Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Criminal Justice Bill: Sex Offender Notification and DNA/Fingerprint Retention Clauses

27 September 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 Sydney Anderson
Mr Stewart Dickson
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Patsy McGlone
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr Gary Dodds	Department of Justice
Mr David Hughes	Department of Justice
Mr Gareth Johnston	Department of Justice
Mr Ian Kerr	Department of Justice
Ms Amanda Patterson	Department of Justice

The Chairperson: I welcome Gareth Johnston and Amanda Patterson from the criminal justice policy and legislative division, who will take us through this. This session will be recorded by Hansard. Mr Johnston, can I hand over to you?

Mr Gareth Johnston (Department of Justice): I will ask Amanda to take us through the individual clauses; I can come in with some general comments if need be.

Ms Amanda Patterson (Department of Justice): Clause 1 and schedule 1 make changes to the current legislation set out in the Sexual Offences Act 2003, which requires offenders who have been convicted of a sexual offence to be subject to notification requirements for a specified period depending on the seriousness of the offence, as measured by the length of the sentence. By way of background, a person who has been sentenced to imprisonment for a period of 30 months or more is required to notify for an indefinite period. That means that they have to provide the police with details of their identity and whereabouts and update that information regularly. In 2010, the Supreme Court found that such a requirement with no recourse to have it lifted or removed was contrary to article 8 of the European Convention on Human Rights. All jurisdictions in the UK have since moved to address that point. Scotland did so by remedial order in 2010 and England and Wales by remedial order in July of this year.

Clause 1 inserts an amendment to the 2003 Act that allows for the review and discharge of indefinite notification requirements and inserts a schedule to the Act detailing the application procedure that offenders would go through to apply for a review of the notification requirements if they are subject to that notification for an indefinite period. Schedule 1 inserts the legislative framework for making applications. It might be easier if we go through schedule 1 now.

The Chairperson: Members, that is in your Bill folder.

Ms Patterson: Paragraph 1 of schedule 1 defines whom the schedule applies to and provides definitions of the terminology used in the schedule.

Paragraph 2, "Initial review: applications", sets out how exactly the application process will work. An offender may apply to the Chief Constable after an initial review period. That review period is 15 years from the date of initial notification or eight years if the person was under 18 at the time of conviction. It also explains that the date of initial notification is three days after conviction. It disregards any period spent in custody after that. Therefore, an application can be made by an offender only 15 years after release from a prison sentence for the relevant offence.

Paragraph 2 also excludes from eligibility to apply those who are already subject to a sexual offences prevention order (SOPO) or those who may have a further conviction that attaches a fixed period of notification that is still outstanding. Therefore, the only offenders who can apply are those who have indefinite notification for a particular offence and who are not subject to a SOPO, which indicates that the person is at a high level of risk and requires a SOPO to manage that risk. It also ensures that, where an offender has more than one conviction attracting indefinite notification, the review period will start and be calculated only from the most recent of those convictions.

Finally, the paragraph sets out that the application must be in writing and what it must contain. The Chief Constable then has to acknowledge receipt of that application within 14 days. There is also provision for him to request information from any other appropriate source before determining an application.

Paragraph 3 sets out the benchmark for determining an application. Where the Chief Constable satisfies himself that an offender poses a risk of sexual harm and the risk justifies the continuance of notification, the requirements will not be discharged. Paragraph 3 is quite lengthy, and I do not intend to go into it in detail other than to say that it sets out the various criteria that the Chief Constable must take into account when considering an application. Fourteen specific criteria are listed at paragraph 2(2)(a) to (n). The end of that paragraph requires the Chief Constable not to delegate the functions of determination to anyone below the level of superintendent.

Paragraph 4 requires the Chief Constable to reach a decision and serve notice on an applicant within a 12-week period of receipt of the application.

Paragraph 5 is the initial review and the application to court. That provides a right for the offender to apply to the Crown Court if the Chief Constable decides either not to discharge the requirements or does not respond within the statutory 12-week period. An application to the court must be made within 21 days, and the court has to determine the outcome on the same basis as the police; in other words, another application to the court. If the application is unsuccessful, paragraph 6 allows for further applications to be made by the offender eight years after the outcome of the initial review. That is cut to four years in the case of a person who was under the age of 18 at the time of conviction for the relevant offence.

Paragraph 7 requires the Department to issue guidance on the making of applications and the determination of applications by the Chief Constable. The last paragraph, paragraph 8, gives jurisdiction in Northern Ireland to decisions made by the rest of the UK: England, Wales and Scotland. That is clause 1 and schedule 1 covered, which is the review of indefinite offender notification requirements. Shall I move on to the other clauses before answering questions?

The Chairperson: If we could perhaps deal with this area first before moving to the next clauses. We will run through those paragraphs, and if members have questions, they can ask them. This will be familiar to members who were here in the previous mandate; however, those of you who are not familiar with it please feel free to ask questions.

Mr Weir: I was going to ask a generic question that does not relate to a specific paragraph. I appreciate that some members may have been here in the previous mandate, and that there was some controversy around this then, but there is also an acceptance that, legally, there is limited room for manoeuvre on it. As England, Scotland and Wales are also having to put in place similar arrangements, I wonder whether you could highlight any differences. Those jurisdictions face the same dilemma about how to square the circle on this. There may be variations between ourselves and other jurisdictions; whether in some case we may be taking a tougher approach or a less tough approach. There is good co-operation between the various police forces across the islands in connection with this. If you were to talk to people who have been victims, particularly of sexual abuse, they will say that one of the concerns in the past was about people trying to take advantage of shifting across jurisdictions because of the extent to which they were monitored. Will you outline where we have diverged from the path? It may be a tougher path than that taken in other jurisdictions.

Ms Patterson: There are not many differences; the major aspects are the same. The review period is the same; it is 15 years in all jurisdictions. The court process is slightly different in the three jurisdictions. In Scotland it goes to the Sheriff's Court; England and Wales have inserted an appeal to the magistrates' court; here, we have chosen a Crown Court route. Other differences are really not huge.

The Scottish system is slightly more "liberal", if you must use that term, in that the review takes place despite an application. The offender does not have to apply; it is for the police in Scotland to make an application for a continuation order. If they do not do that, or if they are unsuccessful, the notification requirements will cease after the 15-year period. However, our proposals, and England and Wales in their remedial order, have chosen the offender approach, whereby the offender has to make an application, and the notification requirements will continue until such time as a determination has been made.

Mr Weir: One of the key grounds that the Chief Constable has to take into account is the assessment of the risk of sexual harm. The agencies involved are mentioned in article 49(1) of the Criminal Justice (Northern Ireland) Order 2008. Are those assessments made automatically? Is there not a question of having to go out to those agencies; will they automatically make that assessment? What is the process there?

Ms Patterson: That would probably be covered by the guidance on who the agencies are that meet, assess and manage risk under what we call public protection arrangements. Where a case has recently been looked at by a local area public protection panel, which is formed by representatives of those agencies, that might do as an assessment of the risk at that particular time. However, I think that, in most cases, it is more likely to be a special case, where they will look at the case before they make a determination.

Mr Weir: I appreciate that it will be covered by the guidance. It will mean that, in every case in which there is an application, assessments will have been made. I am conscious of the fact that we should not get into a controversial situation, a few years down the line, whereby the notification has been changed and it is then found that the right hand did not know what the left was doing, and assessment was not on that. Will that be well tied up?

Ms Patterson: That will be very well tied up. Some of the cases will undoubtedly be those at the lower level of risk, which may not have been in the risk-management process. Those cases will have to come forward and be looked at again.

Mr Weir: Thank you.

The Chairperson: There are a couple of points that I want to ask about applications. If you are under the age of 18, it is eight years. Is it the same in England? And if you are an adult, it is 15 years; is that the same as in England?

Ms Patterson: Yes.

The Chairperson: As to the further reviews, for those aged under 18, there will be a further review every four years; and for adults, there will be a further review every eight years. Is that the same as in England?

Ms Patterson: It is not quite the same: I was just about to come to that. In England, Wales and Scotland, the police can extend the eight-year period to a maximum of 15 years. The police here were not keen on following that route, because they reckoned that eight years is a long time. They could not see any reason why they would want to extend that second review to a period beyond eight years. It also caused difficulty here because, if it were to go into the appeal process and there was a judicial review of the length of time that the police were giving for an extension, it would cause all sorts of difficulties. It would be a natural thing that everyone would go to court to challenge it. Therefore the police were happy with an eight-year gap between the first and second review.

The Chairperson: Therefore it is eight years in England and Scotland, but they can extend that?

Ms Patterson: They can, in exceptional circumstances, if they feel that they need to.

The Chairperson: Therefore they just have an additional element that says, "It will be eight years but —"

Ms Patterson: In exceptional circumstances that period could be extended. The Chief Constable would have to make a case for those exceptional circumstances. Therefore it was not considered to be a very useful aspect.

Mr Johnston: I think that we feel that, in England, they will probably face plenty of judicial reviews on that point, and, to be honest, it ends up being more bother than it is worth.

The Chairperson: The Chief Constable performs his role first. It is the police who make that initial decision, and then you can go to the Crown Court; or, if the police do not do it within the time frame, you can automatically go to the Crown Court.

Is that the same procedure as in England and Scotland? Initially, I think that the Home Secretary said that it would only be by way of judicial review.

Ms Patterson: No.

The Chairperson: Have they changed that?

Ms Patterson: They had to change it as a result of the report of the Joint Committee on Human Rights. They reckoned that it would not be compliant if there was not some form of independent tribunal involved. Therefore they have inserted the provision to allow for an appeal to a magistrates' court.

The Chairperson: OK. My last point relates to paragraph 8 of schedule 1, "Discharge in Great Britain". If all the laws are the same, you will be discharged wherever you are; if you are discharged in England, it will apply here.

Ms Patterson: Yes.

The Chairperson: I take it that that applies only where the legislation is identical; if there is any variance — or perhaps there is no variance at all. What I am worried about is where you are discharged in another jurisdiction in the United Kingdom, and the law that we pass is stricter, that discharge may not apply in Northern Ireland. I just want to be sure that we do not let someone off here, once we pass a law, because somewhere else's law is not up to the same rigorous standard as ours.

Ms Patterson: It depends on what is passed in Northern Ireland, but, at the minute, the provisions and the proposals in the Bill would not cause that problem, because even though there are slight differences on the edges, the basic, fundamental tenets are the same. The criteria by which the police determine whether there is still a risk are the same in all the jurisdictions. Fundamentally, that is what will decide whether or not risk is still present.

Mr McCartney: Thank you very much for your presentation. What are the main changes from the previous Bill?

Ms Patterson: That is a good question. What have we changed?

Mr McCartney: Substantially, there do not seem to be many.

Ms Patterson: There are not many. I am sorry; I am struggling on that one.

Mr McCartney: That means that I do not have to ask any more questions. I can refer to your answers in the past. *[Laughter.]* There is not really any great change from the previous proposition.

Ms Patterson: There is not.

Mr Johnston: There are some specific issues around people whose convictions were in other countries and automatic notification.

Ms Patterson: That is not in this. I am just talking about the review mechanism.

Mr McCartney: That is fine. There are no substantial differences in taking this through, so the issues that the Committee raised previously have been well ventilated.

Ms Patterson: More or less.

Mr Johnston: What has changed in the meantime is not so much what is in this clause; it is, rather, that England and Wales have come closer to our position.

The Chairperson: I would find it useful if you were to give us a paper detailing any changes from the previous Bill and giving an analysis of what we are doing compared with what England and Scotland have done. That would be helpful.

Ms Patterson: That is not a problem.

The Chairperson: Previously, when we looked at the Bill, England was talking about judicial review, and that led us to be reticent. If that was the route that England was going down, we wondered whether we should fall into line. If we could have those two pieces of work, that would be helpful for the Committee in trying to deal with this. Take us through the other clauses, please.

Ms Patterson: Clause 2 is entitled "Ending notification requirements for acts which are no longer offences". That is, basically, a consequential amendment as a result of the Sexual Offences (Northern Ireland) Order 2008, which should really have been done at the time but which was not. It left the law a little behind what it should be. Yet again, it amends the Sexual Offences Act 2003 to expand the scope of schedule 4 to that Act to include offences that have been abolished since that Act was made. It does not change any real policy; it just changes the offences that should be included in this. It means that offenders who have notification attached only by offences that have since been abolished can apply to have their notification requirements removed. The original abolished offences in the Act include section 61 of the Offences against the Person Act 1861, covering buggery; and section 11 of the Criminal Law Amendment Act 1885, covering indecency between men, where the other party was over the age of 17. The Bill would add in article 19 of the Criminal Justice (Northern Ireland) Order 2003, again covering buggery; and section 5 of the Criminal Law Amendment Act 1885, covering carnal knowledge of a girl under 17. The offences that would be included are consensual offences where the other party was aged 16 or over as opposed to 17 or over. That is a consequence of replacing those offences, which involve a repeal now in the Sexual Offences (Northern Ireland) Order 2008, with offences relating to sexual activity with a person under the age of 16 rather than 17.

The clause also expands the provisions by allowing applications where the offender was convicted or sentenced for the above offences on the basis that he honestly believed that the other party was aged 16 or over but, in fact, was under 16.

Clause 3 deals with offences committed in a European Economic Area (EEA) state other than the United Kingdom. It would, again, amend the Sexual Offences Act 2003 to change the way in which

notification requirements are attached to offenders with convictions from outside the United Kingdom. The clause makes it a statutory requirement for offenders who come to Northern Ireland with convictions for sexual offences in another EEA country to notify the police of their personal details in the same way as domestic offenders do. However, offenders from other countries would still be exempt from that statutory requirement until such times as the police would apply and obtain a court order known as a notification order, which is the current arrangement. However, when the Bill was with the Executive, there was some concern about the clause, and they would not agree to introduce the Bill on that basis without a commitment that an amendment would be brought forward to create an acceptable single enhanced process for attaching notification for all sex offenders with convictions from outside the UK. As a result, the policy is under review again, and the Department will need to have further discussions with stakeholders to find another suitable way forward. At that point, we would envisage coming to the Committee with revised proposals.

The Chairperson: The police raised a point about identifying people within the three-day notification period. How would they identify such people, and how can that be enforced?

Ms Patterson: Basically, it cannot and will not be enforced. In practical terms, it would mean that when the police discover that a person from another country who has sexual offence convictions is in Northern Ireland, they can go to that person and immediately make them subject to the notification requirements without the need to make a case and apply to the court, given the length of time that that takes. There is not really any way of ensuring that somebody who comes to Northern Ireland from a country outside the UK knows about that when they arrive. The police's view is quite pragmatic. They see the benefit of it because they can, where necessary, make sure that a person either agrees, becomes subject to notification and makes his notification immediately, or is arrested for breaching the requirement.

The Chairperson: Unless it is flagged up when they come into the country.

Ms Patterson: Unless it is flagged up in some other way. For example, it will be of benefit in the Republic of Ireland, because there will be joint arrangements whereby offenders coming out of prison in Ireland will be informed at that point that if they travel across the border to Northern Ireland, they will be obliged to notify the police. Therefore they will know that if they stay here for a period of seven days, they will have three days to notify the police. If someone from the Republic of Ireland came here without notifying the police of their personal details, they would be in breach and would be found immediately.

Mr Johnston: Of course, there are, in any event, quite good arrangements for information exchange between the two police services in cases where somebody who is being released does not pose any kind of risk.

The Chairperson: The Public Prosecution Service (PPS) has highlighted that this element of the Bill already exists in Part 2 of the Sexual Offences Act 2003 and that it has already been applied in Scotland, under the section on powers of entry to and examination of relevant offender's home address in the Justice (Scotland) Act 2006.

Ms Patterson: I do not think that that is correct.

The Chairperson: I will take your word for it.

Ms Patterson: I am not sure what that is, but I do not think that it is correct. That would be new.

The Chairperson: OK. We will look at the PPS response in more detail. It did flag that up with the Committee.We will look at that more, and if there is something that we need to get some clarity on, we will write to you.

Ms Patterson: Clause 4 is entitled, "Sexual offences prevention orders", and is quite straightforward. It simply explains the scope of sexual offences prevention orders to allow the court to require an offender to do something as well as prohibit them from engaging in certain activities. It allows positive conditions to be added into the SOPO if the court is agreeable to that. That will add to the effectiveness of the order as a risk-management tool and allow the order to be more readily understood by the offender, which, in turn, may reduce the number of breaches due to misunderstandings of how they have to be written. At the minute, you cannot tell an offender to do

something. That is a straightforward measure that is already in operation in Scotland, although they do not have it yet in England and Wales.

Mr Johnston: Coming back to the PPS point, there is a very straightforward point to note about the structure of the legislation rather than the content. Our Bill inserts section 96A. However, there is already a section 96A inserted by another piece of legislation about something completely different, but it only applies to Scotland. So, it is just a question of whether ours needs to be 96B rather than 96A. It is a straightforward point that we will check with the lawyers.

The Chairperson: Thank you very much.

We now move on to the DNA/fingerprint retention clauses. I welcome David Hughes, deputy director of policing policy and strategy division, and Ian Kerr and Gary Dodds from police powers and custody branch. This session will be covered by Hansard, and members will have an opportunity to ask some questions once we have had a briefing from Mr Hughes.

Mr David Hughes (Department of Justice): I do not need to rehearse too much by way of background. Members will recall the substance of these provisions, which are to be incorporated into the Police and Criminal Evidence (Northern Ireland) Order 1989 in response to the judgement of the European Court of Human Rights in the case of S and Marper v UK. Following that judgement, in Northern Ireland and in England and Wales there is a requirement to change the retention framework. The UK Government adopted the protections afforded by the existing Scottish model and legislated for its own framework based on that. Those provisions are set out in the Protection of Freedoms Act 2012.

These clauses would introduce the substance of the changes to the PACE Order through the schedules. With your permission, we will be able to cover the clauses quite quickly. The new clauses that are being inserted into the PACE Order contain the bulk of the material.

Clause 7 gives effect to schedules 2 and 3, which insert the new retention framework and make consequential amendments. It also requires the Department to make an order containing transitional or saving provisions associated with the coming into force of that clause and the repeals in schedule 4. It specifically requires the Department, in the exercise of that order-making power, to provide for the destruction or retention as appropriate of biometric material taken before the coming into operation of the new framework. That is to say, the order will apply the new criteria for retention to legacy material, effectively clearing the current database in line with the new rules.

Clause 8 gives effect to the appeals in schedule 4, Part 2 of which relates to DNA and fingerprints.

Clause 9 allows the Department to schedule commencement of the provisions of the Bill that do not come into force on assent.

If the Committee is content, I will move on to schedule 2 to the Bill and its substance. Article 63B sets out the basic rules governing the destruction of fingerprints and DNA profiles taken from a person either under the powers in Part 6 of PACE or with the consent of the person in connection with the investigation of an offence. For example, someone might choose to do so to eliminate themselves from an inquiry. This material, which is referred to throughout as article 63B material, must be destroyed unless one or more of the provisions in article 63C to 63J apply, in which case the article that delivers the longest retention period determines the maximum period for which the material may be held. The Chief Constable is required to destroy 63B material if it appears that the material was taken or derived unlawfully or if the arrest of the person was unlawful or based on mistaken identity. However, on the recommendation of the Attorney General, that is made subordinate to article 63C. If the material is of potential evidential value, it may be retained until the conclusion of any investigation or associated criminal proceedings and the effect of any unlawfulness is considered by the court as part of its decision on the admissibility of evidence. A search may be carried out against the fingerprint and DNA databases on such material before its destruction, if the Chief Constable considers that to be desirable. That may serve to confirm the person's identity, indicate that he or she had previously been arrested under a different name or indicate a potential match of the person's biometric material to the fingerprints or DNA profile obtained from a crime scene.

Does the Committee want me to go through this article by article or stop at each article?

The Chairperson: If members have any points they want to raise as we go through each article, feel free to do so.

Mr Hughes: I will keep going.

Article 63C will permit the retention of article 63B material taken from a person in connection with the investigation of an offence until either the conclusion of the police investigation or the conclusion of any criminal proceedings brought against that person or any other; for example, a co-defendant.

Article 63D provides for the retention of material taken from persons arrested for or charged with but not subsequently convicted of certain serious violent or sexual offences, referred to in the Bill as qualifying offences. A list of qualifying offences will be set out in article 53A of PACE, which will be incorporated when the relevant sections of the Crime and Security Act 2010 are commenced. Article 63D includes a provision that recurs throughout the articles, and it provides that, where article 63B material is taken on arrest in connection with a recordable offence, whatever the outcome of that particular investigation, that material may be retained indefinitely if the individual concerned has a previous conviction for a recordable offence. Material is retained on the strength of the earlier conviction in respect of which article 63B material may already be held; the purpose being to ensure that existing lawfully held records are as up to date as possible. Exceptions to this are where the material was obtained unlawfully or on the basis of mistaken identity, or where the previous conviction was for an excluded offence; that is, a single conviction for a non-qualifying offence, a minor offence committed while under the age of 18 and one for which a custodial sentence of less than five years was imposed. In such a case, the material may be retained only for the duration of the retention period relevant to that offence. Where a person has been charged with a qualifying offence but not convicted, the article provides for the retention of such material for a period of three years, with a single possible extension of two years on application to the courts. It provides the police with the right of appeal to the County Court against a refusal to grant an extension, or, alternatively, the right for the subject to appeal against the granting of an extension.

Article 63D also deals with the material taken from persons arrested for but not charged with a qualifying offence. That material may be retained for three plus two years if the Chief Constable considers that certain prescribed circumstances apply and independent authorisation is given. In light of the comments of the Examiner of Statutory Rules, we intend to set those circumstances out in the Bill rather than in an order, as originally intended, although we will want to take an order-making power to be able to change the criteria. Those circumstances will, as suggested in the early briefings, include cases where the victim is a juvenile, a vulnerable adult or associated with the person to whom the material relates. For those purposes, "associated with the person" will be defined by reference to article 3 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998. They will also include cases where those three categories do not apply but where the Chief Constable is satisfied that grounds exist for the retention of the material in the interests of public protection.

I would just like to expand briefly on that last point. The case made by the police has revolved around the issue of alcohol and sexual predation. They cited instances where, for example, allegations of rape may have been made against individuals in the city centre on a Friday or Saturday night but charges cannot be brought due to the intoxication of the victims at the time of the alleged offence and the assertion by the individuals concerned that sex was consensual. They make the point that, if, for example, three different women make the same allegation against the same person on three different occasions, they would welcome the power to retain a DNA profile and fingerprints in the absence of charges. The power would be framed with that in mind. As I mentioned, retention in such circumstances would be subject to independent approval. The Bill provides for this role to be carried out by a biometric commissioner, but we are examining the possibility of the courts taking that role.

Article 63D(11) and article 63D(12) make provision for the Department to appoint a Northern Ireland Commissioner for the Retention of Biometric Material, who would deal with applications from the police for the retention of material under article 63D(5) where prescribed circumstances may apply. Article 63D(13) provides that material that falls under article 63D(5) can only be retained with the commissioner's consent and that an order by the Department prescribing the circumstances in which applications can be made may also set out the procedures to be followed in relation to any application by the police to the commissioner. Of course, if we pass that approval function to the courts, much of this section will fall away.

Article 63E provides that article 63B material taken from persons arrested for or charged with but not convicted of a minor offence must be destroyed unless they have a previous conviction other than for an excluded offence.

Article 63F provides for indefinite retention on conviction for a recordable offence, as is the case at present, unless the offence is an excluded offence as provided for in article 63H.

Articles 61 to 63 of PACE, as amended by section 9 of the Crime and Security Act 2010, provide police with powers to take fingerprints and a DNA sample from persons convicted of a qualifying offence outside Northern Ireland. Article 63G provides that the fingerprints and the DNA profile derived in such cases may be retained indefinitely.

Article 63H sets out the retention period for material taken from a person under the age of 18 when convicted of a first minor offence. In such cases, the retention period will be determined by whether or not a custodial sentence is imposed for the offence. Where no custodial sentence is imposed, the material may be retained for five years only. Where a custodial sentence of less than five years is imposed, material may be retained for five years plus the length of the sentence. When a person is given a custodial sentence of five years or more, or in the event of a further conviction, material may be retained indefinitely. For these purposes, "custodial sentence" has the same meaning as in Part 2 of the Criminal Justice (Northern Ireland) Order 2008.

Article 63I provides that any fingerprints or DNA profile provided voluntarily by a person, for example, to eliminate themselves from an inquiry, must be destroyed as soon as they have fulfilled the purpose for which they were taken.

Article 63J provides that a person's fingerprints and DNA profile that would otherwise be destroyed may be retained if the person consents to their retention. This applies both to material taken under the powers in part 6 of PACE and to material given voluntarily under article 63I. Consent must be in writing and can be withdrawn at any time.

Article 63K provides for the retention of material in cases where a person arrested for one offence is subsequently arrested for, charged with or convicted of a second, unrelated offence; an offence other than that in connection with which the material was taken. In such a case, the retention of the material would be governed by the rules applicable to the second offence.

Article 63L provides that, if fingerprints are required to be destroyed under the retention framework, any copies held by the police should also be destroyed and that, if a DNA profile is to be destroyed, no copy of that profile may be kept by the police, except in a form that does not identify the person to whom the profile relates. While Forensic Science Northern Ireland (FSNI) retains material on behalf of the police, the legal relationship between them in that matter is that of agent and principal respectively. If the police no longer have the authority to retain material, FSNI has no independent authority in its own right to retain it.

Article 63M deals with the destruction of DNA samples taken by police under any power in PACE or provided voluntarily in connection with the investigation of an offence. It requires that DNA samples be destroyed as soon as a profile has been satisfactorily derived, and no later than six months from the date the sample was taken. The other samples, such as a blood or urine sample taken to test for alcohol or drugs, must similarly be destroyed within six months of having been taken. However, the article allows the Chief Constable to apply to the courts for the retention of a DNA sample beyond the point at which it should be destroyed if, having regard to the nature and complexity of other material that is evidenced in relation to the offence, the sample is likely to be needed in any proceedings for the purposes of disclosure to or use by a defendant or in response to a challenge by a defendant on the admissibility of material in evidence. Any application in such a case must be made before the date on which the sample would otherwise fall to be destroyed. The court may make an order allowing a sample to be retained for a period of 12 months from the date it should otherwise be destroyed and for renewal on one or more occasions for a further period of 12 months. A sample retained under such circumstances may not be used for any other purpose. It must be destroyed as soon as an order ceases to have effect. Article 63M(11) enables a person's DNA sample that would otherwise be destroyed to be retained until a DNA profile has been derived from the sample and a search of the relevant database carried out.

Article 63N restricts the use to which fingerprints and DNA samples and profiles may be put to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or for purposes related to the identification of a deceased person or the person to whom the material relates. It makes clear that material that should otherwise have been destroyed must not be used in evidence against the person to whom the material relates or for the purposes of an investigation of any offence.

In all likelihood, any evidence obtained from the impermissible use of the material would be ruled inadmissible in criminal proceedings.

Article 63O(1) and article 63O(2) exclude from the PACE retention framework biometric material taken from persons detained under the Terrorism Act 2000. That Act has its own retention provisions that apply to such material. Article 63O(3) excludes biometric material taken under the International Criminal Court Act 2001 to assist in obtaining evidence of a person's identity. Article 63O(4) excludes material obtained under the Terrorism Prevention and Investigation Measures Act 2011 (TPIM) and material from persons in respect of whom a TPIM notice has been imposed. That Act also has its own retention provisions. Article 63O(5) disapplies the PACE retention framework to any material that is, or may become, disclosable under the Criminal Procedure and Investigations Act 1996 or its associated code of practice. The Act sets out the disclosure duties of the prosecution and the defence in relation to criminal proceedings. That will ensure that evidential material remains available for examination by defence experts and, potentially, the Criminal Cases Review Commission, if required. Article 63O(6) excludes biological material taken from one person that relates to another person — for example, a DNA profile obtained from a sample taken from a rape suspect that is found to relate to the victim. Finally, under 63O(7), material taken from persons under immigration powers or information held by the police for use for immigration purposes is also excluded from the retention framework.

The Chairperson: Before you go on to schedule 3, David, we will give you a break for a moment. Mr McCartney and Patsy McGlone have a couple of points that they want to raise about some of those issues.

Mr McCartney: You talked about article 63D and the commissioner role. Did you say that there is a possibility that the Department may hand that to the courts?

Mr Hughes: We need to examine that possibility, because I think there are pros and cons.

Mr McCartney: We are shaping the Bill, so when will you conclude on that? We have raised the need for this in a previous session. If there is not going to be a commissioner, when will we know? We have to examine that in the Bill.

Mr Ian Kerr (Department of Justice): We gave an undertaking that we would explore this with the various people with whom we need to do so and that, if we were convinced that it was a workable option, we would bring forward an amendment. We would be able to bring that amendment forward for Consideration Stage.

Mr McCartney: But do you see the difficulty for us in taking the Bill through Committee Stage? There is a possibility that this role could be handed over to the courts. We have said in the past what we feel is the appropriate way to deal with this. The Committee will be asked to do a bit of work on it, and active consideration will be given to this.

Mr Kerr: I appreciate the point that you make. We will certainly get a decision to the Committee as soon as we can.

Mr McGlone: I am seeking a wee bit of clarity on the retention of article 63B material pending investigation or proceedings. Article 63C(2) states:

> *"The material may be retained until the conclusion of the investigation of the offence or, where the investigation gives rise to proceedings against any person for the offence, until the conclusion of those proceedings."*

I understand the second bit, but at what point is the conclusion of the investigation of the offence? Could it be retained for a few months, a few years or many years?

Mr Gary Dodds (Department of Justice): No. There would be an obvious conclusion to any investigation, whether charges are brought or a conviction is secured. It is at that point that the material would be —

Mr McGlone: This seems to draw a distinction as regards the conclusion of the investigation, which could be that there is no conviction or charge. I understand that bit, but, to my mind, an investigation

could still be ongoing for a number of years. I could be wrong, but I base that on stuff that we have heard in the past about investigations that continued for quite a while.

Mr Kerr: The intention of the legislation is that the material pertaining to an individual would be destroyed as soon as the police had concluded in the context of an investigation that that person was not to be proceeded with. It would be within those terms. The investigation would have concluded in respect of that individual, if you like, while the investigation itself might run beyond that.

Mr McGlone: I am not a legal person, and, reading that, the first bit is unclear to me:

"The material may be retained until the conclusion of the investigation of the offence".

The second bit is clear enough, but the first bit is not that clear to me.

Mr Hughes: My understanding is that, in practical terms, the point at which the investigation concluded is sufficiently clear. That legislation informs the police who hold the material, and that is the point at which action is taken. It would be sufficiently clear within policing what is meant by "the conclusion of an investigation".

Mr McGlone: Forgive me for suggesting that it could read, "The material may be retained until the conclusion of the investigation of that person in relation to the offence."

Mr Hughes: I see the point that you are making.

Mr McGlone: Do you see the distinction?

Mr Kerr: That is a fair point and one that we can take up with the draftsmen, if that would be helpful. However, there is a subsidiary point about the use of the word "any". The original drafting was against "the" person, which reflects the situation in England and Wales under the Protection of Freedoms Act 2012. The use of the word "any" is at the suggestion of the Attorney General. He raised the possibility of a co-defendant using as their defence the fact that they had been with such and such an individual at the time of the offence, which would effectively, in their mind at any rate, rule them out of the investigation. If DNA from the person on whose activities they were relying was subsequently placed at the crime scene, that material could conceivably be probative against an individual other than the individual from whom it came, and the Attorney General wanted us to draft that so as to capture both possibilities. There could perhaps be a situation where a case against the original individual is not being proceeded with because he or she is in poor health or is now deceased but the material is still probative in respect of someone else. We will need to look at that aspect of it.

Mr McGlone: That bit is still not clear to me, and, if it is not clear to me, somebody else somewhere else will feel the same. I do not know what we are suggesting. Can you look at rewording that?

Mr Hughes: We can certainly take the question as you have asked it and discuss with the draftsman the effect that he believes has been achieved by what is written. Let us take that particular point back.

The Chairperson: You mentioned the commissioner for the retention of biometric material. Keep me right on this: does the legislation state that a commissioner post will be established or does it just give the power to establish it if the Department wants to?

Mr Kerr: Article 63D(11) provides for the Department to appoint a commissioner, and the next paragraph refers to that. So, the commissioner would be appointed under the Bill. We were then going to provide for the prescribed circumstances and the procedures to be used in application to the commissioner in subordinate legislation. However, we have since had a conversation with the Examiner of Statutory Rules, and that material will now be incorporated in the Bill and will mirror provisions that appear in the Protection of Freedoms Act 2012. The debate, as we discussed with Mr McCartney, is whether we appoint a commissioner or refer the matter to the courts. To a certain extent, much will depend on the volume of cases that are likely to go the courts way. If they will collapse under the weight of them, the Lord Chief Justice might have issues with that. That is only one aspect of it. There are other issues, and we still have to tease that out in discussion with our partners in this matter.

Mr Hughes: I will come to your specific question. The Bill is drafted so that the Department must appoint a commissioner. If the view of the Examiner of Statutory Rules is that the prescribed circumstances need to be placed in the Bill, we would have a greater degree of certainty about the impact that would have on what the approval mechanism would be required to face. On the back of that, it would be easier to take a view on whether having that approval mechanism going to the courts is practicable and workable or whether it is more effective to follow the way that the Bill is currently drafted, with that approval mechanism going to a commissioner. So, triggered by the issue of putting prescribed circumstances in the Bill, that decision needs to be taken as the Bill is taken through the Assembly. If it is to be done through the courts, the provisions as currently drafted could not stand because they say that you have to have a commissioner. They would have to be replaced by an alternative set of provisions that would give that role to the courts instead.

The Chairperson: So either the commissioner takes the decisions or the courts do?

Mr Hughes: Yes.

The Chairperson: When the Chief Constable wants to apply to retain material for a further two years and so on —

Mr Hughes: It is not about the retention for an additional two years; it is about the prescribed circumstances. The decision on the extension for two years lies with the courts already.

The Chairperson: So the debate is whether the prescribed circumstances in which you could retain it will be dealt with by a commissioner or whether it should go straight to the courts to decide.

Mr Hughes: Yes. This is possibly the easier bit. *[Laughter.]* Schedule 3 makes provision for minor and consequential amendments associated with the introduction of the new retention framework. It adds necessary definitions to the interpretation of part 6 of PACE and article 53 as new paragraphs 3A and 3B to that article. Paragraph 3A would exclude the destruction of samples under article 63M, in which routine destruction is required by the framework, as grounds for police to take a fresh sample. Legitimate grounds under article 53 may be damage to the whole or part of a sample, rendering it unreliable.

Paragraph 3B clarifies the definition that persons "charged with an offence" includes persons who are informed that they will be reported for an offence — in effect, being summoned to court by the Public Prosecution Service — as a means of initiating proceedings and regarded as equivalent for the purposes of the framework. The schedule adds to the list of qualifying offences in article 53A of PACE the offences of robbery and assault with intent to intent to rob under section 8 of the Theft Act (Northern Ireland) 1969. The list already includes burglary and aggravated burglary under sections 9 and 10 of that Act.

Paragraph 3 inserts a new article 53B into PACE to provide a number of interpretational provisions relating to the application of the retention framework to persons convicted of an offence. Article 53B(1) provides that a reference to a person convicted of an offence includes a person who has been given a caution, a person found not guilty of the offence by reason of insanity, or a person found to be under a disability and to have committed the offence. Article 53B(2) provides that, for the purposes of the retention framework, a conviction for a recordable offence will continue to be considered as such, notwithstanding that it is regarded as spent for the purposes of the Rehabilitation of Offenders (Northern Ireland) Order 1978. Article 53B(3) provides that, if a person is convicted of more than one offence arising out of a single prosecution, those convictions are to be treated as a single conviction for the purposes of those articles, which include the concept of an exempt conviction or excluded offence. Article 53B(4) flags that new article 53(4) of PACE will be inserted on commencement of section 9(6) of the Crime and Security Act 2010 and applies the provisions of article 53B(1)(b) and (c) relating to insanity and disability findings by courts outside of Northern Ireland.

Paragraphs 4, 6 and 7 of schedule 3 are technical amendments that replace references to the previous retention framework with corresponding references to the new framework.

Paragraph 5 of schedule 3 amends article 89 of PACE to provide that an order under the new article 63D(5)(c), relating to prescribed circumstances, will be subject to the negative resolution procedure. However, in light of comments made by the Examiner of Statutory Rules, we will have to amend this to provide for the affirmative procedure.

Schedule 4(2) makes provision for repeals, consequential on or ancillary to the introduction of the new PACE retention framework. Previous provisions for the destruction of DNA and fingerprints were contained in article 64 of PACE. Part 2 of schedule 4 repeals that article and all subsequent amendments to it, including the retention regime that was enacted but never commenced by the previous UK Government.

Those are all the biometric provisions of the Bill. We will take any further questions.

The Chairperson: I do not have any more specific questions.

Mr McCartney: Does a person have the right to question when their DNA is being retained? Is there any provision for that? The Bill states that, when someone is arrested for an offence and not necessarily charged, their DNA can be retained. Have they any recourse to ask why it is being retained in those circumstances?

Mr Kerr: As with the existing framework, the new framework is permissive, if you like, or enabling. It allows but does not require material to be held, so the police have discretion within the framework. They may not go beyond the framework or step outside it, but it is up to them how they act within it. If anyone objects to their material being retained, they are, without any provision having to be incorporated into the Bill, entirely at liberty to apply to the Chief Constable to have their material destroyed. There is no problem with that.

Mr McCartney: So that provision is there?

Mr Kerr: No. It is not in the Bill. That is what I am saying. We do not have to legislate for that.

Mr McCartney: I see. That is current practice.

I am sure that we will come back to this, but a lot of the observations made during the consultation related to balance in the presumption of innocence. This seems to run contrary to the presumption of innocence in a lot of cases. How do you address that particular concern?

Mr Hughes: The important thing to remember is that the presence of a DNA profile on the database does not compromise someone with regard to the presumption of innocence. That database is not a criminal record, but it has a purpose and function in the detection and prevention of crime. It may well be that it is to the benefit of some people that their DNA is on the database to rule them out. So it can be a means of underpinning the presumption of innocence in certain circumstances. I think that the popular suspicion that having one's DNA profile on the database is, in itself, a shadow over the presumption of innocence needs to be addressed in that way, because that is not what the database is, nor what it is for.

Mr Kerr: The concerns around the presumption of innocence relate to the retention of material from people arrested but not convicted. However, we all need to bear in mind that it is on precisely that point that the European Court of Human Rights refers to the Scottish model and the limited retention that it permitted at the more serious end of the offending spectrum.

Mr McCartney: Yes, but I have made the point before about a database, pro rata, becoming too big. One of the consultation papers is titled, 'Keeping the Right People on the DNA database'. That gives a sense of there being right people and wrong people, and, when it comes to the presumption of innocence, that is certainly not the best choice of words.

Mr Hughes: One of my early points was that the writing of these clauses into the main body of the Bill, not even the schedule, was because one of the purposes behind the legislation is to apply this new retention framework to everything that is already there. It is not just from day one onwards that there is a new retention framework; it is being applied to everything that is already there. There is a bit of a clearing out in line with a retention framework that recognises the judgement in the case of S. and Marper versus the United Kingdom, which lies behind article 8.

Mr McCartney: As it now stands, there is provision for children as young as 10 years of age to be on a DNA profile database.

Mr Hughes: That is in connection to conviction.

Mr McCartney: Is it only on conviction?

Mr Hughes: Gary, keep me absolutely right.

Mr Dodds: The Bill destroys material on databases that relates to persons who have not been convicted. So, primarily, you will have a database populated by those who have a conviction. Effectively, once the new framework comes into place, all existing and future material belonging to anyone not convicted will not be held indefinitely on the database, which is the case under present law. That will no longer happen.

Mr McCartney: Thank you.

The Chairperson: It would be helpful for me to have a paper showing how our system compares with that of England, Wales and Scotland. You mentioned that the European Court decided that Scotland's was the model to follow, but it would worry me if we followed that model. It would be useful if I could see just how our system compares with other parts of the United Kingdom. Perhaps you would supply that. Thank you.