Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Criminal Justice Bill: DNA/Fingerprint Retention Clauses

15 November 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 Stewart Dickson
Mr Alex Easton
Mr Tom Elliott
Mr William Humphrey
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Patsy McGlone
Mr Jim Wells

Witnesses:

Mr Gary Dodds	Department of Justice
Mr Ian Kerr	Department of Justice

The Chairperson: I welcome Ian Kerr and Gary Dodds from the police powers and custody branch of the Department.

Annex B contains 40-plus pages of comments and responses. The Committee Clerk has pulled together the key points that summarise each of the areas. I intend to go through those key points. I will then open the meeting up to any members who want to comment on that particular section, and I will then move on to the next element. If members are content with that approach, we will take it in that fashion.

The first general comments that I will highlight relate to pages 1 to 7 of annex B. I will read out the comment and the response by the Department. This is not all the comments, but it summarises them. In the opinion of the Northern Ireland Human Rights Commission, the Department has been mindful of the ruling of the European Court of Human Rights in the case of S and Marper v the United Kingdom when developing the retention proposals, and it recommends that the Committee considers whether the Bill meets the Department's objective of seeking a proportionate balance between the rights of the individual and the protection of the public. Responding to that, the Department has advised that retention is for the sole purpose of the protection of the public, focused on preventing and protecting crime. Material may be retained indefinitely only on the basis of a conviction for an offence serious enough to carry a custodial sentence. Where conviction is not the outcome, material may be retained only in relation to the most serious offences, but for a strictly limited period. The Department considers that that is where the appropriate balance lies.

The Children's Law Centre highlighted that the original responses to the Department's consultation were not published and gave its view that the Department has taken little or no cognisance of the responses that it received and the human rights concerns raised. The Commissioner for Children and Young People also shares concerns that few of the issues that she raised in the consultation have been addressed. In response, the Department advised that the original responses were not published, although they were shared with the Committee. The Department confirmed that it has now published the summary of consultation responses on the departmental website. It also states that it did look carefully at the concerns raised in the consultation.

Disability Action stated the importance of the collection and monitoring of data relating to the retention and disposal of fingerprints and DNA to ensure that people with disabilities are not disadvantaged. The Department has advised that it will discuss monitoring and information gathering with the Police Service and Forensic Science Northern Ireland.

The Northern Ireland Policing Board and the Police Service highlighted the cost implications of the proposed retention framework. The Department confirmed that money has been included in the policing budget for that purpose, although it was for an earlier financial year. The Policing Board questioned whether consideration had been given by the Department to the introduction of legislative framework for the retention of photographs by the PSNI. Responding, the Department confirmed that the Association of Chief Police Officers had set up a working group, on which the PSNI is represented, to bring the management of police information guidelines into compliance with the European Convention on Human Rights (ECHR). The retention of photographs is carried out under those guidelines, and the PSNI will implement agreed best practice. The Department is satisfied with that outcome and does not intend to bring photographs within its retention framework.

That covers pages 1 to 7. Are members content to note the Department's responses to those issues that are raised in respondents' comments, or do members have any particular issues relating to pages 1 to 7 that they want to raise?

With regard to the cost implications of the framework on the budget for the Policing Board, your response indicated that it was for an earlier financial year.

Mr Ian Kerr (Department of Justice): That is right.

The Chairperson: I assume that it will be available when it comes in.

Mr Kerr: Yes; when the police were not in a position to use it because of the delay in implementing the framework, it was surrendered as an easement, so it has gone back into the pot. It means that they will have to bid for it again when the time comes. However, I have no doubt that it will certainly be viewed sympathetically by the Department.

Mr McCartney: May I have clarity on one point? Today, we are not going to be asked to lay out amendments or opposition; we are just dealing with general issues?

The Chairperson: We are just looking at it generally. However, if there are general comments to be made, or if there are concerns or areas where you need more information, now is the time to raise them. At the next stage, we want to be at a point where we are looking at amendments.

We have noted pages 1 to 7. Using the same approach, I will run through pages 7 to 18 of Annex B: Human rights standards. There were several submissions, including those from the Children's Law Centre, the Women's Support Network and Dr Linda Moore from the University of Ulster, which raised concerns that provisions in the Bill, as they relate to children, are disproportionate, unjustifiable and in potential breach of children's rights standards. As you will see on page 9 of the table, the Women's Support Network highlighted article 40 of the United Nations Convention on the Rights of the Child (UNCRC), which places an obligation on state parties to recognise the rights of all children, even those who have infringed penal law, to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, and in a way that takes into account the child's age and the desirability of promoting the child's re-integration and the child assuming a constructive role in society.

In oral evidence, the Children's Law Centre suggested that there may be scope to apply articles 63D and 63E to adults only and that if it was the mind of the legislature to try to retain any DNA and fingerprints of children and young people, which the Children's Law Centre opposes, then a child-specific clause could be created.

Responding to that, the Department considered that the Bill's provisions are sufficiently limited and targeted to be consistent with the safeguards required by the UN convention and that the retention periods for material from under-18s reflect the judgement as to where the balance lies. In its cover note at annexe A, the Department indicates that it is satisfied that it is necessary, proportionate and reasonable to retain biometric material to the extent permitted in the framework for the detection of crime, the protection of the public, and, ultimately, in the best interests of victims, who are also often children, and offenders alike.

In the cases of juveniles who have been convicted of serious or repeat offending, the Department considers that indefinite retention is appropriate, in line with general policy, and points out that the Bill also provides that young people who are convicted of a first minor offence will have their data retained for an individually tailored period of between five and 10 years only. The Department states that in cases where there has been no conviction, research does not support a shorter DNA retention period for juveniles than for adults, pointing out that the future offending risks for juveniles are, in fact, higher than they are for adults. Do members want to make any comment on that point?

Mr McCartney: That is something that we will want to return to. I know that the Department's position is that the Bill, as proposed, reflects the balance between the public and private interests, and we have a few amendments to table in relation to that.

The Chairperson: OK, so that is one area that we can put down for further engagement.

The Children's Law Centre and the Children's Commissioner raised concerns about the stigmatising effect that proposals will have on children and young people. The Northern Ireland Human Rights Commission also raised the issue stating that in light of the emphasis placed on the stigmatising effect of DNA retention by the ECHR and the importance that the UNCRC places on promoting a child's sense of dignity and worth, it considers that a strong evidence case, demonstrating that the arrangement regarding the retention of DNA material of children assists in the prevention of crime, must exist. The commission suggested that the Committee may wish to seek information from the Department on that matter.

Responding, the Department, in its cover note at annexe A, points out that retention is aimed at the prevention and detection of crime; that it cannot be equated to a criminal record; that it will never be disclosed; and that it does not cut across the Department's considerable efforts to divert young people away from the criminal justice system or to deal with them in an appropriate manner, should they come within it. The Department states that it examined cohort studies of youth re-offending in Northern Ireland carried out in 2007 and 2008, and details of the findings are provided in the table on page 11.

Mr Kerr: Those studies are available on the Department's website.

The Chairperson: In the Children's Commissioner's response to the Department's consultation, she suggested that consideration should be given to reviewing the retention of young people's DNA and fingerprints once they reach 18 so that they are given an opportunity to enter adulthood with a clean slate. Responding, the Department points out that a similar recommendation in relation to criminal records has been made in the youth justice review context. In the context of removing obstacles to future employment and rehabilitation in society, it highlights, however, that the purpose of criminal records and the DNA and fingerprints databases are different and confirms that there is no question of anyone ever having to declare retention of their DNA or fingerprints. The Department also draws attention to the draft guidance for forensic science by the Attorney General, which recommends a review, after 10 years, of retention material taken from juveniles in all cases.

If members do not have any comments to make on those two areas, I will move on.

On the minimum age of criminal responsibility, the Children's Law Centre, Dr Linda Moore of the University of Ulster and the Children's Commissioner raised concerns about the application of the provisions in the context of the current age of criminal responsibility of 10 years of age. Pages 14 to 16 of the tables refer to this. The Department has indicated that it intends that the retention framework should apply to anyone who has reached the age of criminal responsibility, which is currently age 10. Any future change to the age of criminal responsibility would be reflected in the operation of the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE), and, therefore, the application of the retention framework. Have members any comments on that area?

Mr McCartney: I have a general comment on the age of criminal responsibility of 10, and we will come back to that.

The Chairperson: The Commissioner for Children and Young People suggests that careful consideration should be given as to how a young person under 18 will be supported to undertake an appeal against an extension to the retention period. The Department states that any process in the Bill that may involve an appeal to the courts will attract the normal legal assistance appropriate in such cases. Are members content to note that?

Members indicated assent.

The Chairperson: On the Department of Justice equality impact assessment (EQIA), the Children's Law Centre was concerned that following equality screening of the policy proposals, an impact assessment was determined not to be required. Dr Linda Moore of the University of Ulster, Opportunity Youth and the Children's Commissioner highlighted concerns about the potential disproportionate negative effect that the provisions will have on children and young people.

The Department states that following a detailed screening exercise, no adverse impact on any section 75 category was identified, reflecting the fact that the proposals increase the protections available to all groups. It is the Department's view that provisions actually discriminate positively in favour of young people in providing for reduced retention in respect of a single, minor offence. Do members have any comment on that area?

Mr McCartney: We expressed the view previously about the need for an EQIA, but it is not necessary to raise that today.

The Chairperson: Schedule 2 deals with articles 63B to 63O of the Police and Criminal Evidence (Northern Ireland) Order 1989, as inserted. The schedule inserts 14 new articles after article 63A of PACE NI to replace the existing framework governing the retention and destruction of fingerprints, DNA samples and profiles and other samples, referred to generally as biometric material taken from a person under the powers of PACE NI or in cases where such material is provided voluntarily. Issues raised in relation to each article will be discussed in the order in which they appear in the Bill.

Article 63B is 'Destruction of fingerprints and DNA profiles: basic rule'. GeneWatch UK is concerned that the discretionary powers of the Chief Constable in relation to the destruction of material will be problematic where individuals dispute the circumstances of their arrest or collection of their DNA or fingerprints. It recommends that such determinations be made by a third party or may be appealed to a third party. The Department states that 63B(3) provides that material must be destroyed if it appears to the Chief Constable that the taking of it was unlawful or based on mistaken identity. The Chief Constable is expected to be proactive in this regard, but there would be nothing to prevent an individual, who was convinced that his or her material had been taken in such circumstances, from applying to the Chief Constable to have the material destroyed, and any refusal to do so could be challenged by judicial review. Have members any comment to make on that aspect?

Mr McCartney: I have one issue around 63B(2). In circumstances where an arrest is unlawful or the taking of the material is deemed unlawful, the material can still be retained. We have an issue with that, and we will come back to that.

The Chairperson: Article 63C is on the retention of article 63B material pending investigation or proceedings. GeneWatch recommended that the wording of this section should be clarified, so that individuals who have been ruled out of further inquiries do not have their data retained indefinitely in circumstances where a case is not closed. That is to say when an investigation may be continuing — perhaps for years — but the individual has been eliminated from inquiries. Members can have a look at the cover note on the issue at annex A, and I will ask officials to outline the current position.

Mr Kerr: As we mentioned when the issue was raised with us, there is a slight complication with the Attorney General's wishes on that point, when material taken from an individual may be used not necessarily against that individual but against someone else involved in the case. We discussed it with the Attorney General, and, on foot of those discussions, have prepared instructions for the draftsman to seek a formulation that links retention to the perceived utility of the material rather than to the conclusion of the investigation. Once the police have established that the material is of no further

interest to them, there is no further reason to retain it, and it will be destroyed. Is that satisfactory, Mr McGlone?

Mr McGlone: Yes, thanks.

The Chairperson: Once we get the wording of that amendment, we can come back to deal conclusively with that aspect. When do you intend to have the specific wording of that amendment?

Mr Kerr: Unless there are further amendments on the back of this evidence session, which seems unlikely, those instructions will go to the draftsman without further ado, and they are normally turned around fairly quickly. We will get draft amendments to you within the next fortnight.

The Chairperson: Article 63D is "Retention of Article 63B material: persons arrested for or charged with a qualifying offence". A number of the organisations that provided submissions on the retention framework highlighted concerns about the retention provisions in article 63D as it applies to a person who is arrested for or charged with a qualifying offence but is not convicted of that offence. The table provides details of the issues that were raised, and I will work through each one.

On undermining the presumption of innocence and proportionality, the Human Rights Commission suggests that the Committee consider whether the provisions appropriately safeguard the presumption of innocence. The Children's Law Centre, the Commissioner for Children and Young People, Opportunity Youth and the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO) believe that the provisions significantly undermine the presumption of innocence and due process. The Evangelical Alliance recommends that the provisions are amended to ensure that, when individuals are acquitted of a crime, their DNA sample and fingerprints are destroyed immediately. GeneWatch UK questions whether retention for a period of three years is necessary and proportionate for people who have been arrested and not charged with a qualifying offence or whether retention for three years should be restricted to those charged. The Human Rights Commission also recommends that the Committee consider the circumstances in which a person who has been arrested but not charged may have his or her DNA retained and to request details of the individual basis informing that approach.

In response, the Department is satisfied that some degree of retention in those circumstances is necessary in the interests of public protection and has sought to put in place a risk-based system that is balanced and proportionate. When conviction is not the outcome, material will be retained only in cases involving serious offences and for a limited time. Safeguards will be put in place so that retention in cases involving an arrest but no charge will require independent consent. The Department goes on to confirm that a significant volume of material from those arrested but not convicted will be destroyed and that the database will be primarily populated by those with previous convictions. The Department also highlights that that was the specific point on which the European Court of Human Rights made favourable reference to the practice in Scotland. So the court countenanced retention other than solely on conviction. Do members have any comment on the area of undermining the presumption of innocence and proportionality?

Mr McCartney: We have some issues, but the broad comments that you read out will guide us.

The Chairperson: The Human Rights Commission, the Children's Commissioner, the Children's Law Centre and NIACRO highlight concerns that the prescribed circumstances referred to in article 63D are not outlined in the Bill and have stated the need for greater clarity on that. The PSNI is concerned about the definition of "prescribed circumstances" and wants to ensure that it reflects the provision in the Protection of Freedoms Act 2012 as closely as possible to give maximum protection in the framework. Members should look at the cover note at annex A, which covers that issue. I ask officials to outline the current position.

Mr Kerr: That recommendation was made by a number of our consultees and the Attorney General, but when we finally heard from the Northern Ireland Examiner of Statutory Rules, we decided that it was time to relent, and we would incorporate the provisions in the Bill instead of in the order as originally proposed. The issue for us concerned the ability to amend the precise terms of the prescribed circumstances on the off chance that, in light of operating the system, we needed to revise that. We did not want to have to wait to find another Bill in which to do that. The Examiner of Statutory Rules suggested — we are happy to take his advice — that we incorporate those in the Bill but take within the Bill an order-making power to amend those by subordinate legislation if necessary. Again, as I mentioned, there are prepared instructions for the draftsman to bring those provisions

within the Bill and a broadly equivalent provision to section 3 of the Protection of Freedoms Act 2012, which sets out the prescribed circumstances and the procedure for applying to the commissioner for retention in those circumstances.

The Chairperson: Members, if you are content with that, once we get the final drafting, we can come back to it with a definitive view, unless members have any other comments.

We will move on to the appeals section. The Human Rights Commission suggests:

> *"that information on the grounds upon which an order may be sought or on which an appeal may be brought should be requested."*

In response, the Department states:

> *"Grounds upon which an order may be sought would be an operational matter for the police. It would be for them to make the argument on a case-by-case basis, to the satisfaction of the courts."*

Are there any comments from members on the appeals section?

On the biometric commissioner, the Human Rights Commission states that a guarantee:

> *"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 is required. There should therefore be a statutory statement to that effect."*

Responding, the Department states:

> *"The biometric commissioner will be a public authority and will be obliged to observe the ECHR. The amendment proposed by the NIHRC is therefore not required."*

Opportunity Youth states that it:

> *"fundamentally disagrees with the need for the introduction of a Biometric Commissioner and believes that the courts should be the ultimate arbiter of what should or should not be retained."*

Again, I refer members to the cover note at annex A. I ask officials to outline the current position.

Mr Kerr: As set out in the note, when the Bill was introduced, we gave an undertaking to explore that matter and are quite open to putting it the way of the courts, but much will turn on the actual volume. Without experience of operating the framework, the police are simply at a loss to be able to put a figure on that, and without any sort of firm figure, the courts are, understandably, reluctant to take it on without a commitment to additional judicial resources. We think that the best way forward at this stage is to go ahead with the commissioner as proposed, but with an undertaking to keep the matter under review. If, as the police seem to think likely, business tails off once the system beds in and we find that we are perhaps dealing only with a handful of such cases a year, we can look again at putting that the way of the courts when it may make better sense to do so.

The Chairperson: Do members have any comments?

Mr McCartney: We have previously outlined our issues around the commissioner, and we can return to the matter.

The Chairperson: Article 63E is "Retention of Article 63B material: persons arrested for or charged with a minor offence" and article 63F is "Retention of Article 63B material: persons convicted of a recordable offence". Articles 63E and 63F will be considered together, and details of the issues raised in relation to those articles are detailed in the table. Members may want to refer to annex C, which is a list of recordable offences that were provided by the Department and which relate to articles 63E and 63F. The first area is necessity, proportionality and the scope of recordable offences. There were a number of submissions questioning the necessity and proportionality of the provisions to retain material indefinitely from all adults convicted or cautioned for any recordable offence and all young persons convicted or cautioned for more than one recordable offence. The Human Rights Commission highlighted that the definition of recordable offences includes a wide range of offences

and suggests that the Committee may wish to consider whether periods of retention should be staggered, depending on the seriousness of the offence. The commission is concerned that a blanket approach is vulnerable to future legal challenge. NIACRO shares those concerns and recommends that the legislation is not commenced until after the outcome of an anticipated Department review of the scope of recordable offences. Opportunity Youth suggests a tighter definition of qualified recordable offences rather than a catch-all approach.

Members will be aware of the case yesterday, or two days ago, and the recent judgement in the High Court by Lord Justice Girvan, that the rules on the policy of indefinite retention of data of convicted offenders by a substantial category of offences is not disproportionate and is lawful and entirely rational. There is a copy of the newspaper article of that judgement in the tabled pack. I ask the officials to outline the findings in this case, its relevance to the provisions in the Bill and the Department's position on the issues raised by the organisations on that part of the Bill.

Mr Kerr: From the Department's perspective, the judgement is very welcome. It identified the factors that it needed to take into account in considering the question of proportionality, and it identified 11 in all, only one of which focused on the particular circumstances of the case. The rest considered the issue generally and so are of general relevance. The judgement was completely unequivocal. As you said, the build-up of the database of those convicted was an entirely rational step and furthered the legitimate aim of countering crime in order to protect the lives and rights of others. It could not be considered blanket or indiscriminate, because it ruled out those not convicted and those convicted of lesser offences, of which there are many. It drew out the very limited impact of the retention and use of such material on a person's "real private life", which was the term it used. Having dealt with the proportionality issue, it gave a nod to Strasbourg's recognition of the justification for limited retention, even in the cases of some unconvicted persons, i.e. the basis for referral to the Scottish model. All in all, we see it as a vindication of the Department's policy as set out in the Bill and, indeed, the practice in the other UK jurisdictions.

The Chairperson: Have members any comment on the area of necessity, proportionality and scope of recordable offences?

Mr McCartney: Again, it is something that we will be visiting.

The Chairperson: We move on to appeals and complaints. The Human Rights Commission considers that it would be good practice to provide a right for individuals to apply for the destruction of their fingerprints and DNA. The commission wants a procedure whereby the court or, in the first instance, the biometric commissioner has a clear process through which a petition will be assessed according to clear criteria. 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 proceedings are more efficient, straightforward and speedy. The commission highlights the fact that the current position, whereby judicial review is the only appeal to the Chief Constable's decision, is one of the least efficient and most expensive ways to get justice. Opportunity Youth also seeks further clarification around the appeals process.

Responding, the Department states that the question of review:

> *"is open to anyone — under the current system and under the proposed framework — to apply to the police to have their material removed. No specific review mechanism is included within the framework because any refusal by the police to remove material from the database would be challengeable by judicial review and the Department has always been of the view that that should be sufficient."*

Do members have any comments?

Article 63G is "Retention of Article 63 B material: persons convicted of an offence outside Northern Ireland". No issues were raised in relation to article 63G of schedule 2, unless members have any comments that they wish to make.

Article 63H is "Retention of Article 63B material: exception for persons under 18 convicted of first minor offence". The Children's Law Centre is concerned that article 63H:

> *"proposes to link the amount of time that a child or young person's fingerprints or DNA are retained to the length of their sentence, where the child is being convicted of a first minor offence."*

The Children's Law Centre contends:

> *"Article 63H also allows for the retention of fingerprints and DNA where children are given non-custodial sentences in respect of a first minor offence."*

It does not believe that this is a proportionate response. The Children's Law Centre:

> *"also questioned whether there is potential for the fingerprints and DNA to be retained for 5 years for a child who receives their first caution."*

Responding, the Department has confirmed:

> *"A caution is treated as a conviction for the purposes of the retention framework. In the case of a juvenile receiving a caution for a first, minor offence, the framework allows the material to be retained for up to five years, at the discretion of the police."*

Do members have any comments?

Mr McCartney: Again, the issue of juvenile courts is an area that we will be exploring.

Mr Elliott: The Children's Law Centre:

> *"also questioned whether there is potential for the fingerprints and DNA to be retained for 5 years for a child who receives their first caution."*

Is the centre questioning whether that is possible, or is it just questioning the merit of it? I do not understand the point that it is making.

The Committee Clerk: When it put in its evidence, the centre was putting it as a question as to whether that was the case.

Mr Kerr: It was seeking clarification; that was our interpretation.

Mr Elliott: OK.

The Chairperson: Article 63I is "Retention of Article 63B material given voluntarily". No comments were made about that article, unless members wish to comment on it now.

Article 63J is "Retention of Article 63B material with consent". Again, no comments were made about this article, unless members wish to comment on it now.

Article 63K is "Article 63B material obtained for one purpose and used for another". No comments were made about this article, unless members wish to comment on it now.

Article 63L is "Destruction of copies". GeneWatch UK states:

> *"this provision allows police to retain copies of DNA profiles provided the individual cannot be identified ... but in practice anonymising DNA profiles may be impossible."*

GeneWatch UK recommends that the:

> *"use of batch files created at Forensic Science Northern Ireland (FSNI) is clarified, preferably with the assistance of the Information Commissioner's Office".*

In the table, the Department addresses the issues raised by GeneWatch UK and cites correspondence from the chairman of the National DNA Database Strategy Board confirming the Information Commissioner's satisfaction with the procedures that are in place. Do members have any comments to make?

Article 63M is "Destruction of samples". GeneWatch UK indicates that the provisions for the destruction of samples were in line with international best practice.

Article 63N is "Use of retained material". GeneWatch UK is concerned about:

> *"the phrase 'purposes related to' the prevention or detection of crime as it can be interpreted broadly and is open to abuse."*

GeneWatch UK recommends that an additional clause is added to prevent any unethical research.

In response, the Department states:

> *"There is nothing in a DNA profile that definitively identifies any characteristic other than gender. Much more information — for example, about race or health — is available from the biological DNA sample and it is expressly in recognition of the sensitivities around that that the Bill provides for samples to be retained for no longer than 6 months, unless likely to be needed in proceedings."*

Do members have any comments about that?

GeneWatch UK is also concerned that the use of material to identify the person to whom the material relates is also open to abuse. The Department considers that confirming a person's identity or, indeed, establishing that he or she has previously been arrested under a different name are entirely legitimate uses of biometric material. Have members any comments?

Article 63O is "Exclusion for certain regimes". No comments were made or issues raised on article 63O of schedule 2. Do members want to comment? If not, we will move on.

Schedule 3 deals with amendments, fingerprints and DNA profiles. Article 53B(1) deals with persons convicted of an offence. The Children's Law Centre, the Northern Ireland Commissioner for Children and Young People, Opportunity Youth, GeneWatch UK and NIACRO highlight concerns that the Bill treats cautions in the same way as a recordable offence and that all adults who are cautioned or convicted for a single minor offence and all young persons who are cautioned or convicted for more than one offence will have their records retained indefinitely. GeneWatch UK suggests that consideration be given to whether that is necessary or proportionate. The other organisations question whether the provisions run contrary to the purpose of a caution, which is to divert children away from the criminal justice system. In response, the Department states:

> *"A caution is treated as being equivalent to a conviction for the purposes of the retention of DNA profiles and fingerprints because it involves acceptance of guilt. There is no logical basis for treating it otherwise for the purposes of the DNA and fingerprint databases, which are, as observed above, quite different from criminal records...*
>
> *At present, cautions are the only diversionary disposal treated as a conviction for the purposes of the retention framework, although consideration is being given to treating completion of a diversionary youth conference similarly."*

Do members have any comments?

Mr McCartney: I have a general comment on cautions.

The Chairperson: On other amendments, I refer members to annex A. It provides information on other proposed amendments relating to retention on award of a penalty notice, the inclusion of diversionary youth conferences within the definition of conviction for the purposes of retention, and a drafting error in the Bill. Do officials want to outline the proposed amendments that relate to penalty notices, youth conferencing and the drafting error?

Mr Kerr: Yes. Penalty notices already exist in retention legislation in Scotland and were introduced in England and Wales in the Protection of Freedoms Act 2012. We did not have them here at the time the Bill was originally drafted. However, the provisions have been commenced since, so in our view, they should be brought within the terms of the framework on the same basis as in the other jurisdictions. That involves retention for a two-year period.

With regard to diversionary youth conferences, colleagues on the youth justice and probation side of the office have said that, as we are bringing cautions within the Bill and treating them as convictions, it

would be inconsistent not to treat diversionary youth conferences in the same way. So, at their suggestion, we are bringing them in.

The drafting error is precisely that: it was a slip of the keyboard, I suspect. It is a reference to PACE in England and Wales, when it should, in fact, be a reference to the Police and Criminal Evidence (Northern Ireland) Order 1989, because both of those feature in that part of the Protection of Freedoms Act 2012.

While we are dealing with diversionary disposals — although it will not be a matter for the Bill, just for completeness — there are plans elsewhere in the office to introduce prosecutorial fines, probably in the faster, fairer justice Bill next year. If so, it is likely that a line will be included to bring those within the retention framework, again with some sort of fairly modest retention — probably the two years that are associated with them.

The Chairperson: OK.

Mr McCartney: I want to go back to penalty notices. When that came through in the Justice Act 2011, the way in which it was framed was that those notices would be given in such circumstances so that a young person would not enter into the criminal justice system in any way. I cannot recall, when we went through that in the previous mandate, whether there was any suggestion that fingerprints and DNA would be taken at the issuing of one of those notices.

Mr Kerr: If a young person has been arrested for a recordable offence, his or her fingerprints and DNA will have been taken. If a penalty notice is the disposal that is used, the two-year retention would accompany that. The taking power accompanies the arrest rather than the disposal.

Mr McCartney: You say "arrest". Again, the way in which that was explained to us was that if, for example, a young person is caught shoplifting, which I think was one of the examples, he or she is asked to report to the local station within 48 hours. There is no suggestion of arrest or is that seen as an arrest?

Mr Gary Dodds (Department of Justice): There would be cases in which an individual is arrested because an officer feels that an arrest is appropriate. That person is brought back to the station. Through enquiries or whatever, the officer decides that the best diversion would be a penalty notice for the particular offence. However, by virtue of the fact that the individual was arrested, the police have the power to take DNA and fingerprints. That would not happen in every circumstance. A penalty notice for disorder (PND) could be issued without an arrest. It is only in cases in which an arrest has actually been effected that the power would kick in to take the biometrics. So it would happen only in those cases. Generally speaking, I think that PNDs would be issued without an arrest as such. I do not have figures for the number of cases in which arrests actually took place.

Mr McCartney: Perhaps we could come back to that issue. Although I am not certain, my recollection is that there would be circumstances in which there would not be an arrest. The young person might be stopped in the street, accepts that what he or she did was wrong, be asked to come to the barracks within 48 hours and takes the penalty notice, so that there would be no arrest. If you are saying that, in those circumstances, there is no taking of DNA or fingerprinting, that is partly satisfying —

Mr Kerr: I think that that is right. The taking power has to be triggered in the first instance, and that is on arrest.

The Chairperson: When we get the exact drafting of the amendments, we will come back to penalty notices. Unless I have left anything out that members wanted to raise, that has given us a clear guide of the areas that we can narrow down for future discussion. I thank the officials very much for attending.