

## **Response from the Northern Ireland Commissioner for Children and Young People to Consultation on Proposals for the Retention and Destruction of Fingerprints and DNA in Northern Ireland**

### **1.0 Introduction**

The Office of Commissioner for Children and Young People (NICCY) was created in accordance with 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003) to safeguard and promote the rights and best interests of children and young people in Northern Ireland.

Under Articles 7(2)(3) of this legislation, NICCY has a mandate to keep under review, the adequacy and effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities. The remit of our Office is children and young people from birth up to 18 years, or 21 years of age if the young person is disabled or in the care of Social Services.

In determining how to carry out her functions, the Commissioner's paramount consideration is the rights of the child and NICCY is required to base all its work on the United Nations Convention on the Rights of the Child (UNCRC).

NICCY welcomes the opportunity to respond to this consultation by the Department of Justice on DNA and fingerprint retention and destruction.

### **2.0 International Law**

#### **2.1 Children's Rights**

The United Nations Convention on the Rights of the Child (UNCRC) provides the overarching framework which guides the work of NICCY. The UK Government, including Northern Ireland, is a signatory to the Convention and has agreed to uphold the rights of children and young people based on the Convention.

NICCY appreciates that there are often complexities when reconciling the rights of children and young people with their welfare and best interests. NICCY would recommend the proposals are reviewed against the following relevant Articles within the UNCRC and that these are incorporated in the policy as underlying principles, to ensure that the rights and best interests of children and young people are upheld and protected

- Article 2: Children shall not be discriminated against and shall have equal access to all articles in the UNCRC



- Article 3: All decisions taken which affect children's lives should be taken in the child's best interests.
- Article 6: All children have the right to life and to the fullest level of development.
- Article 12: Children have the right to have their voices heard in all matters concerning them.

In reviewing the consultation proposals, the following Articles from the UNCRC are also relevant and require special consideration and reference within the policy.

**Article 16** states that;

*'No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation. Furthermore, 'the child has the right to the protection of the law against such interference or attacks'.*

The Children's Commissioners for England, Northern Ireland and Wales submitted joint evidence to the UN Committee on the Rights of the Child in June 2008 where they argued that the indefinite retention of children's DNA contravened children's privacy rights under Article 16 of the UNCRC<sup>1</sup>. The UN Committee shared this view in its concluding observations in November 2008 expressing concerns that; *"data regarding children is kept in the national DNA database irrespective of whether the child is ultimately charged or found guilty"*. The Committee called on the Government to introduce stronger regulations for data protection in relation to both legislation and practice that may impact upon children and young people's right to privacy<sup>2</sup>.

**Article 40** states that;

*'States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.*

Furthermore, *'Every child alleged as or accused of having infringed the penal law has at least the following guarantees:*

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<sup>1</sup> UK Commissioners' Report to the UN Committee on the Rights of the Child (2008)

<sup>2</sup> UN Committee on the Rights of the Child, 49<sup>th</sup> Session. *Concluding Observations on UK*, 20<sup>th</sup> October 2006, at para 36.



- (i) *To be presumed innocent until proven guilty according to law and*
- vii) *To have his or her privacy fully respected at all stages of the proceedings.*

In reviewing the relevance of Article 40 to the consultation proposals, the Nuffield Council on Bioethics (2007:xvii)<sup>3</sup> noted, *"it may be argued that retaining bio information from young people is contrary to Article 40 of the UN Convention on the Rights of the Child, in that the Convention requires special attention to be given to the treatment of children by legal systems, to protect them from stigma, and that if they have offended, opportunities for rehabilitation should be maximised. The destruction of relevant criminal justice records and accompanying body samples could become one element in such a rehabilitative process."*

NICCY strongly encourages the Department of Justice to ensure that this policy reflects **all** the relevant recommendations of the Committee on the Rights of the Child.

## **2.2 European Convention on Human Rights**

The Human Rights Act 1998 (HRA) incorporated provisions of the European Convention on Human Rights into domestic legislation. Although the Human Rights Act is not child-specific, children are afforded the rights contained within it to the same degree as adults, it is therefore essential that the proposals outlined in this consultation are compatible with the following articles of the HRA.

The Consultation proposals note that the European Court of Human Rights intervened with regard to this issue in its judgment in the case of *S and Marper vs the UK*, ruling that the blanket policy regarding the indefinite retention of fingerprints and DNA of all people arrested but not convicted was in breach of the individual's right to respect for private life, under Article 8 of the European Convention of Human Rights.

**Article 8** states that *'Everyone has the right to respect for his private and family life, his home and his correspondence'*. It goes on to state that *'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-*

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<sup>3</sup> Nuffield Council on Bioethics (2007) *The Forensic Use of Bioinformation: Ethical Issues* (London, September).



*being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.*

**Article 6** of the European Convention on Human Rights is also relevant to the Consultation. It states that *‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded...where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice’.*

Also particularly significant to the proposals contained in the Consultation document, Article 6 states that *‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’.*

### **3.0 Research**

In 2007, NICCY carried out a major review of children’s rights, which highlighted the gaps, problems and difficulties in the protection, promotion and implementation of children’s rights in Northern Ireland<sup>4</sup>.

In relation to DNA and fingerprint retention, this Review referenced research indicating that DNA samples from over 3,100 under 18 year olds were held and of these, over 1,100 were from young people who had not been convicted or cautioned<sup>5</sup>. We highlighted a number of concerns in relation to the retention of DNA and fingerprints including;

- the potential for unauthorised access, abuses and/or misuses and mistakes;
- the creation of a permanent ‘list of suspects’ that may be made available to a wider range of organisations in the future;
- the use of this information for research projects, and;
- the use of the data for ‘familial searches’ (trying to trace a suspect through their relatives).

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<sup>4</sup>NICCY (2008) *Children’s Rights: Rhetoric of Reality: A Review of Children’s Rights in Northern Ireland*, p.78-80.

<sup>5</sup> Save the Children & the Children’s Law Centre (2008). *Northern Ireland NGO Alternative Report: Submission to the UN Committee on the Rights of the Child for Consideration during the Committee’s Scrutiny of the UK Government Report*. Belfast: Save the Children and Children’s Law Centre.



The Review also referenced parental concerns about the retention of young people's DNA and particularly the effect this had in 'criminalising' them<sup>6</sup>. At the time of the Review, NICCY recommended, along with the Children's Commissioners in England and Wales that the Scottish approach to DNA retention be applied throughout the UK.

While the current proposals seek to introduce greater leniency in the practice of DNA and fingerprint retention, NICCY would note that the retention of this information still presents significant risks, a number of which were listed in the bullet points above.

#### **4.0 Consultation with Children and Young People**

NICCY has regularly expressed concern through a broad range of policy and consultation work that Section 75 is not being adequately enforced in respect of the age criterion and that public authorities are consistently failing in their duty to meaningfully consult with children and young people on issues that have direct relevance to their lives. Article 12 of the UNCRC also provides that children have the right to express their opinion in matters directly impacting upon them and have those views given due weight in accordance with the age and maturity of the child.

In addition to this Action 4.1 of Our Children and Young People - Our Pledge Action Plan 2007-2008 states that all Departments should 'consider the views of children and young people in the development of new policy that impact on their age group'. This action places an emphasis on all Ministers to ensure that their department is actively seeking the views and opinions of children and young people.

NICCY would like further information on how the department has sought the views of children and young people at this stage of the consultation. Evidently the consultation proposals impact directly on children and young people. It is therefore important that consideration has been given to their views and experiences with regard to the revised legislative proposals.

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<sup>6</sup>NICCY (2008) p.80



## **5.0 Comments on the Proposal**

### **5.1 Background**

The NI Commissioner for Children and Young People issued statements in August 2006 and June 2007, highlighting concerns regarding DNA retention and particularly the indefinite retention of DNA samples<sup>7</sup>. NICCY noted that this contravened articles enshrined in the UNCRC and specifically provisions regarding children and young people's privacy and freedom. In 2006, the Commissioner became aware that over 3000 samples of DNA from children and young people under 18 years were retained by the PSNI at that time. The issue was raised with the PSNI and the Policing Board. Subsequently and as noted above, NICCY, along with the Children's Commissioners from England and Wales reported their concerns to the United Nations Committee on the Rights of the Child in November 2008.

In August 2009, the Children's Commissioners for England, Wales and Northern Ireland submitted a joint response to a series of proposals outlining reforms to the National DNA Database, highlighting the Government's failure to respect children's right to privacy and family life under Article 16 of the UNCRC<sup>8</sup>. They also called on Government to ensure that the retention regime was compliant with Article 40 of the UNCRC and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), by establishing clearer differentiation and stronger support for the desirability of reintegration. The Children's Commissioners were concerned that the proposals failed to distinguish between children and adults arrested or convicted of a serious, sexual or terrorism related offences. In the proposals relating to the National DNA database, children who were arrested but not convicted of recordable offences were to continue to have their DNA retained, and any re-arrest before the profile was deleted would transfer them into the regime of adult retention. The three Commissioners highlighted the system in Scotland, commenting that it is 'more fully compliant with the rights of children and provides the best starting point for reform'.

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<sup>7</sup> <http://www.niccy.org/article.aspx?menuid=522>, Belfast Telegraph (2006) 'Commissioner Blasts DNA Sampling'

<sup>8</sup> [http://www.niccy.org/uploaded\\_docs/Joint%20response%20by%2011%20Million,%20NICCY%20and%20the%20Children's%20Commissioner%20for%20Wales%20to%20the%20Home%20Office%20Re%20Keeping%20the%20Right%20People%20on%20the%20DNA%20Database.%20August%202009.doc](http://www.niccy.org/uploaded_docs/Joint%20response%20by%2011%20Million,%20NICCY%20and%20the%20Children's%20Commissioner%20for%20Wales%20to%20the%20Home%20Office%20Re%20Keeping%20the%20Right%20People%20on%20the%20DNA%20Database.%20August%202009.doc)





## **5.2 Proposals for the Retention and Destruction of Fingerprints and DNA in Northern Ireland**

In approaching its consideration of the legislative proposals contained within the consultation document, NICCY wishes to acknowledge the effectiveness of DNA and fingerprint evidence in the detection and prosecution of crime. NICCY also recognizes that it will be necessary to collect and retain DNA profiles and fingerprints for the purposes of criminal investigations and that in some cases, this may include retaining data relating to young people.

NICCY is most concerned however, that human rights principles of proportionality, necessity and presumption of innocence, should strongly underpin these policies, and therefore impose strict limits on data retention. Whilst recognizing the value of DNA profiles as intelligence and evidence tools, this should be balanced against the extremely personal nature of the data retained. Consideration must be given to the potentially negative implications of retaining information, particularly where it impacts on a child or young person's privacy and safety or when it results in them coming into contact with the criminal justice system.

In setting out the proposals regarding DNA and fingerprinting retention and destruction, the Consultation document states that 'the judgment by the European Court of Human Rights does not change the current law in Northern Ireland but...requires us to reconsider and amend our legislation to address the violation elements of the ruling'. Although broadly welcoming the Department's (DoJ) proposal to amend the legislation following the ruling by the European Court of Human Rights, NICCY would reiterate the fact that it has, for some years, expressed significant concerns within local, national and international fora regarding the current policies for DNA and fingerprint retention and destruction and the detrimental impact these policies have on children and young people.

The Consultation document states that the proposals 'seek to differentiate between adults and juveniles to take account of comments of the European Court of Human Rights' and specifically that 'particular attention should be paid to the protection of minors from any detriment that may result from the retention of data and importance of their development and integration into society'. While acknowledging the DoJ's stated commitment to these principles, NICCY wishes to highlight a number of issues where it has particular concerns and to seek clarification with regard to the detail of some of the proposals contained in the Consultation document.



### **5.2.1 Paragraph 4.3**

It is stated in this paragraph that the proposals will differentiate between adults and juveniles. NICCY recommends that the DoJ confirms that it defines juveniles as children and young people aged between 10 and 18 years.

Reference is made in this paragraph and elsewhere in the document to the option for the period of DNA retention to be extended '*on application to a court*'. NICCY requests clarification with regard to who may apply to a court for a further extension and the grounds upon which such a request can be made and indeed granted. Also, it is not clear from the proposals if there is a limit to the number of court applications that may be made. NICCY would be concerned that if there is none, conceivably DNA could be retained indefinitely.

NICCY has concerns about the extension of DNA retention by Court Order and recommends clarification as to how this will be effectively monitored and regulated to ensure it does not result unnecessarily in the indefinite retention of DNA, particularly in respect of children and young people. If a Court can grant an extension to the retention of the DNA of an individual who has been charged but not convicted, it suggests that doubts remain regarding the individual's innocence, further stigmatizing them and leading to greater suspicion about their innocence.

Also it would be a serious matter if applications to Courts were to become routine; if the police, as a matter of course, sought to ensure that they retained a DNA record for all those charged with an offence lest an individual subsequently commits a crime where the retention of DNA information might be helpful.

The Consultation document states that 'the proposals will differentiate between adults and juveniles to ensure that 'particular attention is paid to the protection of minors...' It then explains that a three year retention period will apply to juveniles who have been charged but not convicted for serious offences which may be extended for a further two years on application to a court. However in reviewing the provisions pertaining to 'Non-convicted Persons' in para. 4.5, the same provisions apply to adults, so no particular attention has been paid to minors in this regard, nor separate provisions made for them.

NICCY would question how the proposal to retain the DNA of young people charged but not convicted for serious offences for a period of at least three years (although in practice this could potentially be for an indefinite period), is in their best interests and will support their development and integration within society. NICCY would suggest that this proposal be reviewed and





consideration given to removing the DNA profiles of all young people who have not been convicted of any offence. Exceptional circumstances could be considered, for example where a young person is arrested for a serious violent or sexual offence but is subsequently acquitted or the charges are dropped. In such cases, the period of DNA retention could be reduced to one to two years following acquittal or the dropping of charges.

NICCY is aware that a disproportionate number of young people come into contact with the police. Research indicates that this may be due to the fact that some children are more likely to be involved in criminal activities in their teenage years. However young people are also more visible to the police. The 'demonization' of young people by politicians and the media has gathered apace in recent years. The UN Committee on the Rights of the Child in its 2008 Concluding Observations, noted its concerns about the *'general climate of intolerance and negative public attitudes towards children, especially adolescents, which appears to exist in the UK, including in the media and may be often the underlying cause of further infringements of their rights'*<sup>9</sup> The UK Children's Commissioners also drew attention to this issue in their Report to the UN Committee, commenting that 'Young people feel the media represents them as anti-social, a group to be feared, selfish and uncaring...' adding that 'the incessant portrayal of children as 'thugs' and 'yobs' not only reinforces the fears of the public but also influences policy and legislation'. In addition, in their recommendations, the Commissioners noted 'There is an urgent need to transform juvenile justice system in the UK...to ensure that it complies with the UNCRC'<sup>10</sup>

### **5.2.2 Paragraph 4.5**

The first set of proposals refer to '*Non-convicted persons*', which NICCY assumes also includes children and young people. NICCY welcomes the first two elements which propose the immediate destruction of fingerprints and DNA profile from persons arrested for or charged but not convicted of a minor offence or arrested for but not charged with a serious offence.

NICCY would recommend, for the purposes of clarifying the application of these proposals, that further definitions of minor offences and serious offences be provided.

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<sup>9</sup> Committee on the Rights of the Child, 49<sup>th</sup> Session. *Concluding Observations on the UK*, 20<sup>th</sup> October, para.36.

<sup>10</sup> UK Children's Commissioners' Report to the UN Committee on the Rights of the Child (2008), p.33-34.



The third set of proposals apply to '*Convicted under 18s*'. While acknowledging that retaining fingerprints and DNA profiles for a five year period provides some safeguards for children and young people, NICCY believes that the proposals do not provide sufficient protection for young people aged between 10 and 18 years. Children and young people should be afforded maximum protection under the law. NICCY is therefore concerned that a child convicted of a minor crime should have their DNA retained at all. Five years is a considerable period of time for a child or young person's personal details to be retained by the Government. NICCY recommends that the Department reconsiders this proposal.

Furthermore, upon receiving a second conviction, even if this is just for a minor offence, a child or young person could have their DNA profile retained for life. This will result in many young people entering the criminal justice system unnecessarily and having a criminal record. NICCY strongly believes that Government should actively seek wherever possible, to divert children and young people away from the criminal justice system. Entry into the criminal justice system clearly has an adverse impact on young people's lives, potentially affecting many aspects of their development and making it difficult for them to integrate into and contribute to wider society. Children and young people should not be stigmatized for activities they have engaged in before reaching maturity, therefore NICCY suggests that consideration be given to removing DNA profiles and fingerprints from young people once they reach the age of 18 years so that they are given the opportunity to enter adulthood with a 'clean slate'. (There may, of course, be exceptions to this, depending on the seriousness of crime(s) committed and the number of offences for which they have been convicted). If the special status of children is genuinely taken into account and their protection identified as a priority, then a more differentiated approach to the retention of their DNA and fingerprints should be considered.

With regard to the retention of DNA data, NICCY would request additional information regarding the sharing of DNA profiles and fingerprints; specifically, who will have access to this information, in what circumstances this information can be accessed and for what particular purposes this information can be used.

NICCY also seeks clarity regarding which databases will contain DNA profiles and fingerprints of individuals in Northern Ireland. The document indicates that three separate databases currently store data; the PSNI maintains a fingerprint database, Forensic Science NI maintains the storage of DNA profiles and profiles are also stored on the UK National DNA database in Birmingham.



### **5.2.3 Paragraphs 4.6, 6.4 and 6.5**

We note the Consultation document's reference to the Protection of Freedom's Bill introduced in Westminster in February 2011. NICCY provided a written submission to the Public Bill Committee for consideration.<sup>11</sup> In considering the DoJ Consultation, NICCY believes there is a need for clarity in terms of the interaction and linkage between it and the proposals contained in the Protection of Freedoms Bill.

The Consultation document notes that 'the Chief Constable will have the ability to extend retention of any material obtained under PACE and terrorism legislation by periods of two years for the purposes of national security'. While acknowledging that the Protection of Freedoms Bill is beyond the remit of this consultation, NICCY would draw attention to the vagueness of the term 'national security' and to the importance of considering the retention of data by the police given the particular context of Northern Ireland as it emerges from a long period of civil conflict.

The Consultation also seeks respondents' views regarding the remit of a Commissioner for the Retention and Use of Biometric Material. NICCY would welcome the appointment of an independent Commissioner who would have oversight of these issues and who would increase public confidence in the work of the criminal justice system. His or her independence and ability to access all information, including that which may pertain to national security, will be vitally important if the Commissioner's role is to be regarded as effective and having validity.

### **5.2.4 Paragraph 4.7**

It is noted that the proposals will apply equally to existing fingerprints and DNA currently retained and there will be a requirement for the phased destruction some material. It would be helpful for NICCY to learn more about plans for the 'phased' destruction of legacy material and how assurances will be made that such material will be destroyed.

### **5.2.5 Paragraph 5 - Photographs**

The Consultation seeks respondents' views regarding the retention of photographs. Currently these may be retained irrespective of whether a person has been convicted or not. NICCY agrees that there are strong parallels between the retention of DNA samples, fingerprints and photographic images.

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<sup>11</sup> [http://www.niccy.org/uploaded\\_docs/2011/Consultations/April%20-%20June/Submission%20to%20the%20Public%20Bill%20Committee%20on%20the%20Protection%20of%20Freedoms%20Bill%20130511.pdf](http://www.niccy.org/uploaded_docs/2011/Consultations/April%20-%20June/Submission%20to%20the%20Public%20Bill%20Committee%20on%20the%20Protection%20of%20Freedoms%20Bill%20130511.pdf)



While the matter of photograph retention is before the Courts, there would appear to be substantial arguments to support changes in the current retention policy.



## **6.0 Recommendations and Points for Clarification**

- NICCY recommends that the Department of Justice confirms that its definition of juveniles is of children and young people aged between 10 and 18 years.
- NICCY requests clarification with regard to who may apply to a court for a further extension to the DNA retention period, the grounds upon which such a request can be made and indeed granted and if there is a limit to the number of court applications that may be made.
- NICCY requests further detail regarding the monitoring and regulation of requests for extensions to the DNA retention period through the Court and particularly in respect of DNA profiles for children and young people.
- NICCY questions how the proposal to retain the DNA of young people charged but not convicted for serious offences for a period of at least three years although potentially for an indefinite period, is in their best interests. NICCY recommends that this element of the proposal be reviewed and consideration given to removing the DNA profiles of all young people who have not been convicted of any offence.
- NICCY is aware that a disproportionate number of young people come into contact with the police and recommends that the Department of Justice carefully considers the contexts in which children and young people do come to the attention of the police. We believe that children and young people's lack of maturity should be taken into account and that they should not be stigmatized by actions undertaken before reaching full maturity.
- While acknowledging that a five year period of retention of fingerprints and profiles provides some safeguards for children and young people, NICCY believes that the proposals do not provide sufficient protection for those aged between 10 and 18 years. Children and young people should be afforded maximum protection under the law. NICCY is therefore concerned that a child convicted of a minor crime should have their DNA retained at all. Five years is a considerable period of time for a child or young person's personal details to be retained by Government.
- NICCY strongly believes that Government should actively seek wherever possible, to redirect children and young people away from the criminal justice system. Entry into the criminal justice system clearly has an adverse impact on young people's lives, potentially affecting many aspects of their development.



- NICCY proposes that consideration be given to removing the DNA profiles and fingerprints of young people once they reach the age of 18 years so that they are given the opportunity to enter adulthood with a 'clean slate'. NICCY recognizes that there may be exceptions to this, depending on the seriousness of crime(s) committed and the number of offences for which they have been convicted). However if the special status of children is genuinely taken into account and their protection identified as a priority, then a more differentiated approach to the retention of their DNA and fingerprints should be considered.
- NICCY requests additional information regarding the sharing of DNA profiles and fingerprints; specifically, who will have access to this information, in what circumstances this information can be accessed and for what purposes this information can be used.
- NICCY recommends that additional information is provided regarding which databases will contain DNA profiles and fingerprints of individuals living in Northern Ireland.
- NICCY would welcome the appointment of an independent Commissioner who would have oversight of the issues outlined in the Consultation document and who would increase public confidence in the work of the criminal justice system. His or her independence and ability to access all information, including that which may pertain to national security, will be vitally important if the Commissioner's role is to be regarded as effective and meaningful.
- NICCY agrees that there are strong parallels between the retention of DNA samples, fingerprints and photographic images. While the matter of photograph retention is before the Courts, there would appear to be substantial arguments to support changes in the current retention policy.





