

FROM THE OFFICE OF THE JUSTICE MINISTER



Department of
Justice

An Roinn Dlí agus Cirt

Máinnystrie O tha Laa

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Our Ref: JCP\24\190
23 October 2024

Dear Caroline,

JUSTICE BILL: REQUEST FOR ADDITIONAL INFORMATION

Thank you for your letter of 30 September in relation to the Justice Bill. Please find below and attached the additional information as requested.

Timeline for Planned Amendments

You asked, firstly, for a timeline for when the Committee can expect to receive the text of our planned amendments.

All of the additional provisions are actively being worked on by the Office of Legislative Counsel at present.

While it is not possible to provide the Committee with precise dates, amendments relating to additional biometric provisions and Restorative Justice services are essentially complete and will be shared with the Committee under separate cover before the end of October. Provisions for the reform of rehabilitation periods are at an advanced state of preparedness but they require a little additional time to allow for a rehabilitation period to be specified for the new Youth Custody and Supervision Orders at Clause 12 of the Bill

and we hope to be in a position to share the texts of these provisions with the Committee during week commencing Monday 4 November 2024.

Drafting of the amendments relating to the AccessNI filtering scheme and provisions to tackle serious organized crime is ongoing and, allowing for some further discussions between officials and OLC, we expect these texts to be with the Committee by the end of November.

The final amendments, which we anticipate will be available by the end of this calendar year, then relate to the repeal of vagrancy legislation and the wider use of live links in courts and tribunals.

Rationale for powers contained in Clause 31

The Committee has requested an explanation of the rationale for the powers contained in Clause 31, including justification for the inclusion of these powers.

The provisions of Clause 31 may look wide, but they do not allow the Minister or the Department to amend any legislation for any purpose. The powers cannot, for instance, be used to substantially rewrite or remove any of the provisions of the Bill, once enacted, or to allow entirely new content to be added. Clause 31 is, instead, an important safeguard to be used in circumstances, such as in this Bill, where the provisions are complex, wide ranging, and amend or repeal other statutes to a large degree. The powers are limited to making supplementary, incidental, consequential, transitory, transitional or saving provisions only for the sole purpose of giving full effect to the intended policy provisions of this Bill alone.

While every effort is made by officials, Departmental legal advisors and the Office of Legislative Counsel to ensure all legislation is error free, there is always a possibility that an amendment or repeal might be missed that would render the policy objective impossible to implement or create a gap in the law. The provisions of Clause 31 afford

the Minister the opportunity to offer the Assembly a timely remedy by way of a secondary legislation fix, rather than by way of further provision in another Assembly Bill, which could be quite some time in the future.

Any subordinate instrument that might be raised under Clause 31 would be subject to a number of safeguards. The Committee would have the opportunity to consider the proposal for any such instrument at the SL1 stage and could, at this point, express concerns with and disapprove the approach. If the Committee did not have any concerns at the SL5 stage, there would be other opportunities for the legislation to be challenged, including by the Examiner of Statutory Rules at the point of introduction – if they considered the instrument exceeded the scope of Clause 31 and was ultra vires – and by the Assembly as a whole during the subsequent debate of the instrument in the Chamber, when the instrument could be voted down and rejected if members considered the provisions of the instrument were too broadly drawn.

ECHR compliance

Your letter sought further information in relation to compliance with the European Convention on Human Rights (ECHR). The Department has carefully considered the ECHR implications of the Bill's provisions throughout the policy development and drafting process.

As a result of that process, the Department is satisfied that this Bill is not incompatible with any of the Convention rights. We have taken account of the findings in *Re Mediahuis and others* in reaching this conclusion.

The Biometrics Commissioner will have an important role in ensuring that any retention of biometric data through the Bill's provisions will continue to be compliant in the future. We have provided, at **Appendix A**, a high-level overview of the Convention rights we consider to have been potentially engaged by the Bill on introduction and a short summary of how we have arrived at our assessment of the compatibility of the relevant provisions.

We hope this will assist the Committee in undertaking its own scrutiny regarding the ECHR compatibility of the Bill's current content.

Data from the Youth Justice Agency

You asked for data on the number of children remanded and given custodial sentences. A copy of the latest Youth Justice Agency workforce statistics for 2023-24, which were published on 19 September 2024, can be found at:

[Youth Justice Agency Annual Workload Statistics 2023-24 | Department of Justice \(justice-ni.gov.uk\)](https://www.justice-ni.gov.uk/youth-justice-agency-annual-workload-statistics-2023-24)

These figures show that there were 114 incidences of children being held on remand during 2023-24. Of these, 29 were remanded directly by court, with the rest being admitted first under the Police and Criminal Evidence (Northern Ireland) Order (PACE) before then being remanded by court.

These 114 remands resulted in only two custodial sentences. In total, only seven custodial orders were served in 2023-24 i.e. five where a child was admitted directly from court to serve a sentence, along with the two who had first been held on remand.

For the previous five-year period (2018-19 to 2022-23), a total of 63 individual children served a custodial order at the Juvenile Justice Centre (JJC). This represented only 14.2% of the total number of individuals admitted to custody (444).

Bail Fostering Pilot

You also sought an update on the pilot bail fostering scheme, which was commenced in the Southern Health and Social care Trust (SHSCT) area in July 2023.

It was intended as a "Proof of Concept" pilot, with the aim of providing short-term, therapeutic foster placements for children remanded to Woodlands Juvenile Justice Centre who could not perfect bail because they had no suitable home placement.

It was introduced in response to concerns by SHSCT and the Youth Justice Agency that children were sometimes spending time on remand, not for justice reasons, but simply because they had no suitable address, and a recognition this this was not in the best

interests of these children. The criteria for admission were that children would be known to the Trust, but not be Looked After Children, and that 'risk of harm to others' assessments had been undertaken and considered.

This pilot was not intended to provide a comprehensive service, but rather to test the concept that bail fostering could provide a solution to this problem, which might in time be rolled-out across Northern Ireland.

To date there have only been two bail fostering placements delivered through this pilot scheme. Both children managed very well in the foster placement, and there were no incidents of the police being called because of breach of bail conditions.

There were initial concerns about maintaining, protecting and financing a bail foster placement that might not always be in use (as proved the case). This was managed by the bed also being made available as a short-term emergency placement, with the proviso that it would be vacated immediately if needed for a bail fostering placement.

The foster parents also provided a number of other foster placements for SHSCT at the same time, and the socialisation effect of these other children appeared to have a positive impact on the two children on bail.

Valuable learning has been taken from the pilot to date, including the need to be flexible and open to change when developing a new service.

The pilot was reviewed at an interagency meeting on 3 September 2024, and it was acknowledged that, although the numbers had been very low, the two bail placements had been successful and the concept shown to be viable.

This success was attributed to the experience, knowledge and skill of the foster parents; good interagency working and communication; and the commitment and support of senior management within SHSCT.

It was agreed that the pilot should be continued and reviewed again after another six months; any rollout of the scheme should not be considered until the pilot has been further tested.

Procedures will continue to be developed in response to feedback from those directly involved in the scheme.

Criteria for admission to the scheme will be extended to all children on remand in Woodlands JJC (except Looked After Children) and, in exceptional circumstances, children who are due to appear in court and are very likely to be remanded because they do not currently have a suitable bail address.

Live Links

A summary of consultation responses on the use of live links for police detention/interviews is attached at **Appendix B**, as requested.

PSNI has advised that while there will be training costs associated with the implementation of these provisions, they have also confirmed that the training costs are expected to be absorbed by usual training budgets and that the benefits brought about by live links, particularly remote Superintendent reviews, will outweigh the training costs.

Legal Aid Funding

With regard to Legal Aid Funding, Legal Aid expenditure data taken from the Legal Aid Management System (LAMS) for proceedings in the higher courts includes expenditure that has been taxed by the Taxing Master, as well as expenditure assessed by the Legal Services Agency, such as for proceedings in the County Court.

Therefore, to determine the legal aid expenditure taxed by the Master, it is necessary to conduct a manual exercise. Such an exercise was completed by LSA Information Analysis Unit for the Taxation Reform branch for the purposes of establishing an annual dataset of taxed certificates.



The table below is the most recent data that we have and covers the period 01/04/2022 – 31/03/2023¹.

Taxation Type	Volume of Cases	Assessed Solicitor Cost	Assessed Counsel Cost	Assessed Third Party Cost***	Assessed Total Cost	Average Cost per case
High Court Bail	157	£275,094	£121,947	£129	£397,169	£2,530
Family Homes Domestic Violence	28	£149,954	£103,544	£1,143	£254,641	£9,094
Quasi criminal*	1	£6,595	£3,659	£0	£10,255	£10,255
Matrimonial / Civil Partnership	195	£1,563,081	£499,557	£1,458	£2,064,096	£10,585
Maintenance	2	£19,353	£14,290	£0	£33,643	£16,821
Land / Property	2	£44,810	£3,597	£0	£48,406	£24,203
Personal Injury	20	£327,113	£179,667	£84	£506,864	£25,343
Children Order Articles 62 - 69	2	£25,731	£30,871	£598	£57,201	£28,600
Judicial Review	91	£1,380,822	£1,260,636	£6,607	£2,648,065	£29,100
Children Order Generic & Child Proceedings	52	£679,808	£840,465	£6,437	£1,526,710	£29,360
Children Order Articles 7 - 41	80	£1,172,050	£1,229,271	£1,090	£2,402,411	£30,030
Appeals	27	£344,511	£618,207	£371	£963,089	£35,670
Other**	39	£789,498	£1,139,433	£0	£1,928,932	£49,460
Children Order Articles 44 - 58	181	£4,777,487	£6,115,548	£22,638	£10,915,672	£60,308
Criminal Court of Appeal	25	£520,927	£1,920,151	£0	£2,441,078	£97,643
TOTAL	902	£12,076,834	£14,080,843	£40,554	£26,198,232	£29,045

¹ This dataset is limited to cases which closed in the period 01/04/2022 – 31/03/2023 and for which the latest authorisation on LAMS was not more than one year prior to the start of this reference period (i.e. last authorisation between 01/04/2021 and 31/03/2023). This equated to 902 taxed bills, spanning 15 taxation types.

* Quasi Criminal matters include inter alia proceedings related to the Proceeds of Crime Act 2002 and court orders.

** Other proceedings include inter alia matters in respect of guardianship and institutional abuse.

*** Third party costs – e.g. fees paid to expert witnesses.

The Department is not able to provide a definitive answer as to why solicitors are required to itemize their costs whilst barristers do not.

The format of bills of costs/ submissions to the Taxing Master for assessment is a matter for the Taxing Office.

However, based on our own research into this area, it is our understanding that the requirements placed upon solicitors and counsel stem from a mixture of legislation, judicial practice directions, case law and “custom and practice”.

The responsibility for producing a bill of costs for assessment lies with the solicitor. With regards to the format of claims for costs, Order 62 of the Rules of the Court of Judicature (NI) Appendix 2 sets out the broad structure which solicitors are required to follow when submitting bills for assessment.

Items are to be set out in chronological order, and include:

- Attendances at court;
- Consultations with counsel;
- Attendance at trial or hearing;
- Preparation – all preparation required including taking instructions from client, review and preparation of documents, all correspondence, engaging with witnesses / experts, research, etc.

Brief fees are not referred to in the Rules of the Court of Judicature; however, counsel costs are included in the solicitors’ bill of costs and are considered a disbursement incurred by the solicitor for the purposes of providing representation to their client. Therefore, a brief fee appears as an item in the solicitors’ bill of costs.

From our review of a sample of Taxing Master files, we are aware that counsel will provide the Master with a “report on case”. This is a narrative of the case which varies in detail and length but does not “break down” the brief fee.

In commentary on the case law underpinning the assessment of costs on taxation, Valentine states that for the trial, counsel is assessed for a brief fee for the case as a whole, which includes and reflects the necessary work in preparing for trial, and refreshers for each day after the first day of trial.

Practice Direction 04/14, issued by the Taxing Master's office, sets out a list of current fees for counsel "in relation to miscellaneous drafting and interlocutory fees". These are itemised fees that might be claimed by counsel and relate to specific work done in the course of proceedings, for example the drafting of certain documents.

The list does not include the "brief fee".

The Comerton Scale is a fee scale produced by the Bar and which sets out a range of suggested "market rate" brief fees. However, the scale is particular to personal injuries cases which involve a sum of money.

It is not widely available and was provided to the Department by the Taxing Master's Office.

As outlined at the oral evidence session on 26 September, the Department continues to engage with the Bar in an effort improve our understanding of the brief fee. A written briefing on taxation reform will follow shortly.

Delegated Powers Memorandum

Attached at **Appendix C** is a copy of the Delegated Powers Memorandum as prepared by the Department to assist the Committee in their consideration of the Justice Bill.

This document identifies the provisions of the Bill (as introduced) which confer powers to make delegated legislation, explaining in each case why the power has been taken and the nature of, and reason for, the procedure selected.



Keeling Schedule

The Committee are aware that upon their initial request for a copy of a Keeling Schedule for the current Justice Bill, officials raised the matter with the relevant drafters in the Office of the Legislative Counsel (OLC) working with us on the Bill. The OLC drafters have confirmed that, just as no such Schedule has been produced by the Department for the Bill, one has not been produced in OLC by them.

Following the presentation to the Committee on 26 September, officials raised the Committee's request with the Minister and have consulted First Legislative Counsel (FLC). Consultation with FLC was in light of the Committee's request, but FLC has considered the matter of Keeling Schedules more generally.

FLC confirms that as well as the fact that Keeling Schedules are not normally produced by OLC nor routinely given to Committees by Departments, production of such Schedules by OLC would be a resource burden that his office could not absorb. *So FLC observes that, even if Keeling Schedules were to be given by Departments to Committees more often, there should be no assumption that the production of such Schedules is something for OLC to consider taking on as new work in addition to their heavy workload in drafting Bills.*

For the avoidance of doubt, FLC advises that there is no practice at present in OLC of automatically producing Keeling Schedules alongside Bills.

The Department has considered the option of taking on the work involved in producing a Keeling Schedule specially for the Committee in the present instance. Unfortunately, this would have the negative impact of significantly diverting staff from other work at a time of diminished resources and competing priorities.

However, in determining whether resources (no matter their source) should be devoted to producing Keeling Schedules, the Department suggests that careful consideration should be given to the real value of such Schedules in particular contexts. In various

instances, Keeling Schedules could in FLC's opinion add far less information or be of notably less assistance than might otherwise be imagined.

On the question of resources (again no matter the source), the Department shares FLC's view that Keeling Schedules typically require substantial time and effort to produce, particularly as necessarily depending on manual input rather than technological automation for their content and accuracy.

The Minister notes the Chair's Point of Order in the Assembly on 14 October and her subsequent correspondence to the Minister (in her private capacity as an MLA), where she cites four examples where Keeling Schedules have been provided since 2014 of which the Department was unaware.

The Department apologises sincerely for its oversight in failing to identify the Keeling Schedules to which the Chair has now drawn its attention, and the Minister is pleased to have taken the opportunity to correct the record for the House.

However, aside from the absence of formal requirements or guidance in favour of Departments providing Keeling Schedules, the Department points to the very fact that so few have been identified with respect to such a long period (during which there have been so many Bills) as showing that there is simply no pattern or convention of such Schedules being provided.

Furthermore, and looking more broadly than the current situation, the Minister suggests that it is always open to the Committee (or any of the other Committees) to commission its own Keeling Schedules or use resources of its own to produce such Schedules whenever wanted in connection with scrutinising Bills.

The Minister, or Departmental officials, are of course happy to discuss the matter of Keeling Schedules further officially with the Committee or (as the case may be) informally with the Clerk.

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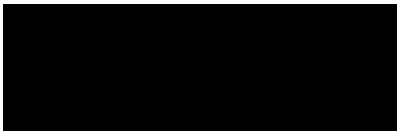
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While the habit and experience to date in relation to Keeling Schedules does not directly involve OLC's specific remit, FLC has helpfully offered to join any such discussion given his obvious and ongoing interest in wider Bill processes.

Clause 25

The Chair also requested an urgent written explanation of Clause 25, which was provided by email on 27 September 2024, prior to Second Stage.

The Minister of Justice trusts that the Committee finds this additional information useful as it reviews and takes evidence on the Bill.



**DAVID GRAHAM
DALO**

Enc: Appendix A - Overview of Convention Rights
Appendix B - Summary of consultation responses on the use of live links
Appendix C - Delegated Powers Memorandum

PART 1

DNA AND BIOMETRIC DATA: RETENTION ETC

1. Retention of fingerprints and DNA profiles
2. Retention of fingerprints and DNA profiles: amendments
3. Retention of fingerprints and DNA profiles: supplementary

CLAUSE(S)/ SCHEDULE(S)	WHICH RIGHTS ARE POTENTIALLY ENGAGED	ASSESSMENT
Clauses 1-3 Schedules 1-2	<p>The European Court of Human Rights found in the cases of <i>Marper</i> and <i>Gaughran</i> that the retention provisions in PACE violated the protections conferred by Article 8 (right to respect for private and family life).</p> <p>The Court considered that the indiscriminate nature of the powers of retention, without reference to the seriousness of the offence or the need for indefinite retention, and the absence of any real possibility of review, failed to strike a fair balance between public and private interests. The Court stressed that it was not necessarily the duration of the retention of data that had been decisive in this regard, but rather the absence of certain safeguards.</p>	<p>The proposed retention regime (new Articles 63B – 63Z1) creates a clearly defined set of rules for the retention and destruction of biometric material, based on the particular circumstances of each person, the nature of the offences involved and the criminal justice outcomes.</p> <p>Further to the new statutory retention periods (which themselves offer protections for the individual against <i>indefinite</i> retention), a number of additional safeguarding provisions are to be introduced:</p> <p>New Article 63G will require the Chief Constable to make an application to the NI Biometric Commissioner to retain (for 3 years) material from a person who has been arrested for, but not charged with, a qualifying offence.</p>

		<p>New Article 63H will require an application to the court where the Chief Constable seeks to extend retention (for a further 2 years) beyond the maximum period of 3 years permitted by Article 63G.</p> <p>New Article 63S will require the Chief Constable to apply to the court for an order permitting the continued retention of material beyond the maximum retention date (generated by any of the criminal justice outcomes contained within Articles 63I – 63R) for a further 2 years, subject to certain criteria being satisfied.</p> <p>It is anticipated that applications being brought by the Chief Constable to extend retention under Articles 63G, 63H and 63S will be exceptional.</p> <p>New Article 63T creates a statutory duty for the Chief Constable to review the continued retention of material held during extended police investigations to ensure that it is not retained for any longer than is necessary.</p> <p>New Article 63U creates a statutory duty for the Department of Justice to bring forward regulations requiring the Chief Constable to conduct reviews of long term retained material (where the maximum retention period is either 25, 50, or 75 years) to ensure that it is not retained for any longer than is necessary.</p>
As above	The Department has also considered whether Article 5 (right to liberty and security) , Article 6 (right to a fair trial) or Article 8 (right to respect for private and family life) might be engaged where a recordable offence is “left on the books”.	Under new Article 63I material relating to offences “left on the books” may only be retained for 12 months or 3 years, depending on whether it relates to a qualifying offence or not. It is not considered that this retention rule engages Article 5 ECHR or Article 6 ECHR.

As above	Article 1 (obligation to respect human rights) provides that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of [the ECHR]”. This arguably permits the retention of data related to a conviction outside of the UK where that retention is deemed necessary to protect the rights and freedoms of others within Northern Ireland. At the same time, the jurisprudence of the European Court of Human Rights makes it clear that the Article 8 rights of the ‘data subject’ should also be respected in the same circumstances, at least to the extent that they should be balanced against the guiding principles of the rights of others that the Department of Justice may be seeking to protect.	New Article 63N permits the application of retention periods (under Articles 63J to 63M) to material taken from a person who has been convicted of offences outside Northern Ireland. However, this is subject to the same safeguards outlined above in respect of Article 8.
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PART 2

CHILDREN

Bail

4. Duties of custody officer after charge
5. Police bail after arrest
6. Court bail
7. Arrest for absconding or breaking conditions of bail
8. Considerations relevant to bail: accommodation

CLAUSE(S)/ SCHEDULE(S)	WHICH RIGHTS ARE POTENTIALLY ENGAGED	ASSESSMENT
Clauses 4-8 Schedules 1-2	Article 5 (right to liberty and security) provides that no one should be deprived of liberty except in accordance with the law. A deprivation of liberty will only be lawful if it falls within one of the permissible grounds specified in sub-paragraphs (a) to (f) of Article 5(1).	<p>These clauses do not create any new offences but impact on the right to liberty. They enhance procedural protection for children by inserting new child specific factors which must be considered - where relevant - when decisions on bail are being made by police or the court.</p> <p>These are: (1) for police bail under Art. 39 - the juvenile's age, maturity and needs, and capacity to understand and comply with any condition of bail. A custody officer may consider the juvenile's accommodation needs but must not refuse to release the juvenile on bail solely because the juvenile does not have any or adequate accommodation.</p>

		<p>(2) For conditions of police bail under Art. 48 – the nature and seriousness of the offence, the character, antecedents, associations and community ties of the juvenile, the record as respects previous grants of bail, the strength of the evidence of having committed the offence, the juvenile’s age, maturity and needs, and capacity to understand and comply with any condition of bail.</p> <p>(3) For court bail and conditions, the court must have regard to the nature and seriousness of the offence, the strength of evidence against the child, the child’s character, history, community ties and associations, the child’s age, maturity and needs and the child’s capacity to understand and comply with any condition of bail. The court may consider the child’s accommodation needs but must not conclude the relevant exception to presumption of bail is met solely because the child does not have any or adequate accommodation.</p> <p>(4) In all instances a condition of bail must be no more onerous than is necessary for the prescribed purpose for which it is imposed.</p> <p>The presumption of unconditional court bail for children is strengthened with only very limited exceptions now possible. These are clearly stated with legal certainty, and the limited circumstances when bail may be refused or when conditions may be imposed are considered to be within the explicit grounds permitted by Art. 5 ECHR.</p> <p>If bail is refused or conditions are imposed or varied by a Court, such decisions must be stated in open court and recorded in age-appropriate language - enhancing the child’s ability to understand the judicial process and what is expected of them.</p>
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As above	Article 6 (right to a fair trial) provides that, in the determination of civil rights and obligations or of any criminal charges, everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal.	It is considered that these clauses enhance rights already set out in existing clear and appropriate procedures, thereby further protecting the accused's existing right to a fair trial.
As above	Article 7 (no punishment without law) provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.	Since these clauses do not alter the substantive criminal law offences or penalties, it is not considered that any Convention compliance issues arise.
As above	Article 8 (right to respect for private and family life) is a qualified right and is subject to important exceptions for measures which are (i) "in accordance with the law", and (ii) "necessary in a democratic society in the interests of ... public safety ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights ... of others."	As these Clauses strengthen the rights of the child regarding bail, it is considered that they will provide additional protections, having regard to Article 8.

Custody on Sentencing

9. Place of detention following sentence

10. Powers to sentence child to detention: amendment

11. Powers to sentence child to detention: removal

12. Youth custody and supervision orders

CLAUSE(S)/ SCHEDULE(S)	WHICH RIGHTS ARE POTENTIALLY ENGAGED	ASSESSMENT
Clauses 9-12 Schedule 3	Deprivation of liberty is permissible under Article 5 (right to liberty and security) in certain circumstances. Article 5(1)(a) permits detention of a person after conviction by a competent court.	<p>Clauses 9-11 largely deal with amendments to the location that the sentence is to be served (in the case of a child, that is a JJC). Therefore, it has already been determined by a judge that a custodial sentence is appropriate.</p> <p>Clause 12 deals with a new sentencing option for those who have been found guilty of an offence by the Court. The new sentencing option includes an element of detention, which would result in a deprivation of liberty, alongside supervised liberty.</p> <p>Even when there is a breach of the supervision element, the period of detention cannot be any longer than that originally determined appropriate by the court.</p>
As above	Article 6 (right to a fair trial) provides that everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal.	We are satisfied that the accused's right to a fair trial is protected.

As above	<p>Article 7 (no punishment without law) provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.</p>	<p>Whilst there will be a retrospective application of the penalty in some circumstances, the penalty will always be for a criminal offence that existed at the time and the penalty imposed will not be to the detriment of the accused.</p> <p>The two new offences (created under new Article 38C) will not be retrospective.</p>
As above	<p>The imposition of a supervision requirement potentially engages Article 8 (right to respect for family and private life).</p>	<p>Such supervision requirements are directed at the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others. Curfew and monitoring arrangements are already enshrined in statute under Chapter 5 of Part 2 of the Criminal Justice (Northern Ireland) Order 2008 and are considered to be lawful. These provisions simply extend those provisions to the new YCSOs.</p>

Custody on Remand and Committal

- 13. Place of detention following remand in custody
- 14. Remand in custody exceeding three months
- 15. Consideration of time spent on remand in custody
- 16. Place of detention in custody for contempt of court
- 17. Removal of powers to remand or commit a child to custody

Supplementary

- 18. Transitional provisions and savings
- 19. Minor and consequential amendments

CLAUSE(S)/ SCHEDULE(S)	WHICH RIGHTS ARE POTENTIALLY ENGAGED	ASSESSMENT
Clauses 13-17	Article 5 (right to liberty and security) has been considered.	<p>Clauses 13 deals with the location that the remand or committal to custody is to be served (a JJC). In the case where the offender has been convicted, it has already been determined by a judge that the remand to custody is appropriate, and these provisions are stating where the sentence is to be carried out. Clause 13 also ensures that a child will be detained in a JJC, away from adults.</p> <p>Clause 14 provides additional safeguards to the child in that the Judge is required to consider the likely period that the custodial sentence would be (if the person was convicted) and also whether the period in remand would exceed that period. The Judge is also required to state in court their reasoning for concluding that a period of remand over three months is appropriate.</p>

As above	Article 6 (right to a fair trial) provides that everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal.	We are content that the accused's right to a fair trial is protected by the court.
Clauses 18	It is not considered that any Convention compliance issues arise.	N/A
Clause 19	Article 7 (no punishment without law) provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.	The transitional arrangements ensure that a person will not be subject to a heavier penalty than the one that was available at the time that the offence was committed.
As above	Article 8 (right to respect for family and private life) was considered in respect of the amendments to the Rehabilitation of Offenders (NI) Order 1978.	Should the rehabilitation period for a Youth Custody and Supervision Order not be included within this amendment, the period for rehabilitation would fall under the general sentence rehabilitation period and would be significantly longer.

PART 3

USE OF LIVE LINKS

20. Interviews: use of live links

21. Detention: use of live links

CLAUSE(S)/ SCHEDULE(S)	WHICH RIGHTS ARE POTENTIALLY ENGAGED	ASSESSMENT
Clauses 20-21	Article 5 (right to liberty and security) and Article 6 (right to a fair trial) have been considered.	<p>These clauses do not create a new offence but provide for the use of live links during the process of the authorisation of extending the period of pre-charge detention at a police station, and, for police interviews to be conducted via live link.</p> <p>PACE NI provides well established and very significant procedural safeguards protecting the rights of a person detained in a police station in Northern Ireland.</p> <p>Clause 21 makes provision for the use of live link technology to facilitate processes under PACE NI (functions of extending pre-charge detention by the police and Magistrates' Court) to be conducted remotely, in certain circumstances, subject to a number of safeguards. The safeguards provided for ensure that the use of live link at any stage is only possible when certain conditions are met. With regard to the functions of extending pre-charge detention, live link may only be used if a custody officer considers that the use of the live link is appropriate, and, the arrested person has had advice from a solicitor on the use of the live link, and, the appropriate consent to the use of the live link has been given.</p>

		<p>With regard to the functions of extending pre-charge detention by a magistrates' court, live link may only be used if a custody officer considers that the use of a live link for that purpose is appropriate, and, the person to whom the complaint relates has had legal advice on the use of the live link, and, the appropriate consent to the use of the live link has been given, and, it is not contrary to the interests of justice to give the direction. In both cases, extensive procedural safeguards are extended to ensure that the mandatory "appropriate consent" by the person detained includes provision for consent by children and vulnerable adults which draw on existing well established procedural safeguards. Further the provision of legal advice is a mandatory requirement before a live link may be authorised in each case.</p> <p>Clause 20 makes provision to enable remote interviewing using live link so that a police officer can interview a suspect from a different location. As above, significant safeguards are provided under the provisions of PACE NI and the codes of practice. Hence, the same well established procedural safeguards that apply to 'in person' interviews are extended to apply to live link interviews.</p>
As above	<p>Article 14 (prohibition of discrimination) provides that Convention rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. It is not a free-standing right. For Article 14 to be relied on another community right must be activated (but not necessarily breached). Age, disability and language could constitute "other status" for the purpose of Article 14 of the Convention in the context of police detention.</p>	<p>These clauses include very significant procedural safeguards that protect the rights of every person detained in the police station, protecting against any potential discrimination contrary to Article 14, further and in addition to the well-established framework of protections in PACE NI and the Codes of Practice.</p>

	<p>Article 14 may also be engaged in relation to vulnerable adults in police detention. Discrimination contrary to Article 14 may arise where States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different.</p>	
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PART 4

ADMINISTRATION OF JUSTICE

Functions Relating to the Police

22. Delegation of functions of the Policing Board

23. Removal of requirement to audit Performance Plan etc

CLAUSE(S)/ SCHEDULE(S)	WHICH RIGHTS ARE POTENTIALLY ENGAGED	ASSESSMENT
Clause 22	It is not considered that any Convention compliance issues arise.	N/A
Clause 23	It is not considered that any Convention compliance issues arise.	N/A

Criminal Proceedings

24. Consent for prosecution in cases of conspiracy to commit offence outside Northern Ireland

25. Death of a child or vulnerable adult: limitation of power to “No Bill” alternative charge

26. Examination in criminal proceedings through intermediary

CLAUSE(S)/ SCHEDULE(S)	WHICH RIGHTS ARE POTENTIALLY ENGAGED	ASSESSMENT
Clause 24	It is not considered that any Convention compliance issues arise.	N/A
Clause 25	Article 5 (right to liberty and security), Article 6 (right to a fair trial) and Article 7 (no punishment without law) have been considered.	<p>The amendment made to section 7 of the Domestic Violence, Crime and Victims Act 2004 -</p> <ul style="list-style-type: none"> • relates only to the already existing “No Bill” procedure and address a lacuna in the existing law which has been commented on the court. The entry of “No Bill” in criminal proceedings is a matter for the Judge; • it does not create any new offences; and • it is not retrospective in its application.
Clause 26	Article 6 (right to a fair trial) has been considered.	<p>The effect of this clause is to extend already existing legislative provision in the Criminal Evidence (Northern Ireland) Order 199 which allows for the assistance of an intermediary or interpreter for an accused in criminal proceedings.</p> <p>It allows an accused to receive the assistance of an interpreter or intermediary where the court is satisfied that the accused’s ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by the accused’s level of intellectual ability or social functioning and that such assistance will ensure the accused receives a fair trial.</p>

Legal aid: Charges and Taxation

27. Legal aid charges to be registrable in the statutory charges register

28. Restriction on ordering taxation of legal aid costs

CLAUSE(S)/ SCHEDULE(S)	WHICH RIGHTS ARE POTENTIALLY ENGAGED	ASSESSMENT
Clause 27	Article 8 (right to respect for private and family life) has been considered.	This amendment does not alter the substance of the Legal Aid statutory charge, or the Assisted Person's obligation to the legal aid fund.
Clause 28	Article 6 (right to a fair trial) has been considered.	This clause does not affect any existing access to legal aid, nor does it change the existing remuneration rates. Any Remuneration Order that replaces the taxation procedure must comply with the statutory criteria set out in the Access to Justice (NI) Order 2003.

Criminal Records Certificates

29. Automatic review of certain criminal records certificates

CLAUSE(S)/ SCHEDULE(S)	WHICH RIGHTS ARE POTENTIALLY ENGAGED	ASSESSMENT
Clause 29	Article 5 (right to liberty and security) provides that everyone has the right to liberty and security of person. No one should be deprived of liberty except in accordance with the law.	This clause does not create a new offence.
As above	Article 6 (right to a fair trial) has been considered.	This clause does not interfere with the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal.
As above	Article 7 (no punishment without law) provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.	It is considered there is no compliance issue in respect of these provisions.
As above	Article 8 (right to respect for private and family life) has been considered.	This clause extends the scope of the filtering scheme by widening the criteria for when a certificate must be referred for automatic review by the Independent Reviewer (IR) of certain information that may be disclosed on criminal records certificates. The IR provides an important safeguard to ensure that there is a fair and proportionate balance struck between the needs of public protection and the rights of the person requesting the certificate.

Court Security

30. Security at buildings used for courts and tribunals etc

CLAUSE(S)/ SCHEDULE(S)	WHICH RIGHTS ARE POTENTIALLY ENGAGED	ASSESSMENT
Clause 30	It is not considered that any Convention compliance issues arise.	N/A

PART 5

FINAL PROVISIONS

31. Further provision

32. Interpretation

33. Commencement

34. Short title

CLAUSE(S)/ SCHEDULE(S)	WHICH RIGHTS ARE POTENTIALLY ENGAGED	ASSESSMENT
Clauses 31-34	It is not considered that any Convention compliance issues arise.	N/A



Department of
Justice

www.justice-ni.gov.uk

**THE USE OF LIVE LINKS FOR POLICE DETENTION/INTERVIEWS - A
CONSULTATION**

SUMMARY OF RESPONSES

JUNE 2020

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1. Introduction
2. Summary of consultation responses
3. Conclusion and way forward

1. INTRODUCTION

1.1. This document provides a summary of responses to the targeted consultation carried out between 20 April and 1 June 2020 on proposals for the use of live links for police detention/interviews. This introduction sets out a high level indication of some of the key issues identified in the consultation responses. Fuller detail on responses to each of the 4 consultation questions can be accessed in Section 2 of the report.

1.2. This was a targeted consultation with emails issued to 54 stakeholder organisations. Provision was made for the consultation to be made available in alternative formats but no requests of this nature were received.

1.3. The proposals were subject to an initial Equality Screening which, following feedback from the Equality Commission Northern Ireland (ECNI), concluded that a full Equality Impact Assessment was not required. Whilst the proposals will apply equally to all individuals who are detained in custody, a number of groups were identified as being minimally impacted by the proposals and mitigating actions were included in the proposals.

1.4. The Department also undertook a Legal Aid Impact Screening which, following feedback from the Legal Services Agency, concluded that the proposals would cause minimal impact in this area.

1.5. The Department received substantive responses from 10 organisations (in alphabetical order):

Consultation Respondents (in alphabetical order)
Campbell & Co Solicitors
Children's Law Centre (CLC)
Include Youth
Law Society Northern Ireland (LSNI)
MindWise
Northern Ireland Human Rights Commission (NIHRC)
Northern Ireland Policing Board (NIPB)
Peter Dornan & Co Solicitors
Police Federation NI (PFNI)
Superintendents' Association Northern Ireland (SANI)

Policy Background

1.6. Delivering an effective justice system is a key priority for the Department. The use of technology is important in that work and the Department is keen to facilitate the use of live links in as wide a range of circumstances as is appropriate.

1.7. Live link services have already operated for a number of years in a range of court processes including in court for preliminary hearings; certain sentencing and appeal hearings; for the giving of evidence by vulnerable witnesses, defendants and appellants; and between courts and hospitals in certain types of case. The prisons and courts regularly use live links for remand hearings.

1.8. The aim of the Department's proposals is to introduce live links into other areas of the justice system to provide more efficient services with less delay.

1.9. The consultation sought the views of key stakeholders and other interested parties regarding proposals to amend the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE). The proposed amendments would enable videoconferencing technology referred to as 'live links' to be used by the PSNI for a number of custody functions. These functions include the extension of detention by both the PSNI and the courts and police interviews with a suspect. The Department also proposed using this legislative opportunity to make some minor amendments within PACE to replace any references to 'video-conferencing' with 'live link'. This would ensure the continuity of terminology throughout.

1.10. PACE is the primary legislation that provides the framework and powers for the PSNI to combat crime. The legislation is supported by Codes of Practice (The Codes) A-H. There is a statutory requirement in Article 65 of PACE which requires the issue of Codes of Practice to set out in more detail the powers that the PSNI have, and the associated rights and safeguards for suspects and the public in Northern Ireland. Throughout this document we will refer to proposed changes to the Codes and it should be noted that any amendments to the Codes will be subject to a separate consultation as set out in Article 66 of PACE.

1.11. The consultation asked respondents to consider the use of live link technology for:

- reviews of police detention – update of terminology;
- extension of PACE detention by a superintendent;
- extension of PACE detention by the courts; and, □ interviews of a detained person.

Reviews of police detention – update of terminology

1.12. Article 41 of PACE states that a review of the continued detention of each person held in police custody in connection with the investigation of an offence shall be carried out periodically by a review officer.

1.13. Currently Article 41A of PACE permits a review of detention by an inspector to be carried out by means of a telephone conversation. Article 46A of PACE permits the use of video-conferencing facilities to be used if available, instead of a telephone conversation, but is subject to the introduction of regulations. It is proposed to update the terminology in the legislation to replace the term 'video-conferencing' with 'live

link'. The Department plans to introduce regulations that will facilitate the use of live links for inspector reviews of detention.

Summary of Views

1.14. There were no objections in relation to the proposal to upgrade the terminology in the legislation to replace the term 'video-conferencing' with 'live link', with only one organisation commenting on this proposal specifically, and in neutral terms.

Extension of PACE detention by a superintendent or above by live link

1.15. It was proposed that a superintendent could undertake a review of the extension of PACE detention via live link. This would allow reviews from across Northern Ireland to be considered by the superintendent, regardless of their location, without excessive travel. Operationally, reviews could be dealt with speedily, whilst managing competing demands, to create a more efficient police system. The amendments will ensure that the existing safeguards in place for face to face superintendent extensions will apply to live link reviews.

Summary of Views

1.16. The majority of respondents were supportive of the use of live links for the extension of PACE detention by a superintendent or above. Additional comments focussed on the need to ensure that the introduction of the proposals would not undermine the rights of the detainee and the need for appropriate safeguards, including legal representation. All of the respondents with the exception of SANI supported the safeguarding measures proposed for superintendent extensions of detention.

Extension of PACE detention by the courts by live link

1.17. It was proposed that magistrates' court proceedings relating to applications for an extension of detention could be heard via live link. The use of live link would allow a detainee to participate in the proceedings before the court via video link without the need for the detainee, their legal representation, or the officer to travel to the court in person, therefore making efficiencies on travel and escort costs. The amendments will ensure that the existing safeguards in place for face to face hearings will apply to live link hearings.

Summary of Views

1.18. Again, the majority of respondents were supportive of the use of live links for extension of PACE detention by the courts. Similar to those of superintendent

extension of detention, most additional comments focussed on ensuring that the rights of the detainee would not be undermined during the process. However, some respondents commented on a lack of trained staff and appropriate technology.

Police Interviews

1.19. It was proposed to amend Article 40 of PACE to enable the PSNI, if necessary, to carry out a police interview via live link. Occasionally, it may be necessary for a detained suspect to be interviewed by an officer who is at a station some distance away.

1.20. These amendments would ensure that compliance with PACE and the Codes is appropriately transferred when the interview is carried out using live link technology. The proposed amendments would ensure that the existing safeguards in the Codes applicable to the conduct and recording of 'face to face' interviews will apply to live link interviews.

Summary of Views

1.21. The proposal around police interviews via live link is one that raised the most commentary with nearly half of respondents objecting to its use. Comments focussed primarily on the ability of the detainee to understand the proceedings and participate effectively as well as the necessary safeguards to ensure that the vulnerabilities of children and young people, people with disabilities, people experiencing mental illhealth, older people, those who require an interpreter, along with other vulnerable groups are considered on a case by case basis.

General Comments

1.22. In addition to the comments made on the above individual live links proposals, there were a number of additional comments with concerns expressed more generally about the use of live links and, in particular, how they might operate where children and vulnerable people were concerned. A full summary of responses follows in section 2.

2. SUMMARY OF CONSULTATION RESPONSES

Comments in support

2.1. Generally, respondents were supportive of the overall aims of the policy, recognising the benefits in making the justice system less prone to delay, more efficient and effective; for example, the use of live links may result in the reduction in time waiting for a superintendent to attend in person. Some respondents suggested that the proposals may help to reduce delay, travel and waiting times.

Responses to individual consultation questions

2.2. The following information outlines the key points raised regarding each of the specific policy proposals on the use of live links. It should be noted that some of the issues raised may relate to more than one question/area - therefore, in order to ensure that we accurately reflect the issues raised, there may be some duplication in the content.

Police detention – updating terminology

2.3. There were no objections in relation to the proposal to upgrade the terminology in the legislation to replace the term ‘video-conferencing’ with ‘live link’, with only one organisation commenting on this proposal specifically, and in neutral terms.

The use of live link technology for extension of PACE detention

2.4. The majority of respondents agreed to the use of live links for the extension of PACE detention by a superintendent or above and recognised the proposals would result in a faster justice system.

2.5. All of the respondents with the exception of SANI supported the safeguarding measures proposed for superintendent extensions of detention.

2.6. SANI contended that the use of live link should be the default position and only in exceptional circumstances (and with the prior approval of the Superintendent) should the review be carried out in person. SANI asserted that the ‘in person’ stipulation is disproportionate and is an extremely inefficient use of senior officers’ time.

2.7. SANI also expressed concern about the introduction of the additional safeguards that focus on the custody officer authorising the use of live link. Their view asserts that the PACE review is, in and of itself, a safeguard to ensure that the detainee has had access to their rights, that representations can be made and that their continued detention is well considered and justified.

2.8. Whilst there were no other specific concerns raised, a number of respondents raised a general concern regarding the issue of consent, both in terms of who might provide consent and the ability of children and those with vulnerabilities to understand what they were consenting to. The consent of the detainee is one of the safeguards proposed before the use of live links is considered.

2.9. MindWise, who are a registered charity responsible for the provision of the Northern Ireland Appropriate Adult Scheme, asserted that consideration should be given to extending the role of the appropriate adult to include providing consent for the use of live links in the absence of a parent or guardian. MindWise provided examples of where the lack of a consent role has proven problematic in the past.

2.10. A secondary concern around consent was in relation the detainee's ability to understand what they were agreeing to when providing consent to the use of live links for extension of detention. These concerns are mitigated by additional safeguards being proposed for the statutory Codes of Practice, which will place a responsibility on the custody officer to ensure that regard is given to the detainee's age, ability to communicate effectively and any vulnerabilities they may have.

Department's Response

2.11. The Department acknowledges the response from SANI in relation to the default use of live links and their comments in relation to the additional safeguards. However, it has been overwhelmingly evident that the additional safeguards that will be introduced are welcomed by all other respondents and are a key element of ensuring that all aspects are considered on a case by case basis, before an instruction to use live link is issued. This includes age, vulnerability, mental vulnerability, disability and the detainee's ability to understand and communicate effectively during a live link interview. It is, therefore, our view that it would be impossible to progress the proposals without these additional safeguards in place.

2.12. The issue of consent is defined in statute under Article 53(1) of PACE and as such the MindWise proposal outlined in paragraph 2.10 cannot be considered for inclusion without further consultation to amend the wider primary legislation. The Department will consider this issue further when undertaking the next general review of PACE NI.

2.13. It is anticipated that the secondary issue of consent will be addressed by amendments to PACE Code C in line with England and Wales. Their purpose is to ensure that the detainee has had the advice of their legal representative on the use of live links and, for juveniles and the mentally vulnerable, that the appropriate adult is present and able to advise before the detainee provides consent.

The use of live link technology for extension of PACE detention by the courts

2.14. The majority of respondents agreed to the use of live links for the extension of PACE detention by the courts with similar comments to those of superintendent extensions regarding support for the safeguards to be introduced.

2.15. Some specific comments focussed on the continued right of the detainee to be advised by and consult in private with their legal representative. Additionally, one respondent commented that, in relation to court extensions, there should be an independent assessment by the magistrate of whether it is in the interest of justice for a person to attend a hearing via live link.

2.16. Whilst the issue of technology was raised a number of times in general comments, one respondent specifically raised the issue of the current use of live links in court and asserted that there was neither appropriate technology nor adequately trained PSNI/court staff.

Department's Response

2.17. The concerns raised in relation to safeguards will be addressed by the proposed amendments to the legislation and anticipated future amendments to PACE Code C. The current rights of the detainee to legal advice, as set out at section 6 of PACE Code C, will not be impacted by these proposals.

2.18. With regards to the concerns raised about technology, the Department is unaware of a systematic failing in the live link equipment. In relation to court hearings the Department and the Northern Ireland Courts and Tribunals Service maintain a full information technology service to address any difficulties or hitches that may occur. In any event, if a live link facility were to fail during the course of a hearing, statutory requirements are in place to ensure the speedy resumption of the case. Amendments to PACE Code C will also include safeguards to test and demonstrate the use of live links before it is used.

2.19. The PSNI has not yet introduced their new IT equipment and the Department will request that the Chief Constable arranges for rigorous user acceptance testing, including compatibility tests with the courts systems, before any services arising from the current proposals are launched.

2.20. The Department accepts the importance of confidentiality in live link services and already has the appropriate standard of service in place in courts. As the current proposals develop it will ensure that this level of service is continued.

The use of live link technology for police interviews with suspects

2.21. Almost half of respondents objected to the use of live links for police interviews. Comments focussed primarily on the ability of the detainee to understand the proceedings and participate effectively. Comments also covered concerns regarding the provision of necessary safeguards to ensure that the vulnerabilities of children and young people, disabled people, people experiencing mental ill-health, older people, those who require an interpreter, along with other vulnerable groups are considered on a case by case basis.

2.22. A number of respondents commented on the inability of interviewers to engage fully with the detainee, to build rapport and the possible misinterpretation of non-verbal cues and body language if the interviewer was not present with the detainee. Additionally, several respondents commented on possible issues around the presentation of exhibits/evidence via a live link interview.

2.23. Several respondents were expressly concerned about the impact of the proposals on children and young people, with others focussing on multiple other vulnerable groups.

2.24. Some of the responses appeared to indicate that the respondent assumed that the solicitor would be joining the interviews remotely. They claimed that extending the use of live links technology to solicitors would greatly impact the proceedings in a negative manner. Others that were supportive of the proposals for the use of live link for police interviews suggested that consideration must be given to allow other participants, such as solicitors, to partake in an interview and consultation process via live link technology.

Department's Response

2.25. The Department acknowledges the concerns raised in relation to this proposal. It is anticipated that the safeguards introduced as an amendment to the PACE Codes of Practice before commencement of the live links proposals, will go some way in alleviating many of these concerns.

2.26. Regarding the issue of solicitors joining the interview remotely, this was not within the scope of this consultation.

General Comments

2.27. In addition to the responses regarding specific proposals, a number of additional comments were made in relation to the overall use of live links, and specifically in terms of the use of live links in children's and young person's matters.

2.28. In terms of general concerns, these were around the use of live links for those who fall into vulnerable categories, including the young, the elderly, people with disabilities and the mentally vulnerable. Comments focussed on ensuring that the policies did not impinge upon, or weaken, a person's human rights. An additional concern was the ability of the individual to understand, participate fully and communicate effectively in the proceedings.

2.29. Caution was expressed by the children's and young people's groups that administrative ease or financial expediency must never take precedence over the rights of often vulnerable children or young people. Children's groups were also concerned about the potential impact the system could have on children and young people participation in proceedings claiming that children and young people in particular could see their interaction and understanding of proceedings hindered.

2.30. The Children's Law Centre cautioned that live links are fundamentally unsuitable for proceedings involving children or young people. Assertions were made around breaches of Article 6 of the ECHR and Articles 3.12 and 40 of the United Nations Conventions of the Rights of the Child (UNCRC).

Department's Response

2.31. Regarding concerns of all individuals, including children and young people, and their ability to understand, fully participate and effectively communicate during the use of live links, the Department has outlined as part of the consultation that the consent of the individual will be one of the main safeguards introduced.

2.32. The Department plans to make revisions to PACE Code C that will introduce provisions that ensure decisions taken regarding the use of live links will require the custody officer to give consideration to multiple factors which include, age, vulnerability, disability, mental vulnerability and the individuals ability to effectively communicate via live link. Additionally, the individual will have had to receive advice from their legal representative and provided consent to its use. The amendments to the Codes, which will be subject to consultation, should go some way to alleviating the concerns raised.

2.33. In terms of the comments around human rights and the assertions that proposals were breaching a number of those rights, live links are already long established as being European Convention on Human Rights (ECHR) compliant and are already operating in a number of areas including in courts and prisons as outlined in paragraph 1.8 of this document.

2.34. The Department recognises the importance of particular care where live links are used in children's cases, but does not agree that live link facilities are breaches of the Convention nor that they are intrinsically unsuitable to the process. Live links are well established in statute and in operation and, in terms of young people, already exist between, for example, the Juvenile Justice Centre and courts.

2.35. All of the current rights of the detainee under PACE will remain, including the right to legal advice either in person, in writing or by telephone. A live link would not, therefore, diminish the rights of the detainee or their ability to instruct their legal representative to make representations on their behalf.

2.36. The Department recognises the importance of informed consent and support, particularly where young people are concerned. It is for that reason that these safeguards, including consent and the presence of an appropriate adult, will be introduced into the Codes of Practice. This, in addition to the aspects that the custody officer must give consideration to, should ensure that the individual understands the use of live link and their part in the proceedings, and informed consent is provided.

Equality Screening

2.37. A number of organisations suggested that the Department's equality screening had not been sufficiently comprehensive or fully taken account of the impact on or views of the groups affected by this policy. Some respondents, felt that the Department should have undertaken a full Equality Impact Assessment (EQIA) on the policy.

Department's Response

2.38. The Department notes the comments made on its equality screening conclusions. However, following feedback from the Equality Commission Northern Ireland (ECNI) during the consultation process, the Department have now reviewed their equality screening assessment and have amended the screening conclusion to – “Screened out with Mitigating Actions”. Whilst the proposals will apply equally to all individuals who are detained in custody, a number of groups were identified as being minimally impacted by the proposals - however, mitigating actions were included in the proposals.

Review

2.39. The Northern Ireland Policing Board (NIPB), Include Youth and the Northern Ireland Human Rights Commission have all recommended that a review should be completed following the introduction of the new provisions.

Department's Response

2.40. This is a reasonable request. In addition to the responsibility of Criminal Justice Inspection Northern Ireland to review custody processes, the Department will recommend that the Chief Constable initiates a review of the processes 12-18 months after introduction. The Department notes that the NIPB have suggested that the Custody Visitors scheme may be able to assist by adding an independent element to review. Additional feedback from MindWise could also be sought as they are working with young people and vulnerable adults in the custody environment.

3. CONCLUSION AND WAY FORWARD

3.1 Consultation responses were received from a broad range of organisations, from those within the policing family to those dealing with the rights of the vulnerable. The Department wishes to thank all respondents to the consultation for their invaluable input.

3.2 Respondents have generally welcomed the proposals while stressing that the rights, voice and participation of the detainee must be maintained at all times. The Department has noted the issues and complexities raised in the consultation.

3.3 The Department now proposes to prepare legislation for the proposals outlined in the consultation document for the use of live links as follows:

- Reviews of Police Detention – update of terminology;
- extension of PACE detention by a superintendent;
- extension of PACE detention by the courts; and,
- interviews of a detained person.

It is hoped that the new legislation will be included as part of the Justice (Miscellaneous Provisions) Bill that is currently being prepared by the Department.

3.4 The Minister of Justice will share this summary with the Justice Committee and seek Executive approval to the new legislation in due course.

3.5 If you require any further information in relation to the consultation or this document please contact:

E-mail: PPHR.Consultations@justice-ni.x.gsi.gov.uk

DELEGATED POWERS MEMORANDUM

JUSTICE BILL

INTRODUCTION

1. The Bill gives effect to the Justice Minister's desire to improve the operation and effectiveness of the justice system.
2. At its core are four key aims, which are:
 - a) to amend retention periods for DNA and biometric material;
 - b) to make changes to bail and custody arrangements for children and young people;
 - c) to improve services for victims and witnesses; and
 - d) to improve the efficiency and effectiveness of aspects of the justice system.
3. The Bill is made up of 34 clauses over five parts and four Schedules. The Bill amends some previous legislation as well as creating new freestanding provisions.
4. Part 1 and Schedules 1 and 2 of the Bill relate to the retention of Biometric Data.
5. Part 1 of the Bill provides for the development of a framework for the retention of biometric material, including DNA and fingerprints, so that such material will no longer be kept indefinitely and will be subject to review. This Part also allows for the appointment of a new commissioner to oversee the new framework and the review process.
6. The changes respond to rulings by the European Court of Human Rights and seek to strike a careful balance between protecting an individual's right to privacy and protecting the public through making effective use of biometric material in the prevention and detection of crime.

7. Part 2 of the Bill is concerned with bail and custody arrangements for children.
8. Part 2 amends existing legislative provisions governing bail, remand and custody for children in order to enhance compliance with Article 37 of the United Nations Convention on the Rights of the Child (UNCRC).
9. It strengthens the existing presumption of bail for children by introducing unconditional bail as standard and requiring that any conditions that are applied should be proportionate and necessary.
10. It also introduces specific conditions which must be met before a child can be remanded into custody and, finally, it places in statute the current arrangements for separating children and adults in custodial settings.
11. Part 3 of the Bill relates to Use of Live Links.
12. Part 3 concerns the use of live links for police detention and interviews so that these can be dealt with more swiftly and efficiently, bringing Northern Ireland into line with existing practice in England & Wales.
13. Part 4 of the Bill relates to the Administration of Justice.
14. This part of the Bill contains a number of miscellaneous provisions relating to policing, criminal proceedings, legal aid, criminal record certificates and court security to fix errors and close lacunas in the parent legislation and address court judgments that the Department must have regard to.
15. Finally, Part 5 of the Bill deals with Final Provisions, relating to supplementary regulations; Interpretation; Commencement; and the Short Title of the Bill

16. The Bill contains the following provisions for delegated legislation:

Clause	Title	Assembly Procedure
1(1)	Retention of non-consensual material: overview and interpretation (new Article 63E-(11))	Draft laid before and approved by resolution of the Assembly.
1(1)	Persons arrested for or charged with a qualifying offence (new Article 63G(4)(b))	Draft laid before and approved by resolution of the Assembly.
1(1)	Persons subject to notification requirements (new Article 63R-(4))	Draft laid before and approved by resolution of the Assembly.
1(1)	Review of retention where material retained for investigations (new Article 63T-(5))	Draft laid before and approved by resolution of the Assembly.
1(1)	Review of retention where material retained for long term (new Article 63U-(1))	Draft laid before and approved by resolution of the Assembly.
3(10)	Retention of fingerprints and DNA profiles: supplementary	Draft laid before and approved by resolution of the Assembly.
12(2)	Supervision under a youth custody and supervision order (new Article 38D-(6))	Negative resolution
27	Legal aid charges to be registrable in the statutory charges register (new paragraph 54(7))	Negative resolution
31	Further Provision	Draft laid before and approved by resolution of the Assembly if they amend any text of primary legislation. Negative resolution otherwise.
33	Commencement	Not subject to any Assembly procedure.

DELEGATED PROVISIONS

PART 1: RETENTION OF FINGERPRINTS AND DNA PROFILES

Clause 1(1): Retention of non-consensual material: overview and interpretation (new Article 63E (11) of PACE(NI))

Purpose of delegated legislation

17. A power to allow the Department to amend the nomenclature of disposals specified in Article 63E(10), which includes references to a caution, an informed warning and a restorative caution.

Reason for delegated legislation

18. The Department considers it prudent to include this power to enable terminology to be readily updated, should this be required in the future. This would ensure that there is clarity on the retention periods that should apply.

Assembly control

19. By virtue of Clause 2(b) and Schedule 2, Part 2, paragraph 11 the regulations at new Article 63E(11) cannot be made unless laid in draft before, and approved by, the Assembly. Since this delegated power allows amendments to be made to the primary provision, the Department considers it appropriate that any exercise of the power should be the subject of Assembly debate.

Clause 1(1): Persons arrested for or charged with a qualifying offence (new Article 63G (4)(b) of PACE(NI))

Purpose of delegated legislation

20. A power to allow the Department to provide in regulations for an application to be made to the Biometrics Commissioner to retain an individual's biometric material for a period of 3 years if a person has

been arrested, but not charged, for a qualifying offence and if any prescribed circumstances apply.

21. The regulations will specify the circumstances that have to be met to enable such applications to be considered and approved by the Commissioner. The regulations may also set out the procedures to be followed in making any such application.

Reason for delegated legislation

22. The Department considers that it is appropriate to set out the prescribed circumstances in regulations, given the detailed nature of the specified circumstances to be complied with as part of any application being brought by the Chief Constable, and to enable any updates or amendments to be made more efficiently if considered necessary in the future.

Assembly control

23. By virtue of Clause 2(b) and Schedule 2, Part 2, paragraph 11 the regulations at new Article 63G(4)(b) cannot be made unless laid in draft before, and approved by, the Assembly.
24. This level of scrutiny is considered appropriate due to the sensitive nature of the provision.

Clause 1(1): Persons subject to notification requirements (new Article 63R (4) of PACE(NI))

Purpose of delegated legislation

25. A power to allow the Department to amend the list of notification requirements set out in new Article 63R(3), which includes references to notification requirements under the Sexual Offences Act 2003, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, the Justice Act (Northern Ireland) 2015 and the Protection from Stalking Act (Northern Ireland) 2022.

Reason for delegated legislation

26. The Department considers that it would be prudent to create a power for it to amend the list of notification requirements currently listed under Article 63R(3) to enable any other relevant provision to be brought within scope, should this be required at a future stage (e.g. if a new notification requirement is introduced).

Assembly control

27. By virtue of Clause 2(b) and Schedule 2, Part 2, paragraph 11 the regulations at new Article 63U(4) cannot be made unless laid in draft before, and approved by, the Assembly. Since this delegated power allows amendments to be made to primary legislation, the Department considers it appropriate that any exercise of the power should be the subject of Assembly debate.

Clause 1(1): Review of retention where material retained for investigations (new Article 63T(5) of PACE(NI))

Purpose of delegated legislation

28. A power to allow the Department to make regulations to set out additional factors that the Chief Constable must consider, or factors that he may or must not consider in conducting a review.
29. Article 63T requires the Chief Constable to review every five years the need to continue retain material held under Article 63F (Retention of Article 63B material pending investigation or proceedings). This is intended to provide a safeguard to ensure that material is not held any longer than is necessary. The Department is required to consult such persons as it considers appropriate before making regulations.

Reason for delegated legislation

30. The Department considers that there may be a need to specify additional factors to be considered by the Chief Constable when reviewing material retained for investigations.

31. It is considered appropriate to make this provision in regulations to enable any factors to be easily added or amended if required in the future.

Assembly control

32. By virtue of Clause 2(b) and Schedule 2, Part 2, paragraph 11 the regulations at new Article 63T(5) cannot be made unless laid in draft before, and approved by, the Assembly. This level of scrutiny is considered appropriate due to the sensitive and detailed nature of the subject matter to be covered in the regulations.

Clause 1(1): Review of retention where material retained for long term (new Article 63U(1) of PACE(NI))

Purpose of delegated legislation

33. A power to allow the Department to make regulations to require the Chief Constable to review the retention of long term retained material. Article 63U(3)-(5) sets out the key elements the regulations should cover, including conferring a right of appeal against a determination made on a review, and the procedure for such appeals. The Department is required under Article 63U(8) to consult such persons as it considers appropriate before making regulations.

Reason for delegated legislation

34. The new statutory requirement for the Chief Constable to review the need to continue to retain long term retained material, i.e. retained for 25/50/75 years, is intended to provide an important safeguard, thereby ensuring that material is not held any longer than is necessary.
35. The Department considers it appropriate to set out the detailed arrangements for the review mechanism in regulations. This will provide clarity on the requirements of the process and enable the detail to be more easily amended if considered necessary in the future.

Assembly control

36. By virtue of Clause 2(b) and Schedule 2, Part 2, paragraph 11 the regulations at new Article 63U(1) cannot be made unless laid in draft before, and approved by, the Assembly. This level of scrutiny is considered appropriate due to the sensitive and detailed nature of the subject matter to be covered in the regulations.

Clause 3(10): Retention of fingerprints and DNA profiles: supplementary

Purpose of delegated legislation

37. A power to allow the Department to make regulations to make such further transitional, transitory or saving provisions necessary to bring the provisions of Part 1 of the Bill into operation.

Reason for delegated legislation

38. The Bill makes wide ranging and complex changes to the law including existing primary legislation.
39. While every effort has been made to identify consequential amendments and transitional provisions, it is possible that not all of the consequences have been identified. This provision is intended to enable any such consequential and other provisions to be made, to ensure that the provisions of the Bill operate as the Assembly intended.

Assembly control

40. To the extent that any regulations under this Clause amends or repeals primary legislation, it will be laid before, and approved by resolution of, the Assembly.
41. This level of scrutiny is considered appropriate due to the detailed nature of the subject matter to be covered in the regulations and because they enable amendments to be made to primary legislation.
42. Otherwise, any regulations under Clause 3(10) will be subject to negative resolution.

Clause 12(2): Supervision under a youth custody and supervision order (new Article 38D(7) of the Criminal Justice (Children) (Northern Ireland) Order 1998)

Purpose of delegated legislation

43. A power to allow the Department to make rules regarding the supervision of an offender subject to a youth custody and supervision order.

Reason for delegated legislation

44. This delegated power will enable the Department, in due course, to establish rules which regulate the community supervision element of the new youth custody and supervision order. Such rules will be informed by the operation of the new order in practice and are therefore more suited to subordinate legislation. They will not, however, deal with any matter which is regulated by rules established under Article 44 of the Criminal Justice (Northern Ireland) Order 2008, which relates to electronic monitoring and curfew requirements under the order.

Assembly control

45. Rules developed under new Article 36D(6) will be subject to the negative resolution procedure in the Assembly. The Department considers that this level of scrutiny is appropriate given that any such rules will not impact on the statutory framework or operation of the new order and are simply intended to enable appropriate supervision of individuals, based on operational experience.

Clause 27(7) Legal Aid charges to be registerable in the statutory charges register

Purpose of delegated legislation

46. A power to allow the Department to specify a relevant day for any other description of property than that set out in paragraph (6) of Clause 27.

Reason for delegated legislation

47. Clause 27 will provide for the registration of charges on the statutory charges register from the date of Royal Assent for charges over property meeting the conditions stipulated at Clause 27(6), i.e. charges over property recovered for or by a person in land over which they have a legal estate.
48. Clause 27(7) is a commencement provision that empowers the Department to extend the effect of Clause 27 to enable charges other than those described at Clause 27(6) also to be registered in the same way.
49. This construction achieves two aims. It limits the immediate effect of Clause 27 to only those charges specifically expected by the Department to require registration in this way, so avoiding any unintended application to other types of charge.
50. It also permits the subsequent application of the provision to other categories of charge not currently identified as requiring registration, should the need arise, without the need for further primary legislation.

Assembly control

51. This power is subject to the negative resolution process.

PART 5: FINAL PROVISIONS

Clause 31: Further provision

Purpose of Delegated Legislation

52. Clause 31 confers power on the Department of Justice to bring forward regulations to make such supplementary, incidental, consequential, transitional, transitory or saving provision as it considers necessary for the purposes of the Bill.

Reason for Delegated Legislation

53. The Bill makes wide ranging and complex changes to the law including existing primary legislation.
54. While every effort has been made to identify consequential amendments and transitional provisions, it is possible that not all of the consequences have been identified. This provision is intended to enable any such consequential and other provisions to be made, to ensure that the provisions of the Bill operate as the Assembly intended.

Assembly Control

55. To the extent that an order under this Clause amends or repeals primary legislation, it will be laid before, and approved by resolution of, the Assembly. Otherwise, an order under Clause 31 will be subject to negative resolution.

Clause 33: Commencement

Purpose of Delegated Legislation

56. The power in Clause 33(3) has been provided to enable certain provisions of the Bill to be brought into operation by Commencement Order made by the Department.

Reason for Delegated Legislation

57. The delegated power has been provided to enable provisions of the Bill to be brought into force on a date determined by the Department, when appropriate administrative and other arrangements have been made.

Assembly Control

58. By virtue of clause 33, as is usual with commencement orders, these are not subject to any Assembly procedure.

Commented [BR1]: Agree. This does not deal with any matters of substance or content of legislation. Accordingly, there is no reason for any Assembly scrutiny.



**Northern Ireland Assembly
Committee for Justice**

David Graham
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30 September 2024

Dear David

Justice Bill

At the meeting on 26 September 2024, the Committee heard evidence on the Justice Bill from a number of Departmental Officials.

Officials agreed to provide further information in relation to a range of issues arising from the evidence session: these included:

- A timeline of the sequencing for when the Committee can expect the text for the consideration of Amendments to the Bill.
- An explanation of the rationale for the powers contained within Clause 31 (the Henry VIII Powers), including justification for the inclusion of these powers.
- Information on the extent and nature of any additional screening that has taken place in relation to compliance with the European Convention on Human Rights, following the recent judgment *In Re Mediahuis and others' applications for judicial review*¹. In addition, information on the extent to which the Department is satisfied that all provisions are fully compliant and that any retention of biometric data through the Bill's provisions will continue to be compliant in the future.
- Data from the Youth Justice Agency on the number of children remanded and given custodial sentences.

¹ [2024] NIKB 45

- An update on the “bail fostering” pilot and further information on the number of cases and any further rollout plans.
- A summary of the consultation responses on the Live Links amendment, broken down if possible by case type, and further, the cost of any training for the PSNI associated with a further roll out of Live Links.
- An update on the costs associated with Legal Aid Funding and an explanation as to why Solicitors are required to itemise their costs but Barristers do not have to do so.
- A copy of the Delegated Powers Memorandum as soon as possible.
- Consideration of providing a Keeling Schedule for the Bill.

The Committee Chair also asked for an urgent written explanation of Clause 25 of the Justice Bill and would be grateful if this could be provided prior to the Second Stage.

The committee would be grateful if you could provide further information on all other matters in writing.

I would appreciate this information at your earliest convenience.

Yours sincerely

Caroline Perry

Caroline Perry
Clerk to the Committee for Justice