Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Stewart Dickson
Mr Sammy Douglas
Mr Paul Frew
Mr Seán Lynch
Mr Patsy McGlone
Mr Edwin Poots

Witnesses:
Mr Les Allamby
Mr Colin Caughey
Dr David Russell

The Chairperson (Mr Givan): I formally welcome from the Northern Ireland Human Rights Commission (NIHRC) Les Allamby, chief commissioner, David Russell and Colin Caughey. As with the other evidence sessions, this will be recorded by Hansard and published in due course. Les, I invite you to outline the areas in your written submission that we are dealing with today, and we will then go through it section by section.

Mr Les Allamby (Northern Ireland Human Rights Commission): Thank you. I will ask my colleagues briefly to introduce themselves, and we will then go straight into the key areas of our evidence to the Committee.

Mr Colin Caughey (Northern Ireland Human Rights Commission): I am the policy worker at the Human Rights Commission.

Dr David Russell (Northern Ireland Human Rights Commission): I am the deputy director.

Mr Allamby: I should start by saying that our evidence is part of our statutory duty to provide advice to the Assembly on legislative measures and their implications for human rights. I will concentrate on the key areas in our submission. I will briefly introduce them, but we are happy to take any and all questions on those areas. I welcome the acknowledgement that we will be back with you in a fortnight's time to deal with particular issues.

I will kick off, then, with prosecutorial fines. We have no issue in principle with the idea. I heard the evidence earlier about a restorative approach, and that seems eminently sensible. The one key issue that we want to focus on is a recognition of this scenario: I do not wish to tempt fate, but, if, for...
example, I suddenly behaved very badly and found myself facing a prosecutorial fine, I probably would
find it easier to find the money than my counterpart next door who was on means-tested social
security benefits. I can see some difficulties with the idea of creating levels of fine depending on
financial need, but it strikes me that you could, as a Committee, suggest an amendment to section 18,
for example, which looks at the 28 days to pay, and add words to the effect of "or otherwise a period
as deemed reasonable in the circumstances". It clearly makes no sense, financially or otherwise, to
send someone to prison for fine defaulting or prosecutorial fine defaulting. It seems to me to be
disproportionate. For those who rely on a social security means-tested benefit, there is a provision to
make a deduction based on 5% of that benefit, which is currently £3·65 a week. I do not suggest that
that is necessarily the benchmark, but it gives you an idea of the difference between paying £200 for
criminal damage within 28 days following a 21-day notice period and how the social security system
deals with this. The former might put somebody off the prosecutorial fine route and send them into the
arms of a loan shark or the payday lenders that just get somebody out of one problem and into
another. Therefore, we think that it makes sense to look at that kind of amendment.

We welcome the victim charter and witness charter. We think that the refinements to the earlier
version mean that the victim charter now meets the UN's basic principles of justice for victims of crime
and the abuse of power. It is a step forward. We also think that the provisions to "have regard" to
witnes statements are welcome.

We have a few observations on the criminal records clause, which is an issue that I know you have
scrutinised considerably. The first is that it is clearly an improvement on where we have been. By that
I mean that there are some administrative improvements. We think that portability, if handled right,
makes sense. It is very important that there is now a right of redress to an independent monitor. The
filtering mechanism that has been introduced makes sense, as does a more effective definition of the
relevance of information and certificate. Those are all welcome.

This has been the subject of a lot of litigation in the UK courts and beyond. There is Northern Ireland
case law from the European Court of Human Rights in MM v UK, which we hope has now been
remedied here, in that there was no effective remedy if you were to argue against how your caution
was treated, as in that case. So, judicial review, for example, was not considered an effective remedy
in those circumstances. At the time, the Information Commissioner gave guidance on how to deal with
the case law as it stood then. It seems to me that some of those areas have now been looked at and
that this is a much better set of proposals.

We suggest that the Committee might want to focus some of its attention on the fact that there is a
code of conduct to come on how you might manage these issues. In the past, frankly, very limited
discretion has been given and the judicial decisions, in the early stages, often seemed to be that up.
So, I think that the code of conduct is quite important, and it strikes us that this is one of the areas that
might be amenable to the idea of a targeted consultation so that some key organisations — the kind of
people whom you asked to give evidence today, for example — could have an opportunity to look at
and comment on that before it comes into place. That might be one way of, hopefully, bolstering the
safeguards around the disclosure of criminal records. That is our key comment on that area.

On live links, we think that the important issue is that the accused is properly included, in any event, in
his or her trial and understands what is going on. That is a fundamental principle of justice and good
practice. We do not say that live links cannot achieve that or will make it impossible, but, in some
circumstances, they might make it more difficult. We understand all the administrative and financial
advantages and the notion of weekends, bank holidays or in certain prescribed circumstances, but we
think that you need to look at that very carefully if it is to be introduced. The legislation says that it must
not be contrary to the interests of justice. That is a pretty broad test. We think that it might be better
to look at some test that is bolstered to say that, for example, it must not undermine the effective
participation of the accused in a hearing. That would move the focus a little more to the idea that we
emphasise the importance of the person, who has been accused of something and who may well be
facing a live link, knowing exactly what is going on. We note the technological safeguards and
welcome those, but, as I suspect everyone round this table knows, you can have everything from
technological problems that are so severe that you absolutely know that there is no way that you can
carry on — it is clear that those kind of safeguards are in there — to the lower-level problems of not
quite hearing what is going on or the picture coming and going that are perhaps not to the severe end
of the scale but still impair the person's involvement in the proceedings. We want to see and be sure
that those kind of lower-level gremlins are also provided for in safeguards. For us, that is important.

The commission does not have any difficulty with violent offences prevention orders as a concept.
Interestingly, our issue is that we still fail to understand why the equivalent provision to introduce
domestic violence protection orders has not been included in the Bill. They were recommended by Criminal Justice Inspection in 2010. There have been pilots in England and Wales. The evaluation of the pilots was broadly positive in that the practitioners and victims and survivors viewed them positively as a way of providing some additional safeguards against domestic violence. They were introduced in England and Wales in March 2014. One of the interesting things in the evaluation was that they reduced further victimisation when they were used in chronic cases. Interestingly, the perpetrators seemed to respond reasonably well to them. I cannot for the life of me see why we should not introduce that in Northern Ireland. Given the prevalence of domestic violence, it seems to me that it would be sensible, wise and prudent. We have an evaluation, and it is difficult to see what circumstances in Northern Ireland would make a major difference to the evaluation outcomes in England and Wales. Therefore, while we have no difficulty with what is in the Bill, we think that it should go further. It is about time that DOJ dealt with that. It would not be too difficult to have done it in the Bill.

I am going at breakneck speed, but I am conscious of your time. Again, as a concept, we can see the administrative and financial advantages of early guilty pleas and recognise that it must be weighed against any concerns about an individual making an ill-informed or ill-considered decision. There is nothing wrong in principle with the idea that the accused must be advised at the earliest possible opportunity, but we think that, if that happens, the defence solicitor who has to do that should properly know what the case is against the individual so that any decision that is made by the defendant — the accused — is a properly informed one.

Our one comment on the general duty to progress criminal proceedings, which is in the clause after that, is that it is long overdue. Criminal Justice Inspection set out in 2010 a recommendation that there should be statutory time limits for dealing with issues. While we welcome the idea of progressing criminal proceedings more quickly — there are considerable and serious delays in criminal proceedings — we think that the recommendations starting with some statutory time limits in the youth court and then perhaps expanding from there is a good idea, and I am happy to answer questions on that. I should say that my observation is that — this goes beyond justice issues — when you try to ask Departments to impose time limits on claimants, tenants and others, they are more than willing to do so but, when it comes to doing the same thing on their own services and provision, they are much more reluctant to do so. It seems to me that it would impose a discipline and, as long as the time limits are reasonable — there are some ramifications — I cannot see any reason why that concept could not be adopted, and this Bill might be the place to do it.

I now come to the amendment to the Coroners Act. I have had the opportunity to read the evidence of the health and social care board and the Attorney General’s submissions. On balance, I think that the commission would support the amendment suggested by the Attorney General. I think that it strengthens article 2 safeguards, which clearly cover deaths caused by alleged medical errors. It seems to me that, on balance, it would be immensely more sensible for the Attorney General to make an informed decision on whether to refer an inquest. The idea that the Attorney General refers an inquest and then more evidence comes to light and then the Attorney General says, “If I had had all that before me, I would not have referred it in the first place” does not seem the most sensible way to proceed in terms of the best use of administrative, financial and other resources. So, on balance, we think that it is better that the Attorney General has the information that he needs and then can make, hopefully, a proper and an informed decision. The coroner can then proceed from there.

Finally, I have one other small plea on something that, again, is not in the Bill. That is an amendment to the Criminal Justice (Children) (Northern Ireland) Order 1998 to remove the provision that allows children to be placed in Hydebank with adult prisoners. My understanding is that it does not happen at the moment, but the provision is still there to do it. I think that it is time that that provision should be removed. There is an important principle here that under no circumstances should children be placed in prison with adults.

On that basis, I shall draw breath, and I and colleagues are happy to take questions.

The Chairperson (Mr Givan): Thank you very much, Les. The first section that we will deal with is prosecutorial fines. Does any member wish to ask anything on that?

Mr McCartney: I think that your view is that clause 45 should be amended and that the prosecutor should have regard to the circumstances of the offender. I take it that that refers to the financial circumstances.
Mr Allamby: Yes. I might ask my colleagues to come in on this. I think that there are two parts to this. There is that change, but it struck me that, if you have only 28 days to pay this, you need to put something in there about the level of time to pay. What we are saying is that, if you decide to choose to go down the road of prosecutorial fines, the impact that it has on somebody who has a very reasonable income is relatively limited; the impact that it has on somebody who has not is much more substantial. If you have the flexibility to allow the person to pay that back over a longer period, doing that might be much more attractive to the person. There are probably two sets of amendments there.

Mr McCartney: If the prosecutor makes a decision on that and they are charged in the open court system, they might feel that they are being disadvantaged simply because someone has made a judgement that they have not got the means to pay. How do we protect ourselves against that?

Mr Allamby: This is a voluntary provision, so I have to say that I had not thought of it those terms. That is why the amendment to article 18 might be useful too. I had seen it more in terms of being able to say to somebody that there is an option here and not to not offer it because they are on benefit. It is to say that we can be flexible here. Not that they would have an interminable period to pay, but it is a recognition that we can offer something instead of saying to someone that this is their option and they have only 28 days to pay when they have no savings and are on benefit. How they are going to find that money? Unless they have family or some other support, they will struggle to pay it. It seems that, on balance, that is a better way of dealing with it.

Mr McCartney: It would allow the person the choice. We should not take that choice away.

Mr Allamby: This is not attempting to say that, hypothetically, only the middle classes should be offered that provision. We are not coming at it from that standpoint.

The Chairperson (Mr Givan): Do members have any questions on victims and witnesses? Are there any questions on the criminal records aspect?

Mr McCartney: This is in relation to your recommendation in bold type in paragraph 17. It is to do with the independent monitor and how an individual will apply. The paragraph states:

"The Commission advises the Committee to ask the Department to provide details on how an individual will apply to the Independent Monitor."

What do you think is the best way for a person to apply for independent monitoring?

Mr Allamby: There are two or three things that strike me immediately about making that meaningful. First, it must be very clear that you have the option. It must be very widely publicised, and it must be clear to the individual so that he or she is aware of the provision available. Secondly, you would need to see what powers you are giving the independent monitor and the terms of reference that he or she has. There is devil in the detail in terms of how an independent monitor is potentially a really important safeguard. How effective a safeguard it is depends on exactly what powers the independent monitor has, how he or she is allowed to exercise them, the degree of discretion and the resources to deal with the cases properly. I do not expect to see thousands of them, but it is those kinds of issues.

Mr Caughey: To echo the chief commissioner's initial comments, the person has to apply in writing to the independent monitor. If the person has a disability, for instance, they might need some assistance with writing. It is about making sure that there is some advice and assistance available to persons who wish to make an application.

The Chairperson (Mr Givan): Are there any questions on the live links issue?

Mr McCartney: One of your sentences states:

"there is no obligation to ensure the individual is able to effectively participate in the proceedings."

I think that you were here when the Children's Law Centre talked about informed consent in all aspects of live links. What is your view on that?
Mr Allamby: I was not here when the evidence was given earlier, but my immediate reaction is that it makes immense sense. The question then becomes about how you would make that genuinely informed consent and what you would do to do that. It seems to me that that would make a great deal of sense. One of our concerns is about it being a weekend or a bank holiday. How easy is it to have all the resources to get you to court to do a face-to-face hearing? So live links are looked at. How easy will it be for the person to get to see a solicitor at weekends or bank holidays? It is not impossible, but it is much more difficult. If a live link in some of those circumstances means that you have not had access to proper legal advice and you have barely met your lawyer, it strikes me in very quick terms that it is better to have a face-to-face engagement, for example, with your legal representative at the start of proceedings. I do not quite know how it works in a live link. It strikes me that informed consent is really important. The other kinds of safeguards that go with that are essential as well. While we are not against live links as a concept, we think that you have to make sure that all the safeguards are there.

I look to my colleagues for comments on that.

Dr Russell: Obviously, it is the Children's Law Centre's advice, but I guess that it probably comes from article 12 of the UN Convention on the Rights of the Child. The participation element of the treaty is quite clear about the evolving capacity of the child being central to their participation. The concept of informed consent flows directly from that. Anything that did not take due cognisance of the informed consent of the child, according to his or her evolving capacity, would risk being in violation of the treaty.

Mr McCartney: Going by the Öcalan v Turkey judgement in the European Court, which states:

“To ensure that arrested persons are physically brought before a judicial authority promptly.”

are you saying that the first remand should be held in open court, rather than through live links at the weekend?

Mr Allamby: I am going to extemporise here. I do not think that our position is that that would be an absolute, but I would like to see a safeguard stating that you should have regard to the purpose of the first hearing, the seriousness of the charge and the implications of the particular offence, when deciding whether to use a live link or not. There might be some circumstances where, rather than the broad-brush approach, even within the prescription in the legislation, you might look further at whether it really is appropriate. That is why we suggest that the idea of ensuring proper participation and involvement of the individual in the proceedings might be a further safeguard.

Mr McCartney: We were given an explanation about not wanting people to be left in police cells over the weekend and the availability of judges at the weekend. You can see the common sense of a judge in a single place who does two or three remands in different places on a single day. Is there room for someone appearing on their first remand to say that they have not seen a legal representative, and, therefore, maybe the remand should not take place by live link?

Mr Allamby: It is one of the things that you might want to raise with the Department. I am not saying that it should be an absolute, but it ought to be one of things that are taken into account.

Mr Lynch: The Children’s Law Centre said that it was concerned about that, but it also said that independent research should be carried out before it is introduced. Do you agree with that?

Mr Allamby: I am not sure whether it should be researched before it is carried out. What I think is quite important — it is not confined to this issue but also applies to early guilty pleas, for example — is that there ought to be a way in which we can monitor how it rolls out in practice. This issue and early guilty pleas are two areas where, I think, it would be very useful to have a look at the overall cost-benefit advantages, because, while I can see the benefits, from the Department's position, in terms of economics and administration etc., you want to make sure that it is proportionate to its impact and that the safeguards are there to make sure that it is balanced and sensible. I would be more inclined to say that we should probably look at some of the key areas, and monitor and evaluate those by research, rather than saying that it should not happen until that research has happened.
Dr Russell: I am not commenting on the Children’s Law Centre. Obviously, the more evidence you have about how the thing works, the better. The central point of principle in the commission’s advice is that, without legal representation and advice having been provided to somebody, that remand hearing really should not take place through a live link. It is not the principle of the live link in itself, because, obviously, that would move to fulfil the article 5 duty that came out of the Öcalan case. It is the article 6 provision with regard to a fair trial and legal representation. The two things are balanced, and one should not be at the expense of the other.

The Chairperson (Mr Givan): I noted that you indicated that you were content with violent offences prevention orders being brought in. The Children’s Law Centre has indicated that they should not be applicable to under-18s. Does the commission have a view on whether it should be applicable for under-18s?

Mr Allamby: Again, I am going to extemporise here, so I should look to my colleagues on this. My instant reaction is to agree with the Children’s Law Centre. I think that there is a different issue between adults and children and young people on this. On balance, I would be inclined to say that it probably should be a provision for adults. We have not addressed it in our submission. I do not know whether we looked at the issue specifically.

Mr Caughey: No.

Mr Allamby: It appears that we have not, so, you are getting very much a kind of first flush personal view, but that is my instant reaction.

Dr Russell: Without having looked at it, I say that it is a general point of principle — again, this is probably where the Children’s Law Centre is coming from — that provisions like this, in placing restrictions on children, should effectively be a measure of last resort. If the Committee were to ask us to go away and look at it and come back, it would probably be our starting point, with the Committee on the Rights of the Child (CRC), that, in a proportionate response for children, that should always be a measure of last resort. That is clearly why it is indicating that it may not be appropriate in this circumstance.

Mr McGlone: Chair, you covered most of what I was going to say.

First, Les, my apologies for coming in late; I was taken out on other business. Secondly, congratulations on your elevation, promotion or whatever you choose to call it. It is well deserved.

Mr Allamby: Thank you.

Mr McGlone: To pick up on the Chair’s point about violent offences prevention orders, are you likely to formulate a view on that?

Mr Allamby: Sorry, you mean —

Mr McGlone: I mean the issue and concern about the under-18s.

Mr Allamby: If it would help, I am happy to go away and reflect on that. We are coming back in two weeks’ time, and I am happy to give you a much more considered view then, if that would be helpful.

Mr McGlone: Chair, I think that that would be helpful; certainly to me, anyway.

You support the introduction of the domestic violence protection orders. Forgive my ignorance of this, but, would they apply to people under 18 years of age?

Mr Allamby: I am not sure whether they do in England and Wales. Again, this is a first flush reaction, but I think that I would predominately take the same line, in that we think that they should be introduced, but they would be introduced for adults who —

Mr McGlone: Perhaps it is unfair to ask. You may want to reflect on that, maybe draw on further information and come back to us on it.
I am trying to get a handle on the appropriateness or otherwise of the violent offences prevention orders and the domestic violence protection orders, because, as you rightly pointed out, that is a very big issue irrespective of the age of the perpetrator. I would appreciate further reflection or information from you on that, Les.

Mr Allamby: Putting aside for a second the issue of whether they should apply to people under the age of 18, as I understand it, the evaluation of the domestic violence protection orders said that they gave a measure of reassurance and, in some cases, in the pilot, a measure of additional protection for the victims of domestic violence. They are designed to do exactly the same thing as the VOPOs do in practice. As I understand it, the domestic violence equivalent is pretty much designed to meet the same sets of issues that the violent offences protection order is designed to do. It is not a move that is very different in principle around domestic violence. It still starts from a position that says that you have to determine the level of cases for which you will decide to deal with domestic violence by using this additional tool in your toolbox. I cannot see any fundamental issue of principle that means that, if you think that VOPOs are a good idea, you would not extend it to domestic violence.

The Chairperson (Mr Givan): Are there any questions on early guilty pleas?

Mr McCartney: I have just a small point on the definition of “earliest reasonable opportunity” and the legal consequences of his or her decision. It is how we put in protections for that. Your point is noted, and we will give that some care and consideration.

Mr Allamby: Yes. It is about making sure that the rights of the person who is accused of something are properly respected. It is about that person making a genuinely informed decision — understanding what the case against him or her is, so that when the person makes the decision, it clearly is an informed decision. While I can see all the sensible administrative, financial and other reasons for doing it, such as addressing all the delays in the court, it needs to be balanced against the proper safeguards, so that the person does not feel, in some way, pressured into making a decision that is not appropriate or is making an uninformed decision. If we can make sure that those are built in, it is reasonable to take the approach that is being taken in the Bill.

The Chairperson (Mr Givan): Do any other members wish to say anything? No. Do any members want to ask the Human Rights Commission about the Attorney General’s amendment to do with the inquests? I know that you corresponded with us on that and that you were generally supportive of the Attorney General’s proposal.

Mr Allamby: Yes.

The Chairperson (Mr Givan): OK. There are no questions. Thank you very much for coming. I look forward to seeing you again in a couple of weeks’ time.