Written Evidence to the Committee for Justice

on the

Criminal Justice Bill

August 2012

1. The Children's Law Centre

1.1 The Children's Law Centre is an independent charitable organisation established in September 1997 which works towards a society where all children can participate, are valued, have their rights respected and guaranteed without discrimination and where every child can achieve their full potential.

1.2 We offer training and research on children's rights, we make submissions on law, policy and practice affecting children and young people and we run a legal advice/ information/ representation service. We have a dedicated free phone legal advice line for children and young people and their parents and carers, called CHALKY and a youth advisory group called youth@clc. Within our policy, legal, advice and representation services we deal with a range of issues in relation to children and the law, including the law with regard to some of our most vulnerable children and young people, such as looked after children, children who come into conflict with the law, children with special educational needs, children living in poverty, children with disabilities, children with mental health problems and children and young people from ethnic minority backgrounds, including Traveller children. We also produce a series of leaflets, written in conjunction with children and young people in youth@clc, for children and young people detailing children's rights and the law in a number of areas, one of which is with regard to looked after children.

1.3 Our organisation is founded on the principles enshrined in The United Nations Convention on the Rights of the Child (UNCRC), in particular:

- Children shall not be discriminated against and shall have equal access to protection.
- All decisions taken which affect children's lives should be taken in the child's best interests.
- Children have the right to have their voices heard in all matters concerning them.

1.4 The UK Government as a signatory to the UNCRC is obliged to deliver all of the rights contained within the Convention for children and young people. We believe that the human rights standards contained in the UNCRC should be reflected in all laws and policies emanating from the Northern Ireland Assembly as one of the devolved regions of the UK Government. From its perspective as an organisation which works with and on behalf of children and young people, both directly and indirectly, the Children's Law Centre is grateful for the opportunity to submit evidence on the Criminal Justice Bill. The Children's Law Centre has been involved in the discussion and consultation process leading up to the introduction of this Bill, particularly in relation to the retention and destruction of fingerprints and DNA of children and young people. We do not intend to comment on each clause of the Bill, restricting our comments to areas of particular concern and those of most relevance to the work of Children's Law Centre.

The Children's Law Centre would very much welcome the opportunity to present oral evidence to the Committee for Justice on the Criminal Justice Bill, as we believe that it has potentially far reaching implications for the protection of children's rights.

2. The European Convention on Human Rights

2.1 The Committee will be aware that part of this legislation is being brought forward in an attempt to rectify the incompatibility of current legislation (namely the Police and Criminal Evidence (Northern Ireland) Order 1989 or PACE(NI)) relating to the retention and destruction of fingerprints and DNA profiles with the European Convention on Human Rights (ECHR). The current law under Part VI of PACE(NI) allows the police to take a person's fingerprints or a DNA sample without their consent where they are detained at a police station having been arrested for a recordable offence.[1] These can then be retained indefinitely, regardless of whether a person is subsequently convicted or not. The Department of Justice (DoJ) has stated that currently the PSNI maintains a fingerprint database containing in excess of 450,000 prints from 240,000 individuals. Forensic Science Northern Ireland stores DNA profiles from samples taken from suspects, crime scenes and victims. This holds around 91,000 subject profiles and 18,000 crime scene profiles.[2] It is therefore reasonable to assume that the powers under PACE (NI) to take and retain fingerprints and DNA are frequently employed.

2.2 The current law was found to be incompatible with the ECHR in the case of *S and Marper v the United Kingdom,*[3] where the European Court of Human Rights considered whether the retention of DNA and fingerprints from innocent people was consistent with human rights law. The Court found that there had been a violation of Article 8 of the ECHR, stating:

"*In conclusion, the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but*

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[1] A recordable offence is defined under the explanatory memorandum for the Bill as either being one which is punishable by imprisonment, or otherwise listed in regulation 2 of the Northern Ireland Criminal Records (Recordable Offences) Regulations 1989.

[2] 'Consultation on proposals for the retention and destruction of fingerprints and DNA in Northern Ireland' March 2011, para.1.3.

[3] December 2008; App nos. 30562/04 and 30566/04.

not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society"[4]

2.3 The Court held that the retention of cellular samples and DNA profiles disclosed an interference with the applicants' right to respect for their private lives, within the meaning of Article 8 of the ECHR. It also found that the retention of fingerprints constituted an interference with the right to respect for private life. The Court found that the retention of a non-convicted persons' data may be especially harmful in the case of minors, given their special situation and the importance of their development and integration in society. It is therefore clear that the ECHR, as incorporated by the Human Rights Act 1998, is very relevant to any discussion around the contents of this Bill relating to the retention and destruction of fingerprints and DNA profiles.

2.4 In addition, we would also contend that Article 14 of the ECHR – Right to the Enjoyment of Rights and Freedoms without Discrimination, is also potentially engaged, given the disproportionate level of collection and retention of DNA from children and young people and the differential adverse impact the retention of DNA and fingerprints will have on children.

3. International Human Rights Standards

3.1 As the UK government has ratified the UNCRC, consideration of the Criminal Justice Bill with regard to fingerprint and DNA retention relating to children should be set within the framework of the UNCRC and other international standards and also should take into consideration all relevant recommendations of the United Nations Committee on the Rights of the Child.

3.2 The UNCRC is a set of non-negotiable and legally binding minimum standards and obligations in respect of all aspects of children's lives which the Government has ratified. The Government has therefore given a commitment to implement the terms of the Convention by ensuring that all law, policy and practice relating to children is in conformity with UNCRC standards. The UK Parliamentary Joint Committee on Human Rights has described the obligations the Convention places on Government as follows:

"It should function as a set of child- centred considerations to be used by all departments of government when evaluating legislation and policy making"

3.3 All children and young people under 18 are entitled to enjoy the protection of all rights afforded by the UNCRC and to the rights enshrined in other international standards such as the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),[5] the United Nations Standard Minimum Rules for the Administration of

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[4] Ibid, para. 119.
[5] Adopted by General Assembly Resolution 45/112 of 1990.

Juvenile Justice (the Beijing Rules)[6] and the United Nations Guidelines for the Protection of Juveniles Deprived of their Liberty.[7]

3.4 Article 40 of the UNCRC requires every child under 18 who has been alleged or accused of having infringed the penal law to be afforded the following minimum rights:

i) To be presumed innocent until proven guilty according to law;

ii) To be informed promptly and directly of the charges against him or her, and, if appropriate through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance, and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

vi) **To have his or her privacy fully respected at all stages of the proceedings (our emphasis)**

3.5 State parties are required under Article 40 to seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law.

In addition Article 16 of the UNCRC states that:

"No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

The child has the right to the protection of the law against such interference or attacks"

3.6 The United Nations Committee on the Rights of the Child recommended in October 2002[8] that the United Kingdom should establish a system of juvenile justice that fully integrates into its legislation, policies and practice the provisions and principles of the Convention, in particular Articles 3, 37, 39 and 40 and the other international standards

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[6] Adopted by General Assembly Resolution 40/33 of the 29th November 1985.
[7] Adopted by General Assembly Resolution 45/113 of the 14th December 1990.
[8] Concluding Observations of the Committee on the Rights of the Child, CRC/C/15 ADD.188, 4 October 2002.

in this area outlined above.[9] It repeated this recommendation in October 2008,[10] adding that General Comment No. 10 of the Committee on the Rights of the Child should also be fully integrated.

The Committee expressed its concern about the fact that:

"DNA data regarding children is kept in the National DNA Database irrespective of whether the child is ultimately charged or found guilty"[11]

The Committee recommended that the UK Government:

"ensure, both in legislation and in practice, that children are protected against unlawful or arbitrary interference with their privacy, including by introducing stronger regulations for data protection"[12]

The United Nations Committee also recommended that the United Kingdom government should establish the best interests of the child as the paramount consideration in all legislation and policy affecting children, notably within criminal justice and immigration.[13]

3.7 One of the Children's Law Centre's major concerns with regard to the retention of DNA and fingerprints is the fact that retention will occur in this jurisdiction within the context of an extremely low minimum age of criminal responsibility. The age of criminal responsibility continues to be 10 years and below that age the child is irrebuttably presumed to be incapable of 'offending behaviour'.

3.8 International standards with regard to the minimum age of criminal responsibility are very clear. The UN Committee on the Rights of the Child in its 2002 Concluding Observations, following its examination of the UK Government's compliance with the UNCRC, stated that the age at which children enter the criminal justice system was low and made a clear recommendation that the UK government considerably raise the age of criminal responsibility.[14] This recommendation was reiterated by the UN Committee in its 2008 examination of the UK Government's compliance with the UNCRC.[15] The Committee has previously commented that states should not set the minimum age of criminal responsibility too low. A minimum age of criminal responsibility below the age of 12 is not considered acceptable by the Committee. States are encouraged to increase the minimum age of criminal responsibility to 12 at a minimum and then to seek to continue to increase it to a higher age level.[16] The Chairperson of the UN Committee on the Rights of the Child has further elaborated that the general understanding of the Committee was that industrialized, democratic societies would go even further as to raising the minimum age of criminal responsibility to an even higher age, such as 14 or 16.[17] We were therefore pleased that the recent report of the Review of Youth Justice

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[9] Paragraph 58 (a), CRC/15/Add.188, 4 October 2002 and Para 27 and 77 CRC/C/GBR/CO/4, 3 October 2008.
[10] Concluding Observations of the Committee on the Rights of the Child, CRC/C/GBR/CO/4, 3 October 2008.
[11] Para 36a), CRC/C/GBR/CO/4 3rd October 2008.
[12] Para 37a), CRC/C/GBR/CO/4 3rd October 2008.
[13] Ibid, para 27.
[14] CRC/C/15/Add.188 paragraphs 59 and 61.
[15] Para 78a) CRC/C/GBR/CO/4.
[16] General Comment No. 10 Children's Rights in Juvenile Justice CRC/C/GC/10 April 2007
[17] Professor Yanghee Lee, Chairperson of the UN Committee on the Rights of the Child - The

recommended that the minimum age of criminal responsibility should be raised to 12 with immediate effect and following a period of review of no more than three years, consideration should be given to raising the age to 14.[18]

3.9 Regrettably it is still currently the case that once a child reaches the age of 10, s/he can be arrested on suspicion of a criminal offence and it is within this context that the Committee must consider the issue of taking and retaining a child's DNA or fingerprints. Prior to the *S and Marper* case, children below the minimum age of criminal responsibility who came into contact with the criminal justice system were also subjected to the practices of fingerprinting and DNA evidence gathering techniques and they too had their DNA profiles retained, regardless of their inability to be criminal culpable. While we welcome the fact that following the judgment children aged under ten have had their profiles removed from the DNA database and will not have profiles retained in the future, we continue to have extremely serious concerns about the collation and retention of fingerprints and DNA data from children aged as young as 10.

4. Consultation process and Section 75 of the Northern Ireland Act 1998

4.1 The Criminal Justice Bill is based on the legislative proposals for the retention and destruction of fingerprints and DNA in Northern Ireland that the DoJ issued for public consultation in March 2011. The Children's Law Centre responded to this consultation in June 2011. In our response we raised many of the concerns that appear in this written evidence. We also raised serious concerns with regards to the decision taken by the DoJ that, following an Equality Screening of the policy proposals, an Equality Impact Assessment (EQIA) was determined not to be required. We highlighted how children and young people are the most vulnerable group in our society and are covered under the age category in section 75 of the Northern Ireland Act 1998. We also highlighted the fact that children are not a homogenous group and will be afforded further protection under other categories of section 75. The most relevant protections in relation to the consultation exercise, in addition to age, were protection on grounds of gender, race and religion due to the disproportionate number of young males who come into contact with the criminal justice system, including young black and young Catholic males.

4.2 The Children's Law Centre understands that the DoJ did not publish a summary of consultation responses it received and one is not published on the Department's website.[19] The Explanatory and Financial Memorandum for the Bill states that following the public consultation on the retention and destruction of DNA and fingerprints:

"Overall, the proposed framework was viewed favourably by most respondents as a proportionate and balanced approach to replacing the current indefinite retention policy. As expected, given the subject matter, a wide range of views was expressed on various aspects of the policy proposals."[20]

4.3 As the DoJ do not appear to have published a summary of the consultation responses the Children's Law Centre is unaware of how many responses the DoJ received to the consultation and what the nature of all those responses was. We are aware however

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Convention On The Rights Of The Child From Geneva To Northern Ireland, Bringing Children's Rights Home CLC Annual Lecture 13th March 2008.

[18] 'A Review of the Youth Justice System in Northern Ireland' September 2011, p. 165.

[19] Telephone conversation with DoJ official, 23rd August 2012.

[20] Criminal Justice Bill 'Explanatory and Financial Memorandum' para.29.

that at least one other NGO responded to the consultation process echoing many of the concerns that the Children's Law Centre (CLC) had. It is therefore very disappointing that the clauses of the Criminal Justice Bill that deal with the retention and destruction of fingerprints and DNA are clearly based on the DoJ's initial proposals, which in the absence of the publication of a summary of responses by the DoJ, appears to indicate that the Department has taken little or no cognisance of the consultation responses it has received and the human rights concerns raised therein.

5. Criminal Justice Bill

5.1 In general, the Children's Law Centre has serious concerns about the taking of fingerprints and the deriving of DNA profiles from DNA samples taken from children and young people and the retention of this material. We believe that fingerprinting and taking DNA from a child is entirely disproportionate, unjustifiable and in clear breach of children's rights standards. We firmly recommend that these practices as they relate to children be halted immediately within the formal criminal justice system.

5.2 Information obtained through a 'freedom of information request' by one Non-Governmental Organisation, the Pat Finucane Centre, revealed evidence of the widespread retention of DNA of children by the PSNI in cases where no conviction or cautioning has followed. '*In total, DNA is held on at least 3,065 under 18's, of whom 1,119 have no convictions or cautions.*'[21] The Centre described this as:

"...a serious infringement of the rights of these children. We do not question the need to retain the DNA of serious violent and/or sex offenders but to maintain records on children who have not been convicted of any offence is bizarre."[22]

The Belfast Telegraph also published figures in 2011 that indicated that profiles from 91,327 people were on the DNA database in late 2010. Of these, 34,130 belonged to a person who was not charged or reported and had been released unconditionally. They included samples from 228 children aged between 16 and 18, and 92 samples from children aged between 10 and 15.[23]

5.3 The Northern Ireland Commissioner for Children and Young People has expressed concern about this issue, calling on both the PSNI and Policing Board to reconsider the retention of DNA of under 18's and pointing out that it potentially breaches Articles 16 and 40 of the UNCRC.[24]

5.4 We are also extremely concerned that the contents of the Criminal Justice Bill in relation to the retention and destruction of fingerprints and DNA in Northern Ireland do not fully and adequately consider the particular vulnerabilities of children and young people. In the *S and Marper* judgment, **the Court found that the blanket and indiscriminate nature of the power of retention of DNA data of persons suspected but not convicted of offences did not strike a fair balance between private and public interests**. The Court also commented on the limited possibilities for an acquitted

[21] The PSNI has indicated that this figure may be higher: "there are a further 620 DNA records on a separate system which would have to be manually checked against the records held on the main system to ensure there is no duplication" Statewatch, 2006.
[22] Statewatch 2006
[23] Belfast Telegraph 'Police face DNA data wipeout: European ruling may force PSNI to delete a third of profiles it holds' by Adrian Rutherford, Wednesday, 16th March 2011.
[24] NICCY, 2006

individual to have the data removed from the nationwide database or the materials destroyed and on the fact that the **"*retention of the unconvicted persons data may be especially harmful in the case of minors*".**[25]

5.5 The judgment created an expectation among many persons who had been arrested but either acquitted in court or had had charges dropped, that they would be removed from the DNA database, and hence more broadly the practice of holding innocent persons DNA on the national database would be discontinued. Rather than adopting this approach, the Criminal Justice Bill proposes to continue to retain the DNA data and fingerprints of innocent children and young people.

In the interests of clarity we have listed the clauses of Criminal Justice Bill which are most relevant to children and young people. We have also devised some hypothetical scenarios to explore how the provisions of the Bill may apply to children and young people in practice:

- Clause 7(1) of the Bill inserts new Articles as set out in Schedule 2 of the Bill after Article 63A of PACE. The proposed new Article 63B of PACE provides that in relation to fingerprints and DNA profiles to which Article 63B applies, these must be destroyed unless the material is retained under any of the powers the new Articles 63C to 63J propose. DNA samples, which are samples such as a mouth swab, plucked hair roots or a blood sample are used to form a DNA profile. The proposed Article 63M would introduce a general rule that these be destroyed as soon as a DNA profile has been derived, or if sooner, before the end of a period of 6 months beginning from the date on which the sample was taken. However, the Chief Constable would be allowed to apply to a District Judge (Magistrates' Court) for an order that the sample be retained for periods of 12 months at a time.

- It should also be noted that Schedule 3 of the draft Bill proposes to insert a new Article 53B into PACE. This states that any reference to a person convicted of an offence includes a reference to a person who has been given a caution in respect of the offence which, at the time of the caution, the person has admitted. References to a person convicted of an offence will also include a person found not guilty of an offence by reason of insanity, or a person found to have been under a disability and to have done the act charged in respect of the offence.

- The proposed Article 63D(1) would apply where a person is arrested for or charged with a qualifying offence[26] and is not convicted of that offence and where fingerprints are taken or a DNA profile is derived from a DNA sample taken in connection with the investigation of the offence. Article 63D(2) would allow the retention of this material indefinitely where a person has previously been convicted of a recordable offence which is not an excluded offence, or is convicted of that offence prior to the material being required to be destroyed. An excluded offence is defined under Article 63D(14) as being a recordable offence which is not a qualifying offence, is the only recordable offence of which the person has been convicted and which was committed when the person was aged under 18 and for which the person was not given a custodial sentence of 5 years or more. A hypothetical scenario here could be that child A is arrested for assault

[25] Ibid. para. 124.

[26] Qualifying offences are listed under Article 53A of PACE, which is to be inserted by section 13 of the Crime and Security Act 2010. The offences listed include violent and sexual offences. This provision is not yet in force however.

occasioning actual bodily harm, a qualifying offence. His fingerprints are taken and a DNA profile is derived from a DNA sample taken in connection with the investigation of the offence. However, child A is not subsequently charged or convicted of assault occasioning actual bodily harm. Child A's criminal record contains two cautions for shop lifting sweets, a recordable offence, and his fingerprints and DNA are therefore retained indefinitely as a caution is considered to be a conviction for the purposes of the draft Bill.

- Under the proposed Article 63D(4) if a person is charged with a qualifying offence but is not convicted of that offence and fingerprints are taken or a DNA profile is derived from a DNA sample which has been taken in connection with the investigation of the offence, then under Article 63D(6) the material is retained for 3 years. The retention period of 3 years provided in Article 63D(6) can be extended upon application by the Chief Constable to a District Judge (Magistrates' Courts). The period may be extended by up to 2 years under Article 63D(9)(b). The person from whom the material was taken can appeal the making of the order to the County Court, as can the Chief Constable if the order is refused. According to the explanatory and financial memorandum for the Bill, the provisions under Articles 63D(4) and (5) apply to those persons who have no previous convictions.[27] A hypothetical scenario here could be that child B, who has no previous convictions, is charged with assault occasioning actual bodily harm. As part of the investigation his fingerprints are taken and his DNA profile is derived from a DNA sample. Child B denies the allegation and is acquitted at his subsequent trial. His fingerprints and DNA are retained for 3 years, but before the end of this period the Chief Constable successfully applies to have the retention period extended and child B's fingerprints and DNA are retained for a further 2 years.

- Under the proposed Article 63D(5) where a person is arrested for a qualifying offence, **but not charged** with that offence and fingerprints are taken or a DNA profile is derived from a DNA sample taken in connection with the investigation of the offence, then under Article 63(D)(6) the material can still be retained for 3 years. The retention period of 3 years provided in Article 63D(6) can be extended upon application by the Chief Constable to a District Judge (Magistrates' Courts). The period may be extended by up to 2 years under Article 63D(9)(b). However any of the 'prescribed circumstances' must first apply for the material to be retained for an initial 3 years and the Northern Ireland Commissioner for the Retention of Biometric Material must consent to the retention. The prescribed circumstances are not outlined within the draft Bill and Article 63D(14) simply states that prescribed means prescribed by an order made by the Department of Justice.[28] Article 63D(13) states that the Commissioner may consent if he considers it appropriate to retain the material. Article 63D(11) provides that the Department of Justice must appoint the Commissioner. A hypothetical scenario is more difficult to conceive here, as the prescribed circumstances are not detailed within the draft Bill, nor are the circumstances in which it may be appropriate for the Commissioner for the

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[27] Ibid, para.74.

[28] The Minister for Justice has stated that these prescribed circumstances have been introduced due to the police making the case for retention where 'the victim is a juvenile or a vulnerable adult or is associated with the suspected offender perhaps a family member. These are circumstances in which the victim is more likely to be susceptible to pressure not to give evidence.' (Official Report (Hansard) Northern Ireland Assembly, Tuesday 3rd July 2012, p. 330). The Department of Justice 'Consultation on proposals for the retention and destruction of fingerprints and DNA in Northern Ireland' (March 2011) stated at para 6.3 that examples of prescribed circumstances 'could be that a young person or vulnerable adult is a victim of the alleged offence or where the victim is not able or not willing to come forward and give evidence.'

Retention of Biometric Material to consent to the retention of fingerprints or DNA profiles, or the procedure by which the Chief Constable will apply to the Commissioner for the retention of the material. The Children's Law Centre considers this lack of clarity within the legislation to be very concerning and we would respectfully ask the Committee to examine this issue further. However, our current understanding of this provision is that if child C, who has no previous convictions, was arrested for assault occasioning actual bodily harm and had his fingerprints and a DNA sample (from which a DNA profile is then derived) taken as part of the investigation, these could be retained for 3 years if prescribed circumstances apply and the Commissioner consents to the retention, even though child C is not subsequently charged with the offence. Child C's fingerprints and DNA profile could then be retained for a further 2 years if the Chief Constable successfully applies to have the retention period extended.

- The proposed Article 63E will also allow the retention of fingerprints, or DNA profiles derived from DNA samples that have been taken even where a person is arrested for or charged with a minor offence and where they are not convicted of that offence. If a person is arrested or charged with a recordable offence other than a qualifying offence, is not convicted of the offence in respect of which they were arrested or charged and if material is taken from them in connection with the investigation of the offence for which they were arrested or charged, that material may still be retained indefinitely if the person has previously been convicted of a recordable offence which is not an excluded offence, as defined above. The hypothetical scenario involving child A could again be employed here, only on this occasion child A is arrested for theft, a recordable offence. His fingerprints are taken and a DNA profile is derived from a DNA sample taken in connection with the investigation of the offence. However, child A is not subsequently charged with the theft. Child A's criminal record contains two precious cautions for shop lifting, a recordable offence, and his fingerprints and DNA are therefore retained indefinitely as a caution is considered to be a conviction for the purposes of the draft Bill.

- In relation to children convicted of a first minor offence Article 63H will apply. It provides that where a person is convicted of a recordable offence other than a qualifying offence, has no previous convictions for a recordable offence, was aged under 18 at the time of the offence and has had their fingerprints taken or a DNA profile has been derived from a DNA sample taken in connection with the investigation of the offence the amount of time that persons DNA or fingerprints will be retained is linked to the length of the sentence they receive. Where the person is given a custodial sentence of less than 5 years in respect of the offence, the material may be retained until the end of a period consisting of the term of the sentence plus 5 years. It would appear from this provision that if, for example, a child received a 1 year sentence, their material could be retained for 6 years. If a child received a custodial sentence of 5 years or more, their material may be retained indefinitely.

-Article 63H also allows the retention of fingerprints and DNA where children are given non-custodial sentences in respect of a first minor offence. Where a non-custodial sentence is passed, the material may be retained under Article 63H(4) for a period of 5 years beginning from when the material was taken. However, if the person receives another conviction for a recordable offence before the end of this period, the material may be retained indefinitely. What is not clear from this clause of the Bill is whether cautions, which the Bill proposes to include within the definition of persons convicted of an offence, will also constitute a non-custodial sentence for the purposes of the legislation. As can be seen below, the Children's Law Centre is particularly concerned

about the inclusion of cautions within the definition of persons convicted of an offence. We would therefore oppose the suggestion that cautions also be considered as non-custodial sentences for the purposes of the legislation, opening up the prospect of children and young people having their fingerprints and DNA retained for 5 years upon receiving a caution. A hypothetical scenario here which can be clearly envisaged under the current proposals as we understand them could involve child D. Child D is 10 years old and is arrested and charged with shoplifting, a recordable offence. Her fingerprints are taken. The Public Prosecution Service (PPS) decides to prosecute child D for theft. Child D's case proceeds to the Youth Court and she pleads not guilty. Child D is convicted of theft following her trial. This is child D's first offence and a Youth Conference Order is made, which child D consents to. The plan devised for child D at the youth conference is approved by the Youth Court and child D complies with it. Child D has now been convicted of a recordable offence within the terms of the draft Bill and has received a non-custodial sentence, meaning her fingerprints are retained for 5 years. Four years later, child D is again arrested by police for theft, aged 14. Child D admits to the offence immediately. The case is referred to the PPS who direct that child D be offered a caution. Child D accepts a caution for the offence. She has now received another conviction for a recordable offence under the terms of the draft Bill, within the 5 year retention period for her fingerprints, and so Child D's fingerprints are retained indefinitely.

- If however, under Article 63F, a child or young person is convicted of a recordable offence and fingerprints were taken or a DNA profile was derived from a DNA sample taken in connection with the investigation of the offence, that material may be retained indefinitely unless Article 63H applies. In effect, this would mean that if a child or young person has fingerprints or DNA taken in connection with the investigation of a recordable offence for which they are convicted, and has a previous conviction for a recordable offence, their fingerprints or DNA profile will be retained indefinitely. For example, a hypothetical scenario may involve child E, who is arrested for theft aged 16. Her fingerprints are taken in connection with the investigation of the offence. She has previously received a caution for theft when she was 14, which is considered to be a conviction for the purposes of the draft Bill. Child E admits to the theft and the PPS directs that she be offered a caution. Child E accepts a caution. Therefore, her fingerprints are retained indefinitely.

5.6 **We believe that the proposals under Articles 63D and 63E of the draft Bill significantly undermine the presumption of innocence and due process, as they would allow the retention of the fingerprints and DNA profiles of children and young people who are not convicted of an offence for which that material is taken as part of an investigation and who are therefore innocent children and young people.** The implication from the above proposals is that children and young people who are arrested but not charged with an offence, or charged but not convicted of an offence are somehow not totally innocent or less innocent of the offence for which they did not receive a conviction or may not even have been charged. We contend that the proposals to retain the DNA data of under 18's who have not been convicted of an offence is in breach of the Government's obligations under Article 40 of the UNCRC. Under Article 40, State Parties are obligated to recognise the right of all children,

"...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"

5.7 In addition, Article 40 affords all children the right to be presumed innocent until proven guilty according to law. We contend that the retention of DNA data of children and young people under the age of 18 who have not been convicted of an offence, or may not even have been charged with an offence, entirely undermines the child's right to be presumed innocent until proven guilty. We agree with the argument put forward by the Applicant in the *S and Marper* case that,

"...retention of the records cast suspicion on persons who had been acquitted or discharged of crimes, thus implying that they were not wholly innocent. The retention thus resulted in stigma which was particularly detrimental to children as in the case of S..."[29]

5.8 The UNCRC Committee's General Comment no. 10 on Juvenile Justice also illustrates the fundamental importance of the presumption of innocence of children in conflict with the law. It emphasises the child's right to be treated in accordance with this presumption and the duty on State Parties to respect the presumption of innocence. It states:

"The presumption of innocence is fundamental to the protection of the human rights of children in conflict with the law. It means that the burden of proof of the charge(s) brought against the child is on the prosecution. The child alleged as or accused of having infringed the penal law has the benefit of doubt and is only guilty as charged if these charges have been proven beyond reasonable doubt. The child has the right to be treated in accordance with this presumption and it is the duty of all public authorities or others involved to refrain from prejudging the outcome of the trial. States parties should provide information about child development to ensure that this presumption of innocence is respected in practice…"[30]

5.9 We strongly oppose the retention of fingerprints and DNA data of children who have not been convicted of an offence in relation to which fingerprints or DNA data have been taken, as we believe that such a practice runs entirely contrary to the Government's obligations under international standards.

5.10 We also do not believe that the retention of the fingerprints taken or a DNA profile derived in connection with the investigation of minor, recordable offences, which ultimately leads to the conviction of a child or young person is a proportionate response. As the legislation itself states, recordable offences are less serious, minor offences. The proposals contained within this Bill are extremely disappointing from the perspective of aiming to strike the correct balance between the protection of rights and security. We do not believe that this Bill gives adequate consideration to obligations to uphold the rights of children and young people, in relation to whom we believe the taking and retaining of fingerprints and DNA is entirely disproportionate. Under the proposed Article 63F and 63H, fingerprints or DNA will be retained for a minimum of 5 years and possibly indefinitely, if a child or young person commits two minor offences, or receives a custodial sentence of over 5 years.

[29] Ibid, para. 89.
[30] Para 42, General Comment No. 10 (2007) Children's rights in juvenile justice CRC/C/GC/10

5.11 The Edinburgh *"Study of Youth Transitions and Crime"*[31] followed the progress of 4,000 young people who started secondary school in Edinburgh in autumn 1998. It found that youth crime can be contained by avoiding the punishment and stigmatisation of young people during their formative years. It also found that young people are much more likely to grow out of crime if they are not damaged by intervention from the criminal justice system. This study found that the chances that a young person will stop offending altogether are sharply reduced by contact with the police. It must be concluded therefore that a policy of increased intervention by the juvenile justice system is very unlikely to lead to a reduction in youth offending.[32]

5.12 The European Court of Human Rights in issuing its judgment in *S and Marper* drew on international standards including Recommendation R (92)1 of the Council of Europe's Committee of Ministers, which was adopted without reservation by the United Kingdom. This recommendation sets out that the results of DNA analysis should be routinely deleted when no longer necessary to keep them for the purposes for which they were used, and that retentions should only take place,

"where the individual concerned has been convicted of serious offences against the life, integrity or security of persons' subject to *'strict storage periods defined by domestic law".*

5.13 The only exception set out for retaining the DNA analysis of person who has not been convicted or charged with an offence is in relation to national security, or at the express request of the individual.[33] Article 63F and H will apply to recordable offences, which the legislation acknowledges to be minor offences, rather than serious offences against the life, integrity or security of persons, which would appear to fall under the definition of a qualifying offence. To allow material to be potentially retained indefinitely in such circumstances would not accord with the concept of it being retained subject only to strict storage periods and so would not be in accordance with international human rights standards the United Kingdom has adopted without reservation.

5.14 The Children's Law Centre is also particularly concerned by the proposal to include cautions within the definition of persons convicted of an offence for the purposes of retaining fingerprints and DNA profiles under the proposed Article 53B. The Public Prosecution Service Code for Prosecutors states that cautions are:

"a formal reprimand by Police and, although not a conviction, is recorded on a person's criminal record for a period of 30 months for youths and 5 years for adults."[34]

5.15 It is clear from this that cautions do not have the same effect as convictions under other aspects of the criminal law. It is entirely possible that under the proposed legislation a child who receives two cautions for minor, recordable offences will have their fingerprints

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[31] www.law.ed.ac.uk/cls/esytc/
[32] *DNA Database: Fuelling Children's Criminality?* Terry Dowty and Dr Helen Wallace, ChildRight May 2008
[33] Recommendation no.R(91)1 of the Committee of Ministers on the use of analysis of deoxyribonucleic acid (DNA) within the framework of the criminal justice system (adopted by the Committee of Ministers on 10 Feb 1992 at the 470th meeting of ministers deputies (paragraph 8))
[34] Public Prosecution Service 'Code for Prosecutors' 2008, p. 16.

or DNA profile retained indefinitely. We believe this to be entirely disproportionate. It runs contrary to the purported purpose of a caution, which is to divert children away from the criminal justice system. The Children's Law Centre does not believe that cautions adequately do so at present, as we do not believe that the current operation of diversionary measures has enough emphasis on diversion out of the formal criminal justice system and still involves harmful contact with the criminal justice system. However this present situation will only be exacerbated if the use of cautions results in a child's fingerprints and DNA profile being retained indefinitely. We also believe that it would be useful to clarify exactly what is meant by a caution in this context. For example, will other diversionary options, such as informed warnings or diversionary youth conferences, which do not currently constitute a conviction, fall under the scope of this provision? The Children's Law Centre would oppose the extension of the legislation to include these diversionary disposals, but would respectfully submit that in the interests of clarity the Committee should inquire as to whether they will come within the scope of the legislation.

5.16 General Comment no. 10 of the Committee on the Rights of the Child states that in relation to interventions and diversions from the criminal justice system:

"Children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child's assuming a constructive role in society (art. 40 (1) of CRC)."[35]

The General Comment goes on to state that:

"The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as "criminal records" and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law."[36]

5.17 It is entirely clear therefore that the inclusion of cautions within the definition of convictions for the purposes of this legislation is contrary to international standards, which specifically prohibit children who have been diverted from being viewed as having a previous conviction.

5.18 We do not believe that the proposal to indefinitely retain the DNA of children and young people convicted of offences adequately considers the particular circumstances of children and young people. Indefinite retention of the DNA of a child or young person makes assumptions about the likely actions of children in the future and disproportionately impacts on children, particularly given that their DNA can be held for the rest of their lives. When one considers this penalty as a percentage of the lifetime of a young person it becomes clear that further consideration of the lives of children is necessary in formulating proposals for the retention of the DNA of under 18's. It is also difficult to see how it can be determined, through the proposals to indefinitely retain the DNA of a child, that a child or young person is likely to pose a significant risk of harm by

[35] Ibid para.23.
[36] Ibid, para. 27.

committing further offences when one considers the developmental nature of young people and the fact that their age, maturity and understanding changes so rapidly. We are challenged as to how such a determination can be made with regard to children, particularly given that the development of children is an ongoing process.

5.19 Article 40 of the UNCRC places an obligation on the state parties to recognise the right of all children, even those who have infringed the 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 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. The Committee on the Rights of the Child, in its' General Comment no. 10 has said:

"The Committee reminds States parties that, pursuant to article 40 (1) of CRC, reintegration requires that no action may be taken that can hamper the child's full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society."[37]

5.20 Retention of fingerprints and DNA profiles for a minimum of 5 years and possibly for an indefinite period, particularly where a child has received cautions which are not measured as convictions under other aspects of the criminal law, does not correspond with the state's obligations under Article 40 in this regard.

5.21 The Children's Law Centre is extremely supportive of the recommendation in the Youth Justice Review Report that diversionary disposals should not attract a criminal record or be subject to employer disclosure and young offenders should be allowed to apply for a 'clean slate' at age 18 in line with international standards. The proposals within this Bill in relation to cautions do not sit with these recommendations.

6. Conclusion

6.1 In summary, the Children's Law Centre has serious concerns around the proposals contained within the Criminal Justice Bill, as we believe they have potentially far reaching implications for the protection of children's rights, both for those children and young people who are not convicted of an offence and those who are. The Children's Law Centre is grateful for the opportunity to submit evidence on the Criminal Justice Bill and we hope that the Committee finds our comments helpful in examining the contents of the Bill. We would very much welcome the opportunity to provide oral evidence to the Committee on the contents of the Bill, and are happy to further discuss or clarify anything within this written evidence in advance of this.

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[37] Ibid, para.29.