

Minister's Office Block B,
Castle Buildings
Stormont Estate
Ballymiscaw
Belfast
BT4 3SG

FROM: DAVID GRAHAM
DATE: 16 DECEMBER 2024
TO: CAROLINE PERRY

Business Area: Criminal Justice Policy and Legislation Division
Access to Justice Directorate
Issue: Justice Bill Amendments – Supporting Briefing for the Oral Briefing Session
Restrictions: None.
Action Required: The Committee is asked to note this written briefing ahead of the oral briefing on 16 January 2025
Officials Attending: Lisa Boal (Biometrics Amendments)
Veronica Holland (Restorative Justice Amendments)
Katie Taylor/Debbie Corry (Serious Organised Crime Amendments)
Brian Thomson (AccessNI filtering Amendments)

Introduction

This briefing provides an overview of the four sets of proposed Justice Bill amendments due to be discussed at the oral briefing session on 16 January 2025.

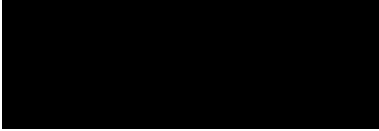
We have provided background on each of the policy areas, along with further detail on what the amendments aim to do and why they are needed in the form of separate appendices to this letter, as follows:

- Appendix A – Biometrics
- Appendix B – Restorative Justice



- Appendix C – Serious Organised Crime
- Appendix D – AccessNI filtering.

I trust this information is helpful to Committee Members ahead of the oral briefing.



**DAVID GRAHAM
DALO**

Biometrics Amendments

Background

1. Part 1 of the Justice Bill provides for a new DNA and fingerprint retention and destruction framework for Northern Ireland that will comply with both the S and Marper v UK and Gaughran v UK European Court of Human Rights judgments.
2. The new framework involves 75/50/25 maximum retention periods, based on the nature / seriousness of the offence, the age of the person concerned, criminal history, and whether the person is convicted or not convicted. The new framework will also support the Data Protection Act 2018 by setting out in regulations a requirement to review long-term retained DNA and fingerprint material. The 75/50/25 retention periods are maximum retention periods, with the review mechanism providing an appropriate safeguard to ensure that long-term retained material is subject to a scheduled review to assess the continuing need to retain DNA and fingerprints in each individual case.
3. The Justice Bill also contains provision for the appointment and functions of the Northern Ireland Commissioner for the Retention of Biometric Material, which will provide important independent oversight of the new retention system.

Amendments

4. Officials alongside PSNI colleagues have been involved in stress testing the DNA and fingerprints provisions contained in the Justice Bill. During this process, a small number of issues were identified that would benefit from some adjustment to improve the operation of the new framework and ensure they operate as intended.
5. There were also a small number of additional provisions that were identified that would assist with the operation of the new framework.

6. Details of the amendments are as follows:

- Replacement of the term 'reported' – Part 6 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE NI) contains multiple references to a person being 'charged with an offence or informed that he will be reported for such an offence'.

Being 'reported for an offence' is commonly understood within the Northern Ireland criminal justice system to mean the stage at which a police officer informs a person that they are being reported to the Public Prosecution Service (PPS) in respect of an offence i.e. a police file will be submitted to the PPS for a decision, following a criminal investigation.

The PSNI highlighted to the Department the ambiguity regarding the references to 'informed that he will be reported' with differing interpretations being used for the taking of DNA and fingerprints and the retention of DNA and fingerprints. The PSNI sought legal advice which indicated that it is only at the point where a complaint is laid, once the PPS make a decision to prosecute, that a person is deemed to have been informed that they are to be reported.

The Department also sought legal advice and following consideration of this advice it is deemed necessary to provide legislative clarity by removing the references to 'reported' and instead providing that a person being 'charged with an offence' includes 'where a complaint has been laid against the person'. This amendment would broadly reflect similar changes that were made in England and Wales by virtue of Section 18(3) of the Protection of Freedoms Act 2012.¹

- Community Based Restorative Justice Schemes – new Article 63P provides for a 5-year retention period for any person who has completed a community-based restorative justice scheme (CBRJ) for an offence. Following the finalising of the provisions, it became apparent that stand-alone CBRJs are available for both adults and under 18s and that they are directed by the PPS and considered to be on a similar level as a caution.

An amendment is, therefore, being made to distinguish that stand-alone CBRJs attract the same retention period as a caution for adults (i.e. 75 years or 25 years) and 5 years for an under 18.

¹ The explanatory notes provide that the definition of persons who are 'charged with an offence' includes those who are informed that they will be reported to a magistrates' court for the issue of a summons to begin criminal proceedings

- Grace period for DNA and fingerprints being held for individuals under investigation – New Article 63E provides for a grace period of 14 days for DNA and fingerprints being held for individuals under investigation. A grace period is necessary 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. It became apparent that 14 days would be insufficient if the PSNI needed to make an application to the Biometrics Commissioner under Article 63G.

The PSNI need time to consider the outcome of the investigation, consider the risk to the public of deleting the DNA and fingerprints and submit an application to the Biometrics Commissioner for continued retention. Therefore, an amendment is being made to Article 63E(5) to increase the grace period from 14 days to 28 days which is considered to be a more appropriate period to ensure that the PSNI have sufficient time to lawfully process the deletion of the DNA and fingerprints or submit an application.

- Applications to the NI Biometrics Commissioner – new Article 63G provides that the PSNI can apply to the Biometrics Commissioner for a 3-year retention period for individuals arrested but not charged and where prescribed circumstances apply (regulations setting out the prescribed circumstances will require the approval of the Assembly).

An adjustment is being made to Article 63G to ensure that the DNA and fingerprints of an individual arrested but not charged can be lawfully retained by the PSNI until the outcome of the application to the Biometrics Commissioner is known.

- The power to photograph individuals in specified circumstances at a police station – Article 64A of PACE NI provides the PSNI with a power to take photographs from a person who has been detained in a police station and/or arrested.

Without amendments being made to the legislation, if a person is arrested, charged or convicted without a photograph being taken, or has been interviewed by way of a voluntary interview (the PSNI are increasingly using voluntary interviews in investigations), there is no power in the legislation for the PSNI to require a person to attend a police station at a later stage for a photograph to be taken. If an amendment is not made it could result in opportunities to take

photographs being missed. The proposed amendment will put photographs on the same footing as fingerprints and DNA in terms of recall powers.

- The power to specify a date of attendance at a police station for the taking of DNA samples, fingerprints and photographs – Individuals who are arrested and taken to a custody suite can have DNA samples, fingerprints and a photograph taken straight away. If this is not done, or if the person has been interviewed by means of a voluntary interview, PACE NI (upon commencement of the new legislative framework) contains a recall power to require those who have been arrested, charged or convicted to attend a police station to have fingerprints, non-intimate samples and a photograph (see amendment 5 above) taken. Without amendments being made, the legislation states that a person can be required to attend a police station at a particular time but not a particular day, only any day within a seven-day period, which would be operationally difficult for the PSNI to resource.

A similar amendment was made to the legislative framework in England and Wales following feedback from their police forces that it was difficult to always have an officer or member of staff available just in case an individual attended on foot of the recall notice, which resulted in opportunities to take fingerprints, DNA and photographs being missed. The proposed amendment will enable the PSNI to stipulate a specific date and time to require people to attend the relevant police station and to better manage this process.

Restorative Justice Amendments

Background

1. The current legislative powers governing the ability to add, remove or inspect schemes from a register of organisations formally accredited to deliver restorative justice services in Northern Ireland are contained in Section 43 of the Justice and Security (Northern Ireland) Act 2007. These powers and functions were overlooked, in error, on the devolution of policing and justice, and remain with the Secretary of State for Northern Ireland. Whilst an Agency arrangement was put in place to enable the Minister of Justice to accredit restorative justice organisations, the position needs to be regularised, and the powers formally transferred.

Effect of new provision

2. The new provision corrects this oversight and transfers the relevant powers from Westminster to the Department of Justice. Secretary of State agreement was received for this transfer in 2019 when the issue was first identified, and a draft clause was originally included in the final Justice Bill of the last mandate. However, when the decision was made to replace that mixed content Bill with the more narrowly focused Justice (Sex Offences and Trafficking Victims) Bill, the restorative justice provisions were removed, and this is the first opportunity there has been to revisit the issue.
3. In the intervening period, there have been a number of developments in restorative justice. In particular, the Department's first Adult Restorative Justice Strategy was published in 2022, and, as one of the first actions associated with it, the Minister commissioned a comprehensive review of the 2007 Government Protocol which governs the formal use of restorative justice as part of the justice system. The Protocol establishes a framework for relations between statutory justice organisations and providers of restorative services, including how referrals are made for individuals to undertake restorative work as part of justice disposal. It also sets out the process by which community schemes could achieve formal accreditation to undertake such work.

4. As a result of the review, a revised Government Protocol, published in July 2023, introduced new accreditation requirements for organisations and – for the first time – for individuals who wish to provide restorative services to the justice system. It also changed the role played by CJINI, removing their responsibility for a pre-accreditation inspection of organisations and instead giving them an inspection role post-accreditation as part of their statutory criminal justice responsibilities. In light of these recent developments, we have taken the opportunity to revise and ‘future proof’ the legislation to ensure the new Protocol and accreditation requirements are reflected.
5. As a result, the draft Clause is significantly different to the original Section 43:
 - First, and as per the original intention, all current references to the Secretary of State in Section 43 are being replaced by references to the Department of Justice.
 - To reflect changes in line with the revised Protocol, the provisions:
 - widen accreditation beyond Community Based Restorative Justice organisations to include other non-statutory organisations and independent restorative practitioners;
 - ensure CJINI are no longer the sole body with the power to submit a report to the Department, which may result in the removal from the register of accredited organisations and individuals; and
 - remove CJINI’s pre-accreditation inspection role. However, they will continue to be able to inspect a registered organisation or individual as part of their statutory functions within the criminal justice system.
 - allow the Department to determine the necessary requirements for accreditation purposes, with examples of what these might be;
 - allow the Department to set an expiration date on accreditation, unless a re-application for accreditation is received; and
 - provide for appeals against accreditation decisions by the Department.

6. The draft clause will provide a permanent legislative solution, as agreed with the Secretary of State, which will remove the need for the temporary administrative Agency arrangements and allow the Minister of Justice to take decisions around the accreditation of organisations and individuals providing restorative justice services.

7. It will also enable wider provision of restorative justice services to the criminal justice system by allowing a greater range of non-statutory organisations and independent restorative practitioners to become accredited, once the new process is finalised.

Serious Organised Crime Amendments

Background

1. In May 2016, the Report of the Fresh Start Panel on the Disbandment of Paramilitary Groups in Northern Ireland identified that there is no specific legislation for prosecuting an individual who directs or is involved in criminal conduct linked to serious organised crime in Northern Ireland. As an outcome of the Tackling Paramilitary Activity, Criminality and Organised Crime Executive Action Plan, the Department reviewed the specific organised crime legislation in other jurisdictions and considered options in respect of their potential application in Northern Ireland. A consultation on proposals was carried out from July 2020 to October 2020.
2. Since October 2020, the policy proposals have been updated as a result of responses to the consultation and engagement with operational partners and neighbouring jurisdictions. The draft clauses do not significantly diverge from the original intention and reflect an all-encompassing approach that aligns closely with neighbouring jurisdictions, in particular where there is a shared border and known to be cross border co-operation in criminal activity.

Detail

3. Offenders are currently pursued through the justice system based on the specific offences they have committed. The new legislation will provide a more effective approach to addressing the specific issue of involvement in serious organised crime. The clauses define what constitutes an organised crime group and set out what it means to 'participate in the criminal activities of an organised crime group'. It also creates two new offences:
 - participating in the criminal activities of an organised crime group; and
 - directing the criminal activities of an organised crime group.

4. Criminal activities mean activities that constitute an offence in Northern Ireland and are punishable on conviction on indictment with imprisonment for a term of four years or more.
5. The participating offence will apply to any acts that are carried out by a person which they know, or have reasonable cause to suspect, will facilitate or is likely to facilitate an organised crime group to carry on criminal activities, i.e. those who are actively involved on the ground by doing acts, and those who are less actively involved, and do acts often at a distance. A person found guilty of this offence is liable on conviction on indictment to imprisonment for a term not exceeding 10 years, or to a fine, or to both.
6. The directing offence will layer onto the participating offence i.e. offenders will have to meet the criteria of the participating offence, with an additional element of directing. A person found guilty of this offence is liable on conviction on indictment to imprisonment for a term not exceeding 14 years, or to a fine, or to both. It is anticipated that this offence will be reserved for those at the top of organised crime groups who direct the criminal activities of an organised crime group. We do not anticipate that this offence will be used frequently; however, its existence means that law enforcement has the capabilities to target those engaged in organised crime at all levels.
7. The clauses also include a power to enable the Department to amend the definition of criminal activities, if required, subject to the draft affirmative resolution procedure. This is intended to future-proof the legislation, with any amendment requiring the approval of the Assembly. The clauses also include the adoption of other related and consequential changes.

Intended benefits

8. The new legislation is intended to demonstrate the importance and commitment of law enforcement to specifically tackle the issue of serious organised crime by ensuring that they have additional legislative tools available. It also sends a strong



message that there are no individuals who are deemed to be untouchable from their criminality; and ensures that there is scope for sentences to more accurately reflect the nature and seriousness of the crime.

9. This legislation is also intended to bring us in line with neighbouring jurisdictions that already have specific offences in place and may also contribute to the reduction of organised crime via deterrence. Overall, the new legislation will provide reassurance to both the public and the community that addressing serious organised crime is a priority for law enforcement, therefore enhancing public confidence.

AccessNI Filtering Amendments

Background

1. The Department undertook a Review of the List of Specified Offences in 2023.

The proposals emanating from the review were the subject of a Public Consultation in summer 2023. These provisions implement the proposals within the Review by streamlining arrangements for the maintenance and ease of understanding of the existing list of 1,200+ serious and violent offences that cannot be filtered from AccessNI Standard and Enhanced disclosures. In doing so, these provisions provide clarity on this aspect of the AccessNI Filtering Scheme and replace the current complex legislative provisions with less complicated arrangements.

Amendments

2. These legislative amendments will:-

- Remove the offences as currently listed in s113A(6D) of the Police Act 1997 (“the Police Act”) and instead set these offences out in a more detailed and user-friendly format in a new Schedule [Schedule 8ZA] to the Police Act.
- Provide powers for amendment of this new Schedule via the negative resolution procedure.
- For the purposes of criminal record disclosures, clarify the definition of Relevant Matter (s113A(6) of the Police Act 1997) in respect of Sentences of Imprisonment, Sentences of Service Detention and Custodial Orders.
- Require the Department to consult with DOH, PSNI and the Independent Reviewer when amending the List of Non-Filterable Offences.
- Amend Article 1A of the Rehabilitation of Offenders (Exceptions) Order (NI) 1979 [which replicates the list of offences in the Police Act] to reference the new list of offences at Schedule 8ZA of the Police Act.

Need for Change

3. Taking each of the above legislative amendments in turn, these changes will:-

- Provide for a more user-friendly, easier to navigate list of offences that will include abbreviated offence descriptors alongside the relevant legislative provisions. In so doing, the list will reduce in size by:-
 - Amalgamating into a single line the existing entries that relate to the same article / section of an Act or Order;
 - Deleting duplicate entries on the published list; and
 - Applying the ‘corresponding offence rule’ to reduce the frequency of the same offence in NI and GB being unnecessarily repeated on the List.
- Streamline the process for maintaining the list of offences going forward by removing the need for amendments to be made via affirmative resolution (requiring an Assembly debate, etc). The negative resolution procedure will still require a Statutory Rule to be approved by the Justice Committee.
- Provide clarification regarding disposals that result in a period of detention (including those suspended) and, as a result, are therefore excluded from the Filtering Scheme.
- Along with AccessNI, ensure that relevant / key authorities with policy and legislative responsibility for criminal record disclosure will consider all future additions, deletions and amendments to the list of offences and, in so doing, ensure that public protection and safeguarding measures are not adversely impacted.
- Ensure that the reciprocal list of offences in the 1979 Exceptions Order remains consistent with that in the new Schedule 8ZA of the Police Act without the need for a separate Statutory Rule each time the list of offences is amended.

4. As indicated above, the approach throughout this exercise has been to re-present the content of s113A(6D) of the Police Act in a more easily understood manner, and without any substantive change. However, in considering the content of the new

Schedule 8ZA a single inconsistency has been noted. Under the existing provisions the Disqualification of Caring for Children Regulations (NI) 1996 requires that the following entry is included in the current List, namely “Any offence involving injury or threat of injury to another person”. It is noted that this is a wide-ranging entry and is inconsistent with how other offences are required to be treated on the List. For example, a conviction for Common Assault is likely to be as the result of (a minor) injury or threat of injury, and current filtering practice is that such convictions are only retained on disclosure checks if the offence was committed against a person u18. Common Assault is on the current list of offences by virtue of offences in Schedule 1 to the Children and Young Persons Act (Northern Ireland) 1968, which stipulates the u18 condition - therein lies the anomaly with the offence highlighted above, as it is not possible to apply both rules in considering a single offence, i.e. the offence is either filtered or not.

5. Due to above, and from an operational perspective, AccessNI has been applying the filtering rules using the offence descriptors on the PNC and cross-referencing against those on the Specified List. This is considered a proportionate approach, particularly as recorded convictions generally reflect the most serious aspects of offences (eg GBH, aggravated burglary, dangerous driving, etc) and will be captured on the List accordingly.
6. It has been noted that the AccessNI approach could result in the (remote) possibility of a conviction being wrongly filtered from a disclosure certificate and that this could lead to a challenge (albeit unlikely that an individual would challenge the removal of a conviction from their disclosure certificate). In any event, and in keeping with AccessNI practice, the case would be referred to police who could then include explanatory information as appropriate, thereby reducing further the risk of an erroneous disclosure certificate.
7. In drafting these clauses, based on legal advice the Department has concluded that that the legislative provisions should reflect operational practice and that the

opportunity should be taken now to correct this position by omitting the above entry from the List on the basis that:-

- the reference is arguably unclear;
 - it is not in keeping with current practice (which may leave AccessNI open to challenge); and
 - it does not accord with the policy in this area (filtering non-serious offences), or indeed the accompanying caselaw.
8. Based on legal advice the Department is now proposing the omission of the above entry from the List, namely “Any offence involving injury or threat of injury to another person”. The Department recognises that this is a departure from the approach taken throughout this review in not seeking any substantive change but considers it appropriate (for the reasons above) in this single and exceptional circumstance.