

Mrs Christine Darrah
Clerk to the Justice Committee
NI Assembly
Room 242 Parliament Buildings
Ballymiscaw
Stormont
BELFAST BT4 3XX

31 August 2012

Our ref: 12/PD/PLM/079

Dear Mrs Darrah

This letter is in response to the Northern Ireland Assembly Justice Committee's request for views and comments regarding the contents of the draft Criminal Justice Bill.

The Northern Ireland Commissioner for Children and Young People (NICCY) has a number of significant concerns regarding the legislative proposals contained in the draft Bill. These are mainly focused on the clauses and schedules pertaining to the retention of fingerprints and DNA profiles. NICCY has not detailed any specific comments regarding the provisions relating to 'Sex Offenders', however we will closely monitor the development of the legislation in relation to this issue. With regard to the clauses concerning 'Trafficking People for Exploitation', NICCY wishes to highlight a number of key issues.

'Trafficking People for Exploitation'

In May 2012, NICCY responded to the Department of Justice's consultation on amending the law to introduce the new trafficking offences¹. We welcomed the development as a progressive step towards implementation of the European Union (EU) Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. We also noted the advice of the Department within the March 2012 consultation document that there would be *"little scope to influence"* the

¹ NICCY's response to the consultation can be viewed via the following link:

http://www.niccy.org/uploaded_docs/2012/Consultations/Apr-July/NICCY%20response%20to%20DOJ%20consultation%20on%20legislative%20amendments%20and%20DOJ%20engagement%20in%20relation%20to%20human%20trafficking%2031%205%2012.pdf

[last accessed 30 August 2012].



proposed legislative amendments, due to the fact that they *"are required in order to comply with the EU Directive"*². In our response to the Department, NICCY highlighted that the obligation to create the new criminal offences, in order to comply with the Directive, does not preclude the implementation of additional measures which would further progress the legislative and policy framework.

NICCY has no specific comments to make regarding Clauses 5 and 6 of the draft Criminal Justice Bill. We would highlight, however, that the safeguarding and promotion of the rights and best interests of separated children and young people subject to immigration control in NI is an important issue for the Commissioner. We believe that the risk of trafficking of the small number of separated children subject to immigration control in NI should not be considered separately from the issue of the complex immigration processes to which these children are subject. It may be of interest to the Committee to hear that the Commissioner will shortly be commissioning a focused piece of research in the area of separated children subject to immigration control.

Retention of Fingerprints, DNA profiles, etc

NICCY responded to the consultation issued by the Department of Justice on 'Proposals for the Retention and Destruction of Fingerprints and DNA in Northern Ireland' in June 2011. This response is attached for the Committee's information. In this, we highlighted a range of concerns and issues which we believed required further clarification. NICCY would draw the Committee's attention to Section 2 which references relevant articles of the United Nations Convention on the Rights of the Child (UNCRC) and of the European Convention of Human Rights concerning DNA and fingerprint retention and destruction. In relation to the UNCRC, Article 16 concerning the child's right to privacy and to have their privacy protected and Article 40 which references the child's right to be presumed innocent until proven guilty and to have their privacy protected during proceedings, are of particular relevance. In addition, Section 5, page 6 details the Commissioner's specific concerns regarding the consultation proposals, and Section 6 presents NICCY's recommendations to the Department of Justice regarding how the legislation should be taken forward.

NICCY is concerned that few of the issues raised in its response to the Department of Justice have been addressed. Indeed, in reviewing the draft clauses and schedules, there appears to have been only minimal alteration to the original proposals concerning the retention and destruction of DNA profiles and fingerprints and their application to children and young people. NICCY is therefore concerned that insufficient consideration has been given to the potentially negative implications of retaining such information, particularly where it impacts on a child or young person's

² Department of Justice (2012) 'Consultation on legislative amendments and Department of Justice engagement in relation to Human Trafficking', section 1.2

privacy and safety or when it leads to them coming into contact with the criminal justice system.

Obtaining DNA samples and fingerprints from children

In its evidence to the Committee for Justice on 28 June 2011, the Department of Justice confirmed that under Police And Criminal Evidence legislation, 'a juvenile is defined as anyone under the age of 18' and that 'DNA and fingerprints are held for juveniles between the ages of 10 and 18.' This means that children as young as 10 years may be asked to give DNA samples and fingerprints and, according to the draft Bill to also give their consent to have samples taken. The Commissioner is concerned that children as young as 10 years of age will be required to provide DNA samples and also that it is unclear how their consent will be secured. The UK Government has been criticised by the UN Committee on the Rights of the Child in relation to its failure to respect the privacy rights of children and young people in contact with the criminal justice system. Obtaining and retaining DNA samples and fingerprints from children requires a detailed consideration of their rights under the UNCRC and especially the principle of the best interests of the Child.

Applications to extend the retention period

The proposal to grant an extension to the retention period of DNA and fingerprint samples and profiles will require very careful monitoring and regulation to ensure that it does not result in the unnecessary and indefinite retention of material, particularly in relation to children and young people. NICCY is of the view that if a court grants an extension to the retention period for the DNA of a child or young person who has been charged but not convicted, this suggests that doubt and suspicion remain regarding their innocence and further stigmatises them. It also contravenes Article 40 of the UNCRC which affords children the right to be presumed innocent until proven guilty according to the law.

Appeals against an extension to the retention period

The draft Bill indicates that 'the person from whom the material was taken' may appeal against an order to extend the retention period. NICCY would suggest that careful consideration should be given as to how a young person under 18 years will be supported to undertake such an appeal. It is vital that under the Bill, children and young people are afforded the same rights as adults, therefore it is important that appropriate and effective processes/mechanisms are put in place to enable them to pursue an appeal and for any such appeals to be given equal weight and consideration.

Differentiation between adults and children

The consultation document issued by the Department of Justice stated that 'the proposals will differentiate between adults and juveniles to ensure that particular attention is paid to the protection of minors'. However, the only difference in the Bill's

provisions for adults and children and young people relates to conviction for a first minor offence. Where a young person has no previous convictions, and they receive a custodial sentence of less than 5 years, material may be retained for the length of sentence plus 5 years. Where the sentence exceeds 5 years, the material may be retained indefinitely. Furthermore, where a young person has a previous conviction for a minor offence, and they are charged with or arrested for a minor offence, the draft Bill allows for the indefinite retention of their DNA or fingerprints.

NICCY does not believe that the retention a child or young person's DNA samples or fingerprints for this period of time for conviction of a minor offence, constitutes a proportionate response. Children and young people should be afforded maximum protection under the law. However five years (without adding on the period of the custodial sentence) is a considerable period of time for a child or young person's personal details to be retained by the Government and NICCY would recommend the Committee considers reducing the period of retention of DNA and fingerprint material for young people who are convicted for a first minor offence.

Inclusion of a caution under definition of offence

We are concerned that the draft Bill includes a caution within the definition of an offence for which a person is convicted. This means that in certain circumstances, if a child or young person has received a caution for a previous offence, this may lead to their DNA samples or fingerprints being retained indefinitely. Given that the purpose of a caution is to divert young people away from the criminal justice system, the inclusion of cautions under the definition of offences seems inappropriate and disproportionate.

Non-convicted children and young people

Where a child or young person is charged but not convicted of a serious offence, and they have no previous convictions, the draft Bill provides that their DNA or fingerprints may be retained for a period of between 3 and 5 years. If a young person has been arrested but not charged, their DNA or fingerprints may only be retained if 'prescribed circumstances apply'. It will be important to ascertain what these circumstances might be and to consider whether this period of retention is proportionate.

NICCY is of the view that where a child or young person has not been convicted for or even charged with an offence, their DNA and fingerprints should not be retained. To do so is to seriously undermine their right to a presumption of innocence until proven guilty, again contravening Article 40 of the UNCRC.

Research suggests that a disproportionate number of young people come into contact with the police and that this may be due to the fact that some of them are more likely to offend in their teenage years. We believe that children and young people's lack of maturity should be taken into account and they should not be stigmatised by actions

undertaken before they reach full maturity. In our response to the Department of Justice's consultation, NICCY suggested that consideration should be given to removing young people's DNA profiles and fingerprints once they reach the age of 18 years, so they are given an opportunity to enter adulthood with a 'clean slate'. Of course, this decision would be dependent on the seriousness of the crimes committed and the number of offences for which they have been convicted. NICCY recommends that particular consideration should be given to this proposal where children or young people have been arrested for or charged with minor offences or have been convicted of first minor offences.

Conclusion

The proposals in the draft Bill mean that many young people will enter the criminal justice system and be given a criminal record. NICCY strongly believes that wherever possible, the Government should actively seek to divert young people away from the criminal justice system. Contact with the criminal justice system clearly has an adverse impact on young people's lives, potentially negatively impacting on their physical, mental, emotional and social development and creating significant challenges for them in re-integrating into society.

NICCY is particularly concerned that significant human rights principles of proportionality, necessity and presumption of innocence strongly underpin the draft Bill's provisions regarding the retention and destruction of DNA samples and fingerprints. Whilst recognising the value of this material as essential intelligence and evidence tools, this has to be balanced against the extremely personal nature of the data. Consideration should be given to the potentially negative implications of retaining this information, particularly when it impacts on a child or young person's privacy and safety or leads to them coming into contact with the criminal justice system. The special status of children and young people should be taken into account and their protection identified as a key priority.

NICCY would like to thank the Justice Committee for the opportunity to comment on the draft Bill. Should the Committee require any further information, please do not hesitate to contact the office.

Yours sincerely



Mairéad McCafferty
Chief Executive