

Submitted to Justice Bill

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Introduction

What is your name?

Name:

Fraser Sampson

What is your email address?

Email:

If you are providing a submission on behalf of an organisation or business, please state its name.

Organisation:

The Committee for Justice has agreed to publish all responses as part of the survey results. If you would like to have your survey results anonymised and for us not to publish your name or organisation, please indicate so here.

I am content for my information, including details of my name and organisation, to be published in the survey results.

Clause 1: Retention of fingerprints and DNA profiles

Do you believe Bill clearly defines what biometric data is?

Yes

Is the definition of biometric data clear?:

Clarity is important for the consistent operation of biometric frameworks within the rule of law; it is also important in maintaining public confidence in the arrangements for oversight of the biometrics framework. Mirroring the legislation from England and Wales, the Bill refers to 'material' being retained but there should be absolute clarity when making the important distinction between DNA samples and DNA profiles/fingerprints. While DNA samples carry significant personal information about the donor, very limited information is produced from a forensic profile derived from it. In respect of 63G retentions, it is the latter not the DNA sample that is being retained. While article 63B is clear on this, Part 2 of the Bill and the wording of the Police and Criminal Evidence (Northern Ireland) Order 1989, article 4(1) definitions of 'material' are confusing as the term material does not apply to a DNA profile.

The Bill proposes to replace the current indefinite retention period for biometric data with a "75/50/25 year" model. Do you agree with the proposed retention periods for biometric data?

Yes

Please provide information to support your answer here::

Article 63S provides for a court to extend the retention period of material held under 63I to 63R for up to two years at a time. Do you support the extension of retention periods in certain circumstances?

Yes

Please provide information to support your answer here::

Articles 63Z and 63Z1, together with Schedule 1 to the Bill, relate to the establishment of a Northern Ireland Commissioner for the Retention of Biometric Material. Do you agree that a Commissioner for the Retention of Biometric Material should be appointed?

Yes

Please provide information to support your answer here::

To get the most from biometric technology, we need a systemic approach to regulation focusing on integrity – of technology, law and practice – along with clear standards for everything and everyone involved because, in a systemic setting, compromising part means compromising the whole. Biometric capability in its widest sense could revolutionise the investigation and prevention of crime and the prosecution of offenders. At the same time, the manner in which that technology is used could jeopardise the model of policing by community consent on which we rely. Effective regulation and oversight ought to reflect both: the potential and the risk. People must be able to have confidence in the whole ecosystem of biometrics, to be sure that what is technologically possible is only being done in a way that is both legally permissible and societally acceptable.

The State's use of biometric technology plainly engages individual data rights, but it should be noted that some of the key issues that have raised significant questions of public trust and confidence are no more 'just' data protection than facial recognition is 'just' photography or DNA profiling 'just' chemistry. The Bill recognises this important reality and makes provision for it, including the creation of an independent commissioner. In order to be effective, the legislation when passed will need judicious oversight, monitoring and training.

The Commissioner for the Retention of Biometric Material will be required to: keep under review the operation of the PACE NI biometric retention framework, including the review process of long-term retained material to be set out in regulations made by the Department; keep under review the acquisition, retention and use of biometric material under the terms of this Bill; review the use and development of existing and new biometric technologies; issue guidance on the use of biometric technologies in a law enforcement setting; and report annually, or further as appropriate, on the Commissioner's functions. Do you agree with these being appropriate to the role of the Commissioner?

Yes

Please provide information to support your answer here::

Drawing upon recent experience as the UK's first combined Biometrics and Surveillance Camera Commissioner, I have focused only on those areas of the Bill where I think comment might be helpful.

Much will turn on the content of the regulations requiring the approval of the Assembly, and on the approach of the commissioner.

Do you have anything further to add on Clause 1 of the Bill?

Not Answered

Please provide any further information relating to Clause 1 here::

Clause 2: Retention of fingerprints and DNA profiles: amendments

Do you have any comments on Clause 2 of the Bill?

Not Answered

Please provide any comments on Clause 2 here::

Part 1: Biometrics - Other

Do you have any other comments or information you would like to be considered by the Committee on Part 1: Biometrics?

Yes

Please provide information to support your answer here::

Added at the end

Any other comments on the Bill?

Do you have any other comments or views on the Justice Bill?

Yes

Please provide any other comments or views you have on the Justice Bill here::

Citizens in a mature and tolerant democracy enjoy a range of clearly described human rights and fundamental freedoms, most of which carry with them obligations and qualifications.

The police must respect and uphold the individual human rights of those they police and from whose consent they derive their legitimacy in our policing model, which is still both venerated and cherished. Their duty is to uphold the rights of the citizen while meeting their legitimate expectations. This is a difficult balancing exercise and often creates contradictory choices and competing demands, which must be balanced in light of all the circumstances of each particular case.

The starting point is clearly defined, publicly accessible and intelligible legislation and policies, and a sensible system for reviewing the arrangements in light of experience. Policy is for others, but practically I believe that we need a set of clear, indefeasible statutory rules by which the police will be held transparently and auditably to account for their use of biometrics. I believe the Bill will support this.

The proposed arrangements whereby the PSNI can apply to the Biometrics Commissioner for a 3-year retention period for individuals arrested for, but not charged with, specific offences and where prescribed circumstances apply represent a powerful enhancement of the contribution biometrics can make to the policing of Northern Ireland.

Having dealt with many such applications during the course of my commission, it seems to me that the broad effect of such retention is threefold:

To assist with the prompt investigation of subsequent offences, particularly where the suspect has come to police attention on more than one occasion;
To provide a deterrent to the subject who knows that their DNA and fingerprints will be checked against crime scenes without the need for further arrest;
and

To provide some positive outcome/reassurance for complainants where they are concerned about future offending by the subject but the decision on prosecution has not met the evidential test.

As highlighted in my annual report to the UK parliament, it is worth noting that a majority of 63G applications are made in connection with investigations

of sexual abuse and violence against women.

I would encourage the PSNI to view the 63G power not only through a data management lens, but also through a crime detection/prevention lens. When a suspect – who will often have come to police attention on one or more previous occasions before the application is made - knows that their fingerprints and DNA profile are being retained by the police, that retention inherently holds a deterrent factor that may prevent potential future offending. While this effect will be difficult to measure, it is a point that those forces using the retention power in England and Wales believe is borne out by experience. Experience in England and Wales also shows how the near identical statutory provisions remain underutilised after their introduction more than ten years ago. One perceived shortcoming is the time limits for retention which begin to run from the moment of application. The extension of the grace period from 14 to 28 days under Article 63E(5) of the Bill, to allow adequate time for PSNI systems to be updated following the conclusion of an investigation and for DNA and fingerprints to be deleted from the databases, is a pragmatic, enabling approach to the legislation.

The statutory period for retention of biometrics on National Security grounds was recently extended from two years to five years in the UK and the provisions for the maximum retention period being extended/renewable under Article 63G might benefit from further review.

A key feature of the process in England and Wales is the legal entitlement for the subject to make representations, either directly or through a representative, parent or guardian. Having received such representations – particularly from parents or carers of subjects under 18 – I am convinced that this is an essential element in balancing the competing considerations and taking account of the specific human rights issues engaged by retention.

The power of the court to extend the retention period as proposed by Article 63H has only been used on one occasion to my knowledge in England and Wales since its introduction over a decade ago; its Scottish equivalent has, I understand, never been utilised.

In this regard it is worth noting that the availability of a statutory power alone is no assurance that the gravamen against which it was intended to operate has been addressed.

Articles 63F, T & Y- Retention of material pending investigation or proceedings

The combination of these articles appears to mirror the provisions of England and Wales in creating what is known as the 'CPIA exception' (from its link to the Criminal Procedure and Investigation Act 1996) which has been problematic in the UK.

In annual reports to the UK parliament, I and my predecessor have cited both the generic use of this exceptional power and the increase in the number of samples being retained (either directly by the police or their forensic service providers) under its authority.

While Article 63F material is covered by an express duty for the Chief Constable to review it (Article 63T), the exclusion for CPIA purposes (under Article 63Y) has no correlative duty.

Close monitoring and auditing of this power/duty and the timely destruction of DNA samples generally is an area that the commissioner will need to address.

Attendance at police station for fingerprinting etc.

The provisions of the amended Police and Criminal Evidence (Northern Ireland)

Order 1989 replicate the arrangements under the Police and Criminal Evidence Act 1984 in England and Wales. Both are based on an approach of taking the person to the technology – in other words they require the person to be either arrested and taken into police detention or to submit themselves to a police station in order to enrol their fingerprints. In the latter case, the technological capability to enrol fingerprints is now sufficiently advanced to allow consideration of whether these biometric processes might also be undertaken at places other than police stations in the future. Taking the technology to the person would have the advantages of being less intrusive, more flexible and less susceptible to disruption by events such as the COVID-19 pandemic which closed custody suites to all but the most pressing cases.

Amendment: Biometrics

Do you have comments on the proposed biometric amendment to the Bill?

Yes

Please provide information to support your answer::

Added at the end

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