mr Wells: I realise why you are here. Do not presume that because this has been foisted upon us by the European Court of Human Rights, we agree with it. Simply because it has come from a judge in Azerbaijan or somewhere does not mean that we in Northern Ireland accept that it is right. Although we may have to accept that it will be imposed on us, that does not mean that we accept the principle on which it is based.

The Chairperson: From your organisation's perspective, the issue with this judgement was the indiscriminate blanket approach that was taken. This now makes distinctions between those who are convicted and those who are not convicted; there is a difference of approach. The issue that you are highlighting now is this: if a person is convicted, where is the proportionality between a non-payer of a TV licence and a murderer? However, this Bill moves us on from the indiscriminate approach that was applied to everybody, whether convicted or not. Having moved away from that indiscriminate, blanket approach, surely we are meeting a test that is required of the state to comply with that judgement. From your point of view, the issue is whether it is fully compliant with the exemplars of best human rights practice?

Professor O'Flaherty: No. Whether some members of the Committee feel a detachment from the international obligations or not, we want to avoid the UK being hauled in front of the European Court of Human Rights. Our concern is that by treating the situation of a convicted person in the manner that this Bill does, the UK — or at least Northern Ireland in the context of the Bill — is, based on evidence from the European Court, going too far. There have been recent cases in the European Court that had nothing to do with the UK. As I mentioned, there was a Netherlands case in which the court was very clear that you could not take a blanket approach to convicted persons and that you had to look at the individual circumstances to meet the test of proportionality. That has not been taken into account in the Bill. We suggest that the Bill sets us up for future trouble with litigation.

The Chairperson: OK. Thank you very much.

Mr A Maginness: Before the chief commissioner goes, I want to say something in relation to what Mr Caughey said. As I understand it, the British Government gave evidence to the Council of Ministers recently. There may be a transcript of that. Is that available?

Mr Caughey: Yes, we can provide that. It is available on the Committee of Ministers website. We can send that to you.

Mr A Maginness: That might be helpful.

The Chairperson: Thank you very much.