



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Criminal Justice Bill: DNA/Fingerprint
Retention Clauses — Children's Law Centre
Briefing

4 October 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 Alex Easton
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Patsy McGlone
Mr Jim Wells

Witnesses:

Mr John Patrick Clayton	Children's Law Centre
Ms Paddy Kelly	Children's Law Centre

The Chairperson: I welcome Paddy Kelly, the director, and John Patrick Clayton, an assistant policy officer, of the Children's Law Centre to the meeting. The session will be reported by Hansard and the transcript will be published on the Committee's web page in due course. I will hand over to you at this point, and you have eight minutes to present to the Committee.

Ms Paddy Kelly (Children's Law Centre): Thank you, Chair. I am Paddy Kelly, director of the Children's Law Centre, and this is my colleague John Patrick Clayton, who is one of our policy officers. On behalf of the Children's Law Centre, we thank the Chair, Deputy Chair and members of the Committee for inviting us to give evidence here today on the Criminal Justice Bill, particularly in relation to the retention of fingerprints and DNA profiles for children.

We have provided you with a short summary of our concerns, and we will speak to that before taking questions. For the benefit of members who may not be aware of the work of the Children's Law Centre, we are a charity based on the principles of the United Nations Convention on the Rights of the Child (UNCRC). We provide free legal advice and representation for children. We have a free phone legal advice line called CHALKY that is for children and their parents and carers. We also have a young person's advisory group. We provide training and research on children's rights, and we make submissions on policy, legislation and practice affecting children.

Within our policy and legal work, we focus on a wide range of children's issues, including looked-after children, children in conflict with the law, children with special educational needs, children with disabilities and children with mental health problems. Some of you will have already referred children and young people to the Children's Law Centre, and we are happy to take referrals to our legal advice service from MLAs about children who live in their constituencies.

Mr John Patrick Clayton (Children's Law Centre): As the Committee will no doubt be aware, the proposals in the Bill are being brought forward in an attempt to rectify the incompatibility of the current legislation, namely the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE), relating to the retention and destruction of fingerprints and DNA profiles with the European Convention on Human Rights.

The current law was found to be incompatible with the European Convention on Human Rights in the case of *S and Marper v the United Kingdom*. Here, the court found that there had been a violation of article 8 of the convention as the current powers were found to be blanket, indiscriminate and did not strike a fair balance between competing public and private interests. The court also found that the retention of a non-convicted person's data may be especially harmful in the case of minors given their special situation and the importance of their development and integration in society.

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 subsequent retention of that material. We argue that fingerprinting and taking DNA from a child is disproportionate, unjustifiable and in clear breach of children's rights standards. Committee members can see from our written evidence, from paragraph 5.5 onwards, that, for the purposes of clarity, we listed those clauses in the Bill that we feel are most relevant to children and young people. We also developed some hypothetical scenarios to outline how the provisions of the Bill may apply to children and young people in practice.

Schedule 3 to the Bill proposes to insert a new article 53B into PACE NI stating that any reference to a person convicted of an offence includes a reference to a person who has been given a caution. Cautions do not have the same status as convictions under other aspects of criminal law, as members can see from paragraphs 5.14 and 5.15 of our written evidence. The Children's Law Centre is very concerned that, as a result of this, various parts of the proposed legislation effectively mean that a child who receives two cautions for minor, recordable offences will have their fingerprints or DNA profile retained indefinitely. As the Committee is no doubt already aware, a recordable offence effectively means any offence that is punishable potentially by imprisonment.

One such hypothetical but potentially real scenario that could arise involving cautions under the Bill could be that of child A. Child A is arrested for theft; a minor, 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 previous cautions for theft, which involved shoplifting sweets when aged 10 and 12. Under the proposed article 63E, the child's fingerprints and DNA profile would be retained indefinitely, as a caution would be considered to be a conviction for the purposes of the Bill.

We believe that considering cautions in this way is an entirely disproportionate course. It runs contrary to the purported purpose of a caution, which is to divert children away from the criminal justice system. Although the Children's Law Centre does not believe that cautions adequately do this at present, for some of the reasons outlined at paragraph 5.15 of our written evidence, the situation will only be exacerbated if the use of cautions results in a child's fingerprints and DNA profile being retained indefinitely.

The Children's Law Centre believes that the proposals under articles 63D and 63E, relating to the retention of the fingerprints and DNA profiles of children who are not convicted of the offence for which the material has been taken as part of the investigation, and who are, therefore, innocent, significantly undermines the presumption of innocence and due process. The implication of the proposals is that children 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.

We agree with the argument put forward by the applicant in the *S and Marper* case that the retention of records casts suspicion on persons who have been acquitted, thus implying that they were not wholly innocent. We also agree with the application in that case that such retention can result in stigma that could be particularly detrimental to children.

Where fingerprints are taken, or a DNA profile derived, in connection with the investigation of a minor offence for which a child is subsequently convicted, proposed articles 63F and 63H appear to be the most relevant. Article 63H proposes to link the amount of time that a child or young person's fingerprints or DNA are retained to the length of their sentence, where the child is being convicted of a first minor offence. Article 63H also allows for the retention of fingerprints and DNA where children are

given non-custodial sentences in respect of a first minor offence. We do not believe that the retention of fingerprints taken or DNA profile derived in connection with the investigation of minor recordable offences, where the child or young person is subsequently convicted, is a proportionate response.

In our written evidence, we referred to recommendation R (92)(1) of the Council of Europe's Committee of Ministers, which was adopted without reservation by the United Kingdom and which was also referred to by the European Court of Human Rights in the S and Marper judgement. That 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 retention should take place only when 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.

Proposed articles 63F and 63H will apply to recordable offences that the legislation acknowledges to be minor offences rather than serious offences against the life, integrity or security of persons. We believe that to allow material potentially to be retained indefinitely in such circumstances would not accord with the concept of it being retained subject only to strict storage periods.

We will be happy to answer any questions that Committee members may have.

The Chairperson: Thank you. In what way do you see the retention of the DNA being detrimental? What you have said is all about the perception that they are not seen as innocent. How will a child's DNA being retained have actual repercussions for the child or a real detrimental impact beyond a perception of guilt?

Mr Clayton: You raise an interesting point about perception. We have thought of a hypothetical scenario involving a child or young person — I used the terms child A and child B a lot in the written evidence, so I will try to avoid doing that now — who was taken into care when they were 11 or 12, perhaps after a suspicion of sexual abuse in their family. They may have mental health problems and find themselves becoming involved in offending behaviour. They may start to receive cautions and, having received two cautions, then receive some help and support from within the children's home and begin to turn their life around.

Our fear is that if that child or young person is arrested a couple of years later — when their life is getting back on track — but is never charged, their fingerprints or DNA will be retained because of cautions in the past. The perception may not be as great to the outside world as it is for that person. In that person's eyes, they might feel like they are being stigmatised unfairly even though they have not been charged with an offence and still benefit from the presumption of innocence for that offence. They might feel like they have made significant efforts to get themselves back on track.

We think that that would have an effect on them at that time. It might affect their perception of themselves or how they are treated in the justice system. We believe that those are children and young people who will come into contact with the police and the justice system and whose fingerprints and DNA will be retained, probably indefinitely, under the clauses of this Bill.

The Chairperson: What about the argument that the Department has put forward that the retention of DNA can be a good thing because it can rule you out of having committed an offence? DNA can show immediately that it was not a particular individual.

Ms P Kelly: In our submission, we referred to a longitudinal study carried out on this in Edinburgh. To pick up my colleague's point, the study indicated very clearly that stigmatisation, which includes children and young people's contact with the criminal justice system, actually goes against their having positive experiences and can make them disengaged from the criminal justice system. The more you stigmatise a child in this way and the more contact they have with the criminal justice system, the more likely they are to re-offend. We believe that that would be counterproductive to what the youth justice review, for example, proposes in relation to children and young people in this jurisdiction.

Mr McCartney: Thank you very much for your presentation. You made the observation about the use of caution, and caution being seen as a conviction. Without prejudice to the wider argument, do you have any suggestions as to how this could be corrected in the Bill as drafted?

Mr Clayton: Cautions are intended to be a diversionary measure. That is their purported purpose. Our source, with respect to other aspects of the law that are not considered to be convictions, is the Public Prosecution Service code for prosecutors, which makes it very clear that cautions are not a

conviction. They are recorded on the criminal record of a child for 30 months and on that of an adult for five years. So, it seems clear to us that cautions do not have the same effect as convictions under other aspects of the law. There is a bit of a disconnect between what is being suggested in the Bill and what happens under other aspects of the law. That, in itself, is concerning for consistency purposes.

The other question that we had arising from the Bill, and on which, we respectfully submit, the Committee may want to engage further with the Department, is that with children in particular there is a range of diversionary measures other than cautions, such as an informed warning or diversionary youth conference. We were not clear whether those will fall within article 53B because they are intended to have the same effect. The intention is to divert children and young people away from the criminal justice system. For clarity and consistency, if that article were to come into practice, which we think it should not, this would be a good thing to explore.

Our organisation has difficulty with the existing diversionary methods. We feel that they divert children from one part of the criminal justice system to another rather than out of the system. We are concerned that the net will be cast very wide with respect to the people who will be caught by these provisions. Generally speaking, as we understand it, a caution is given where the offending is considered to be less serious.

Ms P Kelly: Cautions as they apply to children and young people should not be considered as a recordable offence in the legislation and should be excluded from it.

Mr McCartney: Even without prejudicing articles 63B or 63C, how would that be worded, at least in the first instance, to cover your concern around cautions being seen as a recordable offence? I am not saying that we will be able to do that today.

Ms P Kelly: There should be a qualifying provision in the legislation to say that cautions as they relate to children and young people under the age of 18 should not be treated as a recordable offence. That is very firmly our position and, indeed, our position in compliance with the recommendations of the youth justice review that cautions, along with other convictions as they relate to children and young people, should be wiped clean when they reach 18.

As John Patrick said, we do not believe that cautions are diversionary but are being used as a diversionary tool. If the approach being taken in this jurisdiction, and certainly by other strands in the Department of Justice (DOJ), is that cautions are a form of diversion, and if you are now pulling them into a system of retention of DNA, that goes totally against the whole concept of diversion and diverting children and young people from the criminal justice system. The way to do that would be to include explicitly in the legislation that cautions of children and young people under 18 should not be treated as a recordable offence. It is interesting that cautions remain, as it were, on the record of a child for 30 months yet under this legislation their DNA will be retained for five years. There is a total disconnect.

It also appears that when the legislation was being drafted, proper cognisance of its outworking as it relates to children and young people was not given further and comprehensive examination. Had that been the case, some of these issues would have been picked up already. That is our position.

Mr McCartney: On a point of clarification, these observations are being reported by Hansard. Will the Department respond or will the Committee ask it to respond?

The Chairperson: Yes, we will.

Mr Lynch: Thanks for the presentation. Paddy, you mentioned the Scottish model. Will you outline your views on the Scottish model with respect to a person not convicted and how that was referred to the European Court?

Mr Clayton: We can discuss the Scottish model, although I do not know whether we can give the Committee a completely up-to-date analysis of it. I understand, Chair, that you requested a paper from the Department last week on the various models in England, Wales and Scotland. I can draw attention to some relevant parts of the S and Marper judgement that discussed the Scottish model. We looked at the judgement and thought there were some interesting points in how the European Court commented on the Scottish model. I think one reason the Department offered for bringing

forward this legislation was that they were referred to the Scottish model by the European Court of Human Rights' judgement.

Two things struck us when we looked at it: first, the European Court of Human Rights noted that DNA profiles and samples are, generally speaking, destroyed in Scotland if the person is not convicted or is granted an absolute discharge. That is at paragraph 36 of the judgement. It also noted that the legislation allows for samples and profiles to be retained for three years, possibly rising to five years on application to the Scottish courts, if the person arrested is suspected of certain sexual or violent offences even if not convicted. However, later in the judgement, it notes that this power applied to adults. It could well be that that position has changed in Scotland, but that is how it was commented on at the time of the S and Marper judgement. That is at paragraph 109 of the S and Marper judgement. We thought that was an interesting observation to make. One point discussed in the S and Marper judgement about the system we have now and the system that existed at the time in England and Wales was that it retained everyone's fingerprints and DNA irrespective of age. Age was a consideration of the European Court of Human Rights, and one of the applicants of S and Marper was, of course, a child, so we think those are important issues to bear out.

To go back to the question the Chair asked earlier: that stigmatising effect on children and young people was also referred to in the judgement, so we think it is worth bearing in mind when considering, not just how this legislation would apply to everyone, but how it would apply to children and young people specifically.

Mr McGlone: Thank you very much; it is good to see you. To tease out that last point about S and Marper, did that judgement give any particular direction in relation to young people? I know that your conclusions from reading that S and Marper judgement are that the retention of a non-convicted person's data could be especially harmful to young people. Can you expand on how you think it can be harmful to young people? I have another question after that. Perhaps you could read from the judgement and expand on it.

Mr Clayton: It is a rather lengthy judgement, so I may not have the time to read it all —

Mr McGlone: Please do not read all of it.

Mr Clayton: I know there are other witnesses lined up, so I do not want to maintain the legal argument for too long. What is important about S and Marper is the fact that the European Court of Human Rights talked about the special situation of children. It referred to the fact that they have to be integrated into society. It mentioned their age and maturity, and so on, and, as I said, one of the reasons why it thought the current powers were blanket and discriminate was because they applied to everyone irrespective of age. It referred to the United Nations Convention on the Rights of the Child, which, as Paddy, said, is the document on which we are founded. It recognises the right of children who have either been alleged to have committed criminal offences or have been recognised as having committed criminal offences to be treated with a degree of dignity and to be re-integrated into society. We are keen to see that happen. Our fear is that these proposals on children and young people are very broad, and that an awful lot of children and young people could be caught within them.

Ms P Kelly: The definition of "recordable offences" is so wide that it will catch a number of children unintentionally. I know that the Committee has a considerable focus on the youth justice review and was very committed to early intervention through diverting children and young people away from the criminal justice system. It brought a lot of focus on that issue. We are very concerned about the stigmatisation effect on the children and young people who are caught in this. The potential for quite a few children is that if their DNA profiles and fingerprints were to be retained indefinitely, it could pull them back into the criminal justice system. The scenario is that one part of the Department of Justice is working very hard to ensure early intervention and diversion away from the criminal justice system, and then this legislation will pull children back into the criminal justice system by retaining their DNA and potentially, in their perception, stigmatising them and counteracting their good efforts to engage with society, get qualifications, and so on.

We think that there is a real potential for that happening because there is a total disconnection, to date, between one part of the Department of Justice and another in relation to that. To go back to the point that we made earlier, it appears to us that, had the Department of Justice flushed some of the scenarios that we presented in our written evidence through its proposals, it may have been aware of some of that disconnect, and some of the possibly unforeseen implications of the Bill.

Mr McGlone: Are you saying that the Department may need to refocus and look at the content of that European Court of Human Rights judgement on S and Marper to see what weight should be given to it in light of that judgement?

Mr Clayton: I am sure that the Department has studied S and Marper. There may be some benefit in its looking at how the Scottish model was commented on in S and Marper. Our concern is that S and Marper does discuss the age of people. The judgment comments on the Scottish model and it refers to it being applied, at that time, to adults. We think that this is something that may be worth the Department bearing in mind. It may well have already considered this, but that is not borne out in the proposals put forward.

Ms P Kelly: In considering what the provisions may look like in the legislation, we thought that there may be scope to apply articles 63D and 63E to adults only. Then, looking at a particular provision, if it was in the mind of the legislature to try to retain any DNA and fingerprints of children and young people, which we oppose, then a specific clause should relate to children and young people that takes cognisance of some of the issues — hopefully, not cautions — of children who committed minor offences and are trying to their life back on track. So, a child-specific clause may be needed that takes cognisance of that and of the excellent work going on in other parts of DOJ around diversion.

Mr McGlone: You read my mind. You said that to retain fingerprints and DNA following the conviction of children and young people for minor offences was not proportionate. Will you expand on why you think that?

Mr Clayton: I will follow up on what Paddy said about the need for a specific provision. I am sure that the Committee will be aware that article 63H refers to children convicted of a "first minor offence". As we said in our opening remarks, it links the retention period to the sentence that they receive.

That leads on to our concerns about cautions, the issue of which, we respectively submit, is not entirely clear in the Bill. Article 63H talks about children who receive a custodial sentence and it adds a five-year retention period to the length of the sentence. So, a child with a one-year custodial sentence gets five years on top of that; therefore, a six-year retention. It also talks about children who receive sentences other than custodial, for example court-ordered youth conferences, and so on; about their fingerprints and DNA being retained for five years from the point at which they were taken. On reading that, we were not entirely clear whether a caution would fall into that. Our concern was that such a child may potentially qualify, because the Bill is not clear. However, is there the potential for the fingerprints and DNA to be retained for five years for a child who receives their first caution? That may something about cautions that is worth exploring further.

To go back to your question about why it is not proportionate. We have concerns that the recommendation of the Committee of Ministers in this regard talks about people convicted of offences committed:

"against the life, integrity and security of a person"

and about strict storage periods defined by law. Our concern is that recordable offences are broad — they are any offences that are punishable by imprisonment. They are not necessarily serious offences against the life, integrity and security of a person, nor, necessarily, violent or sexual offences. The Bill provides the scope for fingerprints and DNA to be retained indefinitely. That also, in our minds, would seem to engage that second part of the recommendation, which is to subject the retention to strict storage periods.

Our concern is that if you are a child aged 14, and you find that your fingerprints and DNA will be retained for the rest of your life, that will have more of an effect on you, potentially, than for somebody who is 30, 40 or 50. It is, naturally, going to be a longer period for that young person.

The Chairperson: The next contributions need to be very brief, because our time is up, and Mr Maginness and Ms McCorley have still to ask questions. Members should bear in mind that there are another two presentations to come on identical issues, and I suspect that those presentations will also be identical. We do not need to get all the issues out of our system with the first group of witnesses.

Mr A Maginness: I do not know whether I can obey your instructions. *[Laughter.]* I take the view that, if I were an innocent person who was fingerprinted and DNA'd, or whatever the verb is, I would be very resentful of that. If a child were involved, I would be furious about it, especially if it were my child.

However, you get the situation where the child is not innocent, or has been convicted of something. You say that there should be no retention in the case of a minor offence. Is there a contrary argument to that? Sometimes, you are dealing with vulnerable children who may be associating with other people who are involved in criminal activity or, indeed, sexual criminal activity against them. If their DNA or fingerprints were recorded at a crime scene, would that not be something of value in the protection of children?

Ms P Kelly: I am sorry; I am not quite sure —

Mr A Maginness: Take a crime scene situation, where, say, a sex offender was, in fact, engaging with children, attracting children to their home or something like that. If DNA or fingerprints from the children were recorded at the scene, would that not assist the police in investigating the case, thereby protecting those youngsters who may be vulnerable?

Mr Clayton: I can, perhaps, see the point that you are getting at, Mr Maginness, which applies if, for example, a child or a young person is associating with, shall we say, a bad crowd. I take your point, but I think that there are probably more proportionate and more useful ways to do that across the broad spectrum of cases involving vulnerable children and young people.

I do not know whether fingerprints and DNA are necessarily the answer. You would end up fingerprinting and DNA-ing a lot of children without necessarily having a connection to how that would then protect them. I can see your point, but I think that that would require an awful lot of thought and a certain amount of safeguards, given that we are talking about children who would also have a right to privacy in all this, which is what the S and Marper judgement is founded on.

Mr A Maginness: I understand the essence of the judgement. I am slightly concerned that there might be a situation where, in fact, you could be protecting such children. I understand the argument about the stigmatisation and marginalisation of children in such situations, but you might just want to take that other aspect into consideration.

My final point is about recommendation R(92)1 that the Council of Ministers made. It is a very strong statement that retentions should only take place:

“where the individual concerned has been convicted of serious offences against the life, integrity or security of persons. In such cases strict storage periods should be defined by domestic law”.

That is very strict, but this certainly does not meet any of that, does it?

Ms P Kelly: That would be our interpretation of it, clearly. Again, our position is very clear and in compliance with the UNCRC. It is our belief that the retention of children's fingerprints and DNA profiles should never happen. However, if that were to be legislated for, we would suggest that those are the only circumstances in which children's DNA profiles or fingerprints should be retained, although we do not think that that is compliant with the UNCRC.

We would also note that there was no derogation of the UK Government to that recommendation. Our suggestion is, basically, that there should be one specific clause — none of the other clauses should apply to children and young people — that is very narrowly constructed and in compliance with the Council of Europe's Council of Ministers' recommendation.

Mr A Maginness: Do you think that if those recommendations were accepted, the Bill would be compliant with the European decision?

Mr Clayton: That would be a matter for any future challenge. It would be a matter for the courts to decide.

Ms P Kelly: It is our belief that it would move the Bill closer to compliance with the S and Marper judgement and to the UNCRC, which, of course, the UK Government have also ratified.

I also reiterate very strongly the view that cautions relating to children and young people should clearly be removed from this legislation.

Mr A Maginness: Should that happen so that there is no retention for children who are cautioned?

Ms P Kelly: Any other diversionary dispensation should not be construed as a recordable offence for the purpose of this legislation.

Ms McCorley: Go raibh maith agat, a Chathaoirligh, agus go raibh maith agaibh fosta. Article 63D refers to "prescribed circumstances", but what that means is not outlined. Can you throw any more light on that?

Mr Clayton: As I understand it, at the Committee's meeting last week, the departmental officials said that those circumstances will be in the Bill. At the moment, the Bill refers to them being made by order by the Department. In our written evidence, we stated that further clarification of what exactly that meant was needed. The Department said that it will take steps to clarify that in the Bill. As I understand it, the Department intends to refer to "vulnerable victims" or — I had a log of it somewhere in our written evidence.

Ms P Kelly: I think that, in his evidence to the Assembly, the Minister referred to what the understanding of that circumstance would be.

Mr Clayton: At the start of July, the Minister talked about a situation in which the victim is a juvenile or vulnerable adult or is associated with a suspected offender, who is, perhaps, a family member. I think that, last week, the Department said that it was going to take some guidance from the Family Homes and Domestic Violence (Northern Ireland) Order 1998 about what an associated person would be. I also understand that it referred to an additional ground outside those prescribed circumstances where there would be a certain amount of discretion on the part of the Chief Constable potentially to retain it if he thought that it were for the benefit of public protection. I am sure that that is something that the Committee will look at in greater detail as time goes on. As I understand it, those will now be in the Bill. The Department has been advised that it would be beneficial for it to do that.

Ms P Kelly: Where article 63D is concerned, we are very clear that the DNA or fingerprints of a child who is, effectively, innocent — they have been arrested or charged but not convicted of any offence — should not be retained under any circumstances.

Mr Easton: I am new to the Committee, so I am trying to get my head round this bit. You made a couple of wee statements about children being stigmatised and being more likely to reoffend if there were two cautions. You also said that if a child were trying to get back on track and they were in this situation, it would make it more awkward for them to get back on track. What proof do you have for that?

Ms P Kelly: We referred in our written evidence to the Committee to longitudinal studies that have been done in Edinburgh that very clearly demonstrated that, where children have contacted the criminal justice system in any form, they are more likely to feel stigmatised, less likely to be diverted from the criminal justice system and more likely to retain contact with the police or the criminal justice system. A lot of work has been done on the group of children and young people who have prolonged contact with the criminal justice system. All the evidence says that diversion from the criminal justice system at the earliest possible stage for children and young people is more likely to lead to their long-time diversion from that system.

The Chairperson: I was going to conclude on this point. How does the retention of DNA bring those children and young people back into the criminal justice system? Surely that happens because they commit an offence.

Ms P Kelly: Sorry —

The Chairperson: You said that if we retain the child's DNA, that will bring them back into the criminal justice system. I think that that was what you said. How does the retention of DNA do that?

Ms P Kelly: My colleague gave a very good example of a child who has been taken into care and looked after — maybe they have been abused — and has a caution for breaking a window in a children's home. Maybe there is a second caution for a similar minor offence when they are a child. Perhaps they begin to suffer mental health problems and begin to get excluded from school. That is the profile, as the Committee knows, of children and young people who are in the criminal justice

system. They could get a second caution as a child, and then, at maybe 17, they are perhaps volunteering with Voice of Young People in Care and becoming peer advocates for other looked-after children. They begin to get their life back in place and are then arrested for a serious offence but not charged and certainly not convicted. When we were looking at the Edinburgh evidence and thinking of scenarios, we saw that that was consistent with what is coming through. In their self-perception, that could be very damaging. They tried to get their life together again, and now they are being drawn back into the system with the potential for their DNA profile or fingerprints to be retained for life. Where self-esteem is concerned, especially where the profile is that of a young person, we think that there is a real risk that the work that that child did to rebuild his or her life will be impacted by unnecessary retention of their DNA. That applies especially when they have been arrested but not convicted. So, those are the types of scenario that could happen.

Mr Clayton: Although that person will not be charged with the offence, their fingerprints and DNA will be retained, suggesting that it is thought that they did it, even though they will not be charged or convicted.

To touch on one other brief point, Chair, article 63D also —

The Chairperson: If they are cautioned, they did it.

Mr Clayton: This is the thing. There is an argument about the presumption of innocence, in the sense that, yes, they were cautioned in the past. However, according to our reading of it, this legislation seems to say that if you were cautioned in the past and you are brought back and arrested for something completely different, that past caution will effectively be used as a justification.

The Chairperson: Yes, but they will still have that caution. I am trying to get my head around this. They will still have that caution, and if they get rearrested later in life, that caution will still be there.

Ms P Kelly: The cautions for children and young people are spent after 30 months to begin with. We have issues with cautions being a real diversion, but the use of diversionary cautions is the path that the Department of Justice has taken. Cautions are diverting children from the criminal justice system. I know that the Committee supports that diversion and early intervention, etc, because it works. We are concerned that that retention is undermining the work on diversion and is pulling children back into the criminal justice system, certainly with the retention of DNA profiles and fingerprints.

The Chairperson: Is it not solely, though, that that retention is completely based on an individual's interpretation of what it means to them? You talked about their self-esteem and how their DNA being retained would make them feel.

Ms P Kelly: The Council of Ministers at the Council of Europe has been clear that if you are retaining beyond strictly limited circumstances, that is not compliant with human rights standards.

The Chairperson: I know, but that is why we are doing this, obviously.

Ms P Kelly: Yes.

The Chairperson: At least it improves it for children.

Mr Clayton: To touch on something that Mr Maginness said and on another part of article 63D, it allows, even where there are no previous convictions, in circumstances where someone is charged with a qualifying offence. From our understanding of the Bill's explanatory and financial memorandum, I think that article 63D(4) states that fingerprints or DNA will be retained, not indefinitely but possibly up to five years. I think that Mr Maginness said that a person would feel very aggrieved by that. That could be someone who has had no previous convictions or interaction with the criminal justice system and who may find themselves in the scenario of being acquitted but not convicted of an offence, yet their fingerprints and DNA will be retained. That provision is also in article 63D.

The Chairperson: Lastly, and this will shorten the next presentation, I am quite sure — the Children's Law Centre may feel that it has been picked on. However — Mr Wells.

Mr Wells: I am at a total loss to understand the logic of your argument. I was involved in a car crash a couple of years ago, and I had my fingerprints, photograph and DNA taken. I forgot all about it until the conversation came up about this particular European directive. It never occurred to me. I have never requested for those records to be destroyed on the basis that the only thing that I have to fear is that, if I commit a serious offence, those records will be used against me, and rightly so. Why would I have anything to worry about?

Why would a child or young person even think about it? Why would they feel stigmatised? I cannot understand how it could get into their heads that they should be carrying on their shoulders the awful burden that someone took a swab from the inside of their mouth and kept a record of it. I just cannot see the thought process that would allow their going round the streets of Belfast or wherever with that awful stone of guilt on their shoulders.

Ms P Kelly: If you look at the S and Marper case, you will see that one of the applicants to the court was a child. So, obviously, it had an implication for them in that they were prepared to pursue it. I think that that is a very good example.

Mr Wells: I have no doubt that someone pursued it on their behalf — some liberal who wished to try to prevent the police from exercising their duty. *[Laughter.]*

Mr McCartney: Presumption of innocence.

Mr Wells: I am absolutely certain that the young person could not do it. They probably did not even know what was going on.

Mr Clayton: I do not know about that. I presume that the lawyers representing that person took their instructions. We do not know the ins and outs of the case, but, as Paddy said, it was a young person in the S and Marper case who applied to the Chief Constable of Sheffield, or whatever police district that is, to have the records destroyed. They were not destroyed, and the case went all the way to the European Court of Human Rights.

Mr Wells: Have you come across a young person who has been traumatised because a DNA record has been kept of them? Does such a person exist?

Mr Clayton: I have been working in the Children's Law Centre for three months, so I have not come across too many children or young people in that context.

Mr Wells: In all my dealings with youth offenders, I have never met anybody who said that they cannot sleep at night because their DNA record is being kept as a result of some previous caution.

Mr Clayton: I do not know whether that is necessarily a good reason to do it. We observe that there could be a stigmatising effect. As Paddy said, research has shown that children and young people's becoming more associated with the criminal justice system generally leads to more, rather than less, offending.

Mr Wells: I do not understand how the mechanical taking of a DNA sample adds to that. Surely the caution, which is there whether they like it or not, is what causes any degree of stigmatisation. The actual —

Ms P Kelly: Children and young people are moving on, for example, in the scenarios that we gave you. They may have had a number of cautions for a whole range of reasons. If you looked at the profile of children who come into contact with the criminal justice system, you would see that the research shows that the single biggest determinative is exclusion from school. If a child is either not able to go to school or is excluded from school, they are more likely to come into contact with the criminal justice system. They are more likely to get cautions. They may have a number of cautions when they are 10 or 12. They may be moving on and developing, get to the age of 17 and have their life back on track. They may then be arrested but not charged for a serious offence. They are not found guilty. They are totally innocent of that offence, but their DNA profile is then retained.

Mr Wells: Why would the DNA be the straw that breaks the camel's back? Are you trying to tell me that, on top of all that track record, the retention of the DNA is what causes the young person to be stigmatised?

Ms P Kelly: It goes back to the idea that it undermines the presumption of innocence.

Mr Wells: DNA is very accurate. If I commit a crime and my DNA is tested, the chances are that I did it.

Mr McCartney: They said that about fingerprints.

Mr Wells: Fingerprints are very accurate as well.

Mr McCartney: They are not nowadays.

Mr Wells: I am saying that the only person who has anything to fear is the person who subsequently commits a crime and whose DNA is used to prove it.

Mr Clayton: It is interesting that you refer to that. I believe that the Governments argued in the S and Marper case that the retention of material leads to subsequent convictions. However, the court and the applicants in the case raised the question of whether that is the definitive factor that leads to future convictions.

Mr Wells: What is the problem with it if it leads to future convictions?

Mr Clayton: I do not necessarily have a problem with someone being convicted if they have committed an offence. You seem to be saying that fingerprints and DNA are accurate and that they will always lead to convictions in the future. As other members said, that is not always necessarily the case. I do not claim to be an expert in that material, but, presumably, you have to consider whether advances in science, and so on, would have an impact on how we use that sort of evidence in the future. So, I do not think that it is necessarily an exact science or that, just because fingerprints and DNA are detected, it necessarily means that someone committed the offence.

Mr Wells: They have been incredibly useful in recent years in putting away some of the most horrible gangsters, criminals and child abusers in the country — people who would be walking the streets today if it were not for the modern science of DNA. You are telling us that we should be throwing away a bank of information that may well be useful in the future to identify criminals.

Ms P Kelly: I will go back to what the Chair said. Basically, this is giving effect to a judgement that clearly stated that the retention of that DNA is a breach of article 8 and that it undermines the presumption of innocence.

Mr Wells: That does not mean that we agree with that judgement. We might be forced to do something about it, but it does not mean that we actually believe the basis on which it was made.

The Chairperson: OK. Thank you very much. I appreciate your earlier comments about your organisation's work. I have used it in my constituency and found you very effective in representing some of my constituents, so thank you very much.

Ms P Kelly: Thank you very much. I hope that you continue to use us.