

FROM THE OFFICE OF THE JUSTICE MINISTER

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Our ref: JCP\25\59
11 March 2025

Dear Kathy,

JUSTICE BILL: HUMAN RIGHTS/LEGISLATIVE COMPETENCE IN RELATION TO DEPARTMENTAL AMENDMENTS

The Department, in consultation with the Departmental Solicitor's Office, has considered the European Convention on Human Rights (ECHR) implications along with the legislative competence of the planned Departmental amendments to the Justice Bill.

To assist the Committee in its scrutiny of the amendments we have attached the table at **Appendix A**. The table sets out information on the extent to which the Department is satisfied that all proposed amendments to the Justice Bill are fully compliant with the ECHR.

Section 6 of the Northern Ireland Act 1998 sets out the legislative competence of the Northern Ireland Assembly. The Committee will be aware that legislative competence is considered before a Bill (or an amendment to a Bill) is introduced into the Assembly.

The Department has carefully considered the ECHR implications of the proposed amendments to the Bill 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.

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We have provided in the table below a high-level overview of the Convention rights we consider to have been engaged by the various amendments and an explanation of how what is contained in those amendments provides for compatibility with ECHR. We hope this will assist the Committee in undertaking its own scrutiny regarding ECHR compatibility.

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 – ECHR Table

ECHR TABLE (PLANNED AMENDMENTS)**Biometrics - Amendments to clauses**

| CLAUSE(S)/ SCHEDULE(S) | WHICH RIGHTS ARE POTENTIALLY ENGAGED | ASSESSMENT |
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| Clause 33 | n/a | |
| Schedule 2 “informed that he would be reported” | 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). | This amendment clarifies exactly when a person is reported and removes any risk of arbitrariness from this process. The assessment is that this amendment does not conflict with any convention rights |
| Clause 1 “Community- based restorative justice scheme” | n/a | |
| Clause 1 “retention of material while application to Commissioner is being contemplated / considered” | 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) . 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 | Paragraphs 4A and 6A have been inserted to clarify the right of the Chief Constable to retain material whilst an application to the NI Biometric Commissioner is being either contemplated or considered. The assessment is that this amendment does not conflict with any convention rights. |



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| | <p>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>Schedule 1 “power to photograph certain persons at a police station”</p> | <p>Article 8 (right to respect for private and family life) has been considered.</p> | <p>The inserted provision amends Police and Criminal Evidence (Northern Ireland) Order 1989 to strengthen the protections for individuals with respect to the conditions under which a person’s photograph may be taken at a Police station.</p> <p>The assessment is that this amendment does not conflict with any convention rights.</p> |

**Clause 19 - Organised Crime Groups**

| CLAUSE(S)/ SCHEDULE(S) | WHICH RIGHTS ARE POTENTIALLY ENGAGED | ASSESSMENT |
|---------------------------------------|---|---|
| Clauses 19A-19D Schedule 5 | 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. | Detention will be lawful, following conviction by a competent Court. |
| | 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. |
| | 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 two new offences will not be retrospective. |
| | Article 8 (right to respect for private and family life) is a qualified right of privacy, 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 | The new offences are directed at the legitimate aims of the prevention of crime and the protection of the rights and freedoms of others. Accordingly, any interference with Article 8 is a proportionate means of |

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| | of health or morals, or for the protection of the rights ... of others.” | achieving the legitimate aim. |
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Clause 23A - Repeal of public order offences

| CLAUSE(S)/ SCHEDULE(S) | WHICH RIGHTS ARE POTENTIALLY ENGAGED | ASSESSMENT |
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| Clause 23A | N/A | There are no new offences created. Two historical offences of very considerable vintage are repealed by these Clauses. There are no convention compliance concerns arising. |



Clause 26A - Administration of Justice

| CLAUSE(S)/SCHEDULE(S) | WHICH RIGHTS ARE POTENTIALLY ENGAGED | ASSESSEMENT |
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| Clause 26 A Accredited providers of restorative justice services. | None | Not applicable as no convention rights engaged. |



Clauses 28A - Rehabilitation periods for convictions

| CLAUSE(S)/ SCHEDULE(S) | WHICH RIGHTS ARE POTENTIALLY ENGAGED | ASSESSMENT |
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| <p>Clause 28A</p> | <p>Clause 28A amends rehabilitation periods set under the Rehabilitation of Offenders (Northern Ireland) Order 1978 (“the 1978 Order”).</p> | <p>Clause 28A(2) sees a change in the length of certain sentences which are currently excluded from rehabilitation under Article 6(1) of the 1978 Order, from terms exceeding 30 months to terms exceeding 10 years.</p> <p>Clause 28A(3)-(13) set rehabilitation periods for sentences that are currently excluded from rehabilitation and shorten the rehabilitation period of sentences in Article 6 of the 1978 Order.</p> |
| | <p>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.”</p> | <p>The setting of rehabilitation periods engages Article 8 ECHR. Rehabilitation periods are already a feature of the justice system under the 1978 Order. The purpose of the rehabilitation periods to strike a balance between the right of the individual affected, the protection of society and maintaining confidence in the justice system. The changes made</p> |



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| <p>Clause 28B</p> | <p>Clause 28B inserts new Article 7A into the 1978 Order to provide the Department of Justice with a regulation making power to allow for applications for rehabilitation for certain offences currently excluded from rehabilitation under Article 6(1) of the 1978 Order. This engages Article 8 ECHR.</p> | <p>to the rehabilitation periods by this amendment is as a result of consultation by the Department and careful analysis of response. Any interference with Article 8 is in pursuit of this legitimate aim.</p> <p>The sentences that will be able to have application for rehabilitation made are sentences which exceed 10 years. Other sentences in Article 6(1) (life sentences and those with a public protection element) will remain excluded from rehabilitation. These sentences remain excluded from rehabilitation in order to protect society and maintain confidence in the justice system. Any interference with Article 8 ECHR in this respect of proportionate and pursuit of this legitimate aim.</p> |
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Clause 29A – Matters to be included in criminal record certificates

| CLAUSE(S)/SCHEDULE(S) | WHICH RIGHTS ARE POTENTIALLY ENGAGED | ASSESSMENT |
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| <p>Clause 29A amends section 113A of the Police Act 1997. Section 113A makes provision in relation to criminal record certificates.</p> <p>The amendments made by clause 29A –</p> <ul style="list-style-type: none"> ○ Insert new Schedule 8ZA into the Police Act 1997 which replaces subsection (6D). The Schedule takes the offences in subsection (6D) and lists them within named categories in a more structured and detailed manner. These are offences that cannot be filtered from a criminal record certificate; ○ Allow Schedule 8ZA to be amended by way | <p>Article 8 ECHR (right to private and family life) – this relates to the disclosure of criminal record certificates.</p> | <p>The amendments made by this clause provide for additional structure in the legislation in respect of the filtering scheme for criminal records certificates and the information that must be contained in those certificates.</p> <p>The filtering scheme under the Police Act was considered by the UK Supreme Court in <u>Gallagher’s Application [2019] UK SC 3</u> and was found to be lawful under Article 8 ECHR (with two exceptions which are not relevant to this amendment and have either been amended previously or are being amended in this Bill (see clause 29)).</p> |



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| <p>Order subject to the negative resolution procedure before the Assembly; and</p> <ul style="list-style-type: none">○ Insert a more structured definition of “relevant offence” in section 113A(6) replacing the existing definition. | | |
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(PROVISIONS FOR THE USE OF AUDIO AND VIDEO CONFERENCING WITHIN COURTS AND TRIBUNALS OTHER THAN THE INDUSTRIAL TRIBUNAL AND FAIR EMPLOYMENT TRIBUNAL)

| CLAUSE(S)/ SCHEDULE(S) | WHICH RIGHTS ARE POTENTIALLY ENGAGED | ASSESSMENT |
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| Clausej901-j910 | 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). | These clauses include specific procedural protection to reduce the risk unlawful detention in the unlikely event of technical failure of a live link where, for example, an accused person (P) is on remand, and the court is considering the continuance of that detention. In these limited circumstances, if the court is satisfied that it is not reasonably practicable to bring P to the court before P ceases to be held in custody or detained in hospital, clause [j901A (3)-(6)] permits the court to proceed. |
| | 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. | Art. 6 provides for a fair and public hearing. These clauses are drafted to ensure live links are only used when in the interests of justice as determined by the independent expert judiciary. |

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| | | <p>They include very considerable protections to ensure that any live link direction does not impact on the fairness of a trial in every circumstance. Every decision to make a live link is subject to a determination by the expert judicial decision maker who must apply the interests of justice test. This test must be made in a s.6 Human Rights Act 1998 (HRA) compliant manner, having due regard, inter alia, to the relevant case law of the ECtHR. Every decision must also have regard to the views of the parties and participants and any guidance issued by the independent Lady Chief Justice (LCJ) or Presiding Coroner. Such guidance may be updated at any time at the discretion of the LCJ or Presiding Coroner.</p> <p>The reasons for any decision to refuse an application for a live link direction, or for variation or rescission of a direction, must be stated openly and, if in the magistrates' court, reasons entered in the Order Book. This provides further procedural protection and enhanced transparency.</p> <p>The clauses contain specific</p> |
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| | | <p>safeguard to take account of a person who may have an impairment of hearing or eyesight. This protection is embedded in the definition of live link and hence will apply in every case without exception.</p> <p>These clauses make no changes to the considerable body of existing protections for vulnerable participants, children, those requiring interpreters etc. – they are in addition to, not instead of all existing “special measures” directions and other procedural protections which will continue to operate alongside the new procedurally robust interest of justice test.</p> <p>With regard to “public” element of Art. 6, these clauses include wide procedural protection to ensure public access to the courts. The new limited transmission and broadcast directions will ensure that proceedings can remain “public” in nature, even, for example, in a future public health emergency, where the physical courts / public galleries may be closed to the public or where access is limited.</p> |
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| | <p>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.”</p> | <p>Two new offences are created prohibiting unauthorised recording or transmission of an image or sound transmitted through a live link, limited transmission or broadcast, and, prohibiting unauthorised recording or transmission of an image or sound of a person participating through a live link, or a person viewing or listening to a limited transmission.</p> <p>These offences could apply, for example, when a person is participating in proceedings, or, viewing or listening to a transmission / broadcast, in their own home. The offences contain clear and explicit defences including of reasonable knowledge, are limited to exclude the more generally available “broadcast” provision to ensure it is not an offence to make an unauthorised recording or transmission of a person viewing a broadcast in any circumstance, and ensuring that it will only be such an offence, where the person being captured on the recording or transmission is subject to a limited transmission direction, which</p> |

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| | | <p>requires them to be known to the court, identified, and subject to the standard warnings re behaviour etc. that routinely issue from the courts.</p> <p>The offences are summary only, and, are proportionate, reasonable and necessary to maintain the solemnity and dignity of the courts and to ensure, for example, critical anonymity is preserved in cases involving vulnerable or intimidated victims or witnesses, and to reduce the risk of a threat of imminent serious harm or threat to live that could result from unauthorised recording or transmission.</p> <p>The offences mirror closely the intent and scope of the offenses covering the equivalent live link / remote proceedings provision in England and Wales (see s. 85A of the Courts Act 2003).</p> |
| | <p>Article 10 provides that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This</p> | <p>These clauses explicitly include “representative of the press” in the non-exhaustive list of participants for the purposes of a live link direction, ensuring there is no doubt that the important rights of the media to have access</p> |



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| | <p>Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.</p> | <p>to the courts are explicitly protected.</p> <p>This follows and continues the approach taken in the Coronavirus Act 2020 live link provisions at Schedule 27. As above, the decision whether to make a live link direction to a representative of the press is subject to the interests of justice test, which must be administered by the expert judiciary in a manner compliant with s.6 of the Human Rights Act 1998, having due regard, inter alia, to the relevant case law of the ECtHR.</p> <p>The reasons for any decision to refuse an application, like every other, must be stated openly and, if in the magistrates' court, reasons entered in the Order Book. This provides further procedural protection and enhanced transparency.</p> |
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