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21 March 2025

Dear Kathy,

JUSTICE BILL – BIOMETRICS PROVISIONS AND PROPOSED AMENDMENTS

I refer to your letters dated 7 March 2025, which outlined a number of questions raised by the Justice Committee in relation to the DNA and fingerprints provisions contained in Part 1 of the Justice Bill and the proposed amendments to be made at Consideration Stage. Responses to the queries are provided below.

The rationale for the proposed timescales relating to retention periods for DNA and fingerprints

1. The Department's original plan to address the European Court of Human Rights (ECtHR) Gaughran judgment was to update the provisions in the Criminal Justice Act (NI) 2013 (CJA) which were put in place to address the ECtHR's previous Marper judgment. However, Legislative Counsel was of the view that, due to the complexity of the provisions, and the number of amendments that had been made to CJA since 2013, it would be preferable to repeal the DNA and fingerprints provisions contained in CJA and replace them with one consolidated piece of legislation.



FROM THE OFFICE OF THE JUSTICE MINISTER

2. A number of the retention periods approved by the Northern Ireland Assembly in CJA align with the retention periods in England and Wales, introduced by Part 1 of the Protection of Freedoms Act 2012. These retention periods have been operating in England and Wales since 31 October 2013 without challenge.

75/50/25 model

3. The 75/50/25 model was developed to address the Gaughran judgment following consideration of the Sunita Mason review of criminal records in Northern Ireland,¹ which recommended that criminal record information should be kept until the subject reached the age of 100.
4. There is limited information available regarding retention regimes across Europe, with no standout country setting the standard for good practice. As part of the Department's policy development in 2020, consideration was given to a 2014 report (updated in 2016) by Kristiina Reed and Denise Synderdome Court entitled "*A comparative audit of legislative frameworks within the EU for the collection, retention and use of forensic DNA profiles*"² (the report).
5. The report sets out that Estonia, Finland and Luxembourg hold biometric material until the offender has passed away, with various timelines also factored in for retention after death. Slovakia and Latvia hold material for at least 75 years and Denmark holds material until the offender reaches the age of 80.
6. The Netherlands retain the DNA profiles of convicted individuals for 20, 30, 50 or 80 years depending on the seriousness of the offence and the conviction i.e. a sentence of less than 6 years results in a 20 year retention period, a sentence of 6-20 years results in a 30 year retention period, a sentence of 20-40 years results in a 50 year retention period and a sentence of more than 40 years results in a 80 year retention period.

¹ [Review of the criminal records regime in northern Ireland | Department of Justice](#)

² https://web.archive.org/web/20181111035454/https://www.euroforgen.eu/fileadmin/websites/euroforgen/images/Dissertation_Documents/WP4/Reed_and_Syndercombe_Court_2016_Legal_Audit.pdf

7. A further review of retention arrangements in Scotland in October 2024³ concluded that there was no gold standard of retention that Scotland should seek to emulate.
8. It is important to note that the Department's proposed 75/50/25 retention periods are maximum retention periods. The introduction of maximum retention periods removes indefinite retention, but it also has differing retention periods for minor recordable offences and the more serious qualifying offences (which are set out in Article 53A of PACE NI), and different retention periods for those under 18.
9. The proposed review mechanism will provide an important safeguard by ensuring that long-term retained material is subject to a statutory scheduled review to assess the continuing need to retain DNA profiles and fingerprints in each individual case. The Department believes that the 75/50/25 model, together with the review mechanism, reflects the guidance provided by ECtHR judgments and takes into account good practice from the various frameworks across Europe.
10. The Department believes that the proposals strike an appropriate balance between the Article 2 and Article 8 Convention rights engaged in the issue of DNA profiles and fingerprint retention and the public interest in using DNA profiles and fingerprints to protect the public and investigate crime.

3-year retention period – charged but not convicted

11. When a person has been charged but not convicted of a serious offence (qualifying offence), new Article 63G contains provision to retain their DNA profile and fingerprints for 3 years. A 3-year retention period is the standard retention period for individuals not convicted of serious offences in the other UK jurisdictions. A 3-year retention period was also included in CJA. The Department believes that the proposed 3-year retention period is necessary, proportionate, and in the interests of public protection.

³ <https://www.gov.scot/publications/report-review-retention-biometric-data-provided-under-sections-18-19c-criminal-procedure-scotland-act-1995-scottish-government-scottish-biometrics-commissioner/pages/1/>

12. Furthermore, research carried out in 2008 by Professor

Jim Fraser⁴, Director of the University of Strathclyde's Centre for Forensic Science, found that *"retention of forensic data for a three-year period, from individuals subject to proceedings for relevant sexual or violent offences but not convicted, is in principle, appropriate"*. Additionally, the European Court of Human Rights, in their judgment in the case of *S and Marper v UK*, made favourable references to the 3-year retention period for unconvicted individuals in Scotland. The approach was noted as *"consistent with a recommendation of the Committee of Ministers which stressed the need for an approach which discriminates between different kinds of cases and for the application of strictly defined storage periods for data, even in more serious cases"*.

3-year retention period – arrested not charged

13. Where an individual is arrested but not charged with a serious offence (qualifying offence), new Article 63G provides that the PSNI may apply to the Biometrics Commissioner, in accordance with set criteria (to be agreed in regulations) for a 3-year retention period. A similar approach is used in England and Wales (Section 63G of PACE 1984) which also has a 3-year retention period.

14. A review carried out on behalf of the Biometrics and Surveillance Camera Commissioner's office in 2018 found that 41% of individuals with their DNA profile and fingerprints retained under Section 63G, came to the notice of police again within the retention period. Of the 41%, half came to the notice of police for a similar offence with most applications made relating to alleged sexual offences.

15. The Biometrics and Surveillance Camera Commissioner also advised in 2023 that the provision was not used enough by police forces in England and Wales. The Commissioner suggested that the provision could assist the police with the prompt investigation of any subsequent offences, particularly where the suspect has come to police attention on more than one occasion. It also acts as a deterrent to the individual who knows that their DNA profile and fingerprints are being retained.

⁴<https://webarchive.nrscotland.gov.uk/20201122042907/https://www2.gov.scot/Publications/2008/09/22154244/23>

2-year retention period – penalty notice

16. DNA and fingerprints taken as part of the normal custody process may result in an individual aged 18 and over being given a penalty notice (under section 60 of the Justice Act (NI) 2011) as an alternative to a caution or being charged. In this scenario, it is considered appropriate and proportionate to retain the DNA profile and fingerprints for a short, fixed period of 2 years. The retention provision for penalty notices was carried over from CJA (which was never commenced) and contained a 2-year retention period which is the same as the retention period in England and Wales.

2-year retention period – prosecutorial fines

17. Provision for prosecutorial fines was added to CJA by virtue of section 18 of the Justice Act (NI) 2015; however, this provision remains un-commenced. The provision provides for powers for public prosecutors to offer low level offenders a ‘prosecutorial fine’ which is a financial penalty, up to a maximum of £200 (the equivalent of a level 1 court fine) as an alternative to prosecution of the case at court.

18. If section 18 of the Justice Act (NI) 2015 is commenced, new Article 63PA (Schedule 2 of the Justice Bill) will be commenced and will provide for a 2-year retention period from the date the individual was given the prosecutorial fine notice. When deciding on an appropriate retention period, cognisance was given to the penalty notice provision as an equivalent provision i.e. 2-year retention period.

5-year retention period and 5-years plus length of custodial sentence – under 18s

19. Some of the retention periods set out in the legislation are lower for under 18s than those for adults. Under 18s convicted of a first minor offence and given a non-custodial sentence will result in a 5-year retention period.

20. Under 18s convicted of a first minor offence and given a custodial sentence of less than 5 years will result in a retention period of 5 years plus the length of the custodial sentence.

21. These arrangements for under 18s were carried over from CJA with the retention periods also in line with the arrangements in England and Wales.

12 months and 3-year retention periods – Left on the books

22. When the consultation issued in 2020, the initial proposal was for a blanket period of 12 months but a number of respondents queried whether 12 months was adequate. Legal advice received advised that retention should be for a reasonable time in case proceedings are revived. Based on the evidence available to the Department, a decision was made to amend the original proposal to a 3-year retention period for qualifying offences (serious offences) and 12 months for minor offences.

Ongoing investigation – 5-year review period

23. Depending on the type or crime, a lengthy period of time may be needed for the PSNI to gather all the information that is needed for an investigation. In order to ensure that DNA profiles and fingerprints are not retained for longer than necessary, pending the outcome of an investigation or proceedings, new Article 63T requires the PSNI to conduct a review of under investigation material after a period of 5 years.

24. Statistics on long running investigations show that in April 2024, the PSNI had 3,239 cases (involving 3,018 individuals) that were open for more than 5 years. To avoid a burdensome process for the PSNI to administer, a 5-year period was selected to capture those unusually long running investigations, to ensure material being held is still appropriate and to reduce the risk of material being held for longer than necessary.

25. A requirement to review after 5 years is therefore considered to be a balanced and reasonable approach. A review after 5 years will ensure that a reassessment of the status of the person as a suspect in the investigation is carried out. The review will involve the PSNI assessing whether there remains a need for ongoing retention on the basis that the material has evidential value in the investigation.

The Northern Ireland Commissioner for the Retention of Biometric Material

26. New Article 63Z1 provides that the Northern Ireland Commissioner for the Retention of Biometric Material (the Commissioner) must make a report to the Department on an annual basis about the carrying out of the Commissioner's functions, with the report to be laid before the Assembly. The Department will also be able to require a report on any matter relating to the Commissioner's functions.

27. The Commissioner will be an independent statutory office holder. The Department will have a sponsorship role in relation to corporate governance matters. The appointment of a Northern Ireland Commissioner with a sole focus on biometrics will ensure there is a local body making decisions on local matters in order to protect public confidence in how DNA and fingerprints are used.

28. In relation to the query regarding a code of practice, a code is not expected. However, new Article 63Z provides that the Commissioner may issue guidance about the acquisition of DNA and fingerprint material under new Article 63B, to include guidance regarding the new retention framework in terms of the handling, retention and destruction of DNA and fingerprint material. There is also a statutory requirement that any person exercising powers in relation to DNA and fingerprints, such as the Chief Constable, must have regard to any guidance issued by the Commissioner.

The UK Biometrics and Surveillance Camera Commissioner

29. The Home Office has advised that they are seeking to recruit a post-holder to fill the role of the Biometrics Commissioner in England and Wales, together with the Surveillance Camera Commissioner role through a 2-year appointment, via open competition, as soon as possible.

30. Given that a full public appointment via open competition will take at least 6 months to complete, options are being considered to fill the England and Wales Biometrics Commissioner role on a short-term temporary basis. Should such an appointment be



made, this would focus solely on the delivery of the functions relating to the oversight of National Security Determinations and applications by the police forces in England & Wales to retain DNA profiles and fingerprints under section 63G of PACE 1984. This would be a temporary change to the role, to fulfil these specific functions for an interim period only. It is not considered that this would have an impact for Northern Ireland.

31. The UK Minister of State for Policing has said publicly that the UK Government is taking time to consider the legal framework for the use of facial recognition. This could include the oversight arrangements for facial recognition, including oversight of biometrics, which could impact on the future role of the UK Biometrics Commissioner. The UK Minister of State for Policing is listening carefully to stakeholders and partners and has met with the police, regulators, civil society groups and others.
32. The Home Office advises that any changes to the legal framework will be considered alongside broader police reforms. No decisions have yet been made and, as part of these considerations, stakeholders, including the Northern Ireland Department of Justice and the PSNI, will be engaged and their views sought on any proposed changes, to ensure any potential impacts for Northern Ireland are fully understood. The Department continues to engage regularly with Home Office colleagues on these matters.

Engagement with the Northern Ireland Human Rights Commission (NIHRC)

33. In terms of suggested amendments to the DNA and fingerprints provisions proposed by the NIHRC, as part of the consultation process in 2020, the NIHRC highlighted concerns regarding the volume of offences that would be contained in the 50-year retention band. Officials gave this matter further consideration and added an additional 25-year retention period for non-qualifying offences that don't attract a custodial sentence.
34. The Department is of the view that this particular change provides a greater balance of proportionality and will ensure that the material of individuals convicted of a

relatively minor offence that did not attract a custodial sentence will be subject to a lower maximum retention period and be subject to review at an earlier stage.

35. The NIHRC also raised concerns and queries on whether DNA profiles and fingerprints will be retained after the death of an individual. The Department's view is that where an individual has died, the review mechanism will provide an appropriate safeguard in that it will identify that there has been no recent offending and if there is no other legal reason to retain the material, it will be deleted. In addition, if the PSNI is notified of the death of an individual, it is anticipated that the review mechanism will require the PSNI to review continued retention of that material every 2 years from the date they were notified of the individual's death. The deceased's next of kin can also make an application to the PSNI for the continued retention of DNA profiles and fingerprints to be reviewed.
36. The NIHRC also recommended that the role of the Northern Ireland Commissioner for the Retention of Biometric Material is extended to review existing, emerging and future biometrics for the use by the PSNI and other public bodies for law enforcement, which aligned with the Department's proposals set out in the 2020 consultation. The NIHRC outlined that the proposal would fulfil the need to have an independent specialist authority to oversee the protection of personal data such as biometrics in compliance with Article 8 of the EU Charter for Fundamental Rights.
37. The proposed amendments to be made at Consideration Stage have also been shared with the NIHRC for their views, with NIHRC advising that they did not have anything substantive to offer. These amendments for Consideration Stage were identified as part of the stress testing of the legislation with the PSNI and are aimed at further improving the operation of the legislation.
38. The Department continues to engage with the NIHRC, including on the interface between the proposed 75/50/25 maximum retention periods and the review mechanism. As part of this engagement, the Department highlighted that the 75/50/25 proposals are maximum retention periods, with the review mechanism ensuring that material is subject to a review after a certain period of time, meaning that if there is no

policing reason (i.e. on grounds of public safety, the prevention of crime or the investigation of crime) to retain the material, it will be deleted. The Department is continuing to engage with the NIHRC, taking on board their feedback, as work on the review mechanism progresses.

Departmental Solicitor's Office assessment on human rights compliance and compliance with European Court of Human Rights judgments

39. Regarding the provisions of the Justice Bill as introduced, all proposals have been screened and are considered to be Convention compliant, as set out in paragraph 74 of the Explanatory and Financial Memorandum.

40. As confirmed in the letter to the Justice Committee dated 11 March 2025 from David Graham, DALO, the Department, in consultation with the Departmental Solicitor's Office, has completed its work in considering the European Convention on Human Rights (ECHR) implications, along with the legislative competence, of the planned Departmental amendments to the Justice Bill. The letter confirms that the Department is satisfied that all proposed amendments to the Justice Bill are fully compliant with the ECHR.

41. In relation to the ECtHR judgments in *S & Marper v UK* and *Gaughran v UK*, the Court was helpful in giving guidance as to how a compliant retention framework might be structured. The key elements are as follows:

- to ensure that a new retention framework takes account of the seriousness of the offence and any continuing need to retain DNA and fingerprints for policing and criminal reasons;
- a review process to allow individuals to request deletion of their material, including taking into account possible changes in their personality; and
- taking into account the age of the person when he or she was convicted and the length of time between the offence and the end of the retention period.

42. The Department believes that the new 75/50/25 retention framework, along with the new review process, will address the findings of the Marper and Gaughran judgments.

The regulation making powers contained in the Bill

43. Following Royal Assent of the Justice Bill, a range of subordinate legislation, outlined below, will be required before the new retention framework can be commenced:

- Qualifying offences amendment order (to amend the list of qualifying offences in Article 53A of PACE NI);
- Prescribed circumstances regulations;
- Review mechanism regulations;
- Review regulations where material retained for investigations (only if necessary);
- PACE NI Code D revision order; and
- PACE NI application order;

44. Legislation will also be required from the Home Office and the Northern Ireland Office (e.g. on excepted matters such as arrangements for National Security Determinations for PACE NI material) before the new retention framework can be commenced. This excepted legislation will be coordinated with the subordinate legislation required from the Department and will be commenced in parallel.

45. The Home Office and the Northern Ireland Office have indicated that the legislation falling within their remit will not be taken forward until the DNA and fingerprints provisions in the Justice Bill receive Royal Assent.

46. It is therefore anticipated that commencement of the new retention framework will not take place until 18-24 months after Royal Assent to allow for the various pieces of legislation to be completed. This will also allow time for the PSNI and other criminal justice organisations (such as Causeway, Forensic Services NI) to develop, test and implement appropriate software systems. All required primary and subordinate legislation will be commenced on a single agreed date; this will ensure that no gaps will exist, as all the elements of the new retention framework will be commenced together.

How the PSNI will operationalise the recall powers

47. PSNI has advised that it has already commenced work to review current processes in place for the resampling of individuals arrested, charged or convicted and how they these processes could be adapted in light of the proposals within the Justice Bill. PSNI has advised that it will seek legal advice on any such adaptations before they are adopted operationally.

48. In relation to flexibility for individuals required to attend a police station to give their material, there is provision within Section 12 of the Crime and Security Act 2010 (to be commenced as part of the retention regime) for the individual to vary the date, time, or time interval they have been given. The variation must be confirmed by a Constable in writing.

Proposals for a UK-wide database for custody images

49. The Home Office advise that they are developing a new Strategic Facial Matcher service which will provide a national service to policing to support the use of facial recognition. The system will enable the linking of custody images to corresponding arrest/conviction records, enabling an automated retention regime for images, should it be decided that the retention regime for custody images be similar to that which exists for fingerprints and DNA.

50. Home Office officials have met with policing officials from the PSNI and Police Scotland to discuss the opportunities available through Strategic Facial Matcher and the technical requirements to make use of the service. The PSNI has advised that it does not foresee that the proposed UK-wide database for custody images will have any impact on the Justice Bill.

51. The task of the Department is to provide a resolution to the compliance issues associated with the amendments to PACE NI made by the uncommenced CJA, which related to DNA and fingerprints only. The position regarding custody images in

Northern Ireland is that as facial matching processes and technology in this area is still evolving, and there are important issues to consider (such as when or whether an image becomes a biometric), the Department will not be legislating at this time. Therefore, the provisions contained in Part 1 of the Justice Bill do not extend to custody images.

52. The consideration of policy and the need for legislation regarding the retention of images will be a priority issue for the Department once capacity allows and taking account of developments in England and Wales and Scotland. The Department continues to engage regularly with Home Office and Scottish counterparts to keep abreast of developments on these issues. In the interim, the PSNI has in place a Service Instruction that provides for the retention of images in accordance with the retention of fingerprints and DNA.

The costs associated with the implementation of the DNA and fingerprints provisions and amendments

53. PSNI has advised that it is in the process of developing an outline Business Case, which will be based on estimated project costs. Engagement is taking place with software developers in an attempt to ascertain approximate labour, time and resources required. However, a more accurate estimation of costs will only be possible post Royal Assent when PSNI has a full and accurate understanding of the proposed retention regime and is able to draw up a Requirements Document that will inform all parties of the work required and from which costs and time can be established.

54. As outlined above, the legislation (including amendments and subordinate legislation) will be introduced as a single package and software will therefore be developed and implemented accordingly.

55. The Department continues to assess the potential costs associated with the establishment of the office of the Northern Ireland Commissioner for the Retention of

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Department of
Justice

An Roinn Dlí agus Cirt

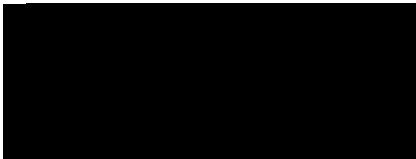
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Biometric Material. Due to competing pressures, this work is not yet complete. However, the Department will share an indicative estimate of potential costs once this information is available.

I trust you will find this helpful.

Yours sincerely,



**DAVID GRAHAM
DALO**



Northern Ireland Assembly Committee for Justice

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7 March 2025

Justice Bill — Proposed Amendments to Biometrics Provisions

Dear David

At its meeting on 27 February 2025, the Committee for Justice received a briefing from the Assembly's Research and Information Service on the Department of Justice's proposed amendments to the Biometrics provisions in the Justice Bill.

The Committee agreed to ask the Department for the following:

- information on the commencement of the regulation-making powers in the Biometrics Part of the Bill and whether a delay in commencement would result in any gaps;
- an analysis of the Bill's compatibility with the Windsor Framework and relevant EU Directives; and
- clarification of whether the Department is aware of any plans to change or abolish the role of the Biometrics Commissioner in England and Wales and details of any engagement the Department has had with the Home Office on this issue.

The Committee also agreed to ask the Department the following questions:

- Does the Department believe that the biometrics amendments comply with the European Court of Human Rights judgments in *S & Marper v UK* (2008) and *Gaughran v UK* (2020)?
- Has the Departmental Solicitor's Office completed its work around "human rights compliance and Windsor framework considerations" on the biometrics amendments given that an indicative suggestion was previously provided to the Committee that this would be completed towards the end of February 2025?
- Has the Department sought the views of stakeholders in relation to these amendments, including the Northern Ireland Human Rights Commission? If so, what are its views on the issues addressed?
- How will the PSNI operationalise the powers around specifying a date and time for individuals arrested, charged or convicted to attend a police station for fingerprints, non-intimate samples and photographs to be taken? Will there be any flexibility around this for individuals who are recalled for this purpose?
- Are the DoJ or PSNI in a position yet to provide a detailed estimate to the Committee of the projected cost of the Justice Bill's biometrics provisions? Has any progress been made on developing a business case associated with this or, if not, when will it be possible to provide an update around this? Are there likely to be any financial implications associated with the further biometrics amendments?
- Can the Department provide any information on engagement it has had with the Home Office around the future role of the Home Office Biometrics and Surveillance Camera Commissioner and what impact this could have, if any, for Northern Ireland?

I should appreciate a response by 21 March 2025.

Yours sincerely,

Kathy O'Hanlon

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