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Justice Bill

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The paper has been prepared to inform the Justice Committee's consideration of the Justice Bill which was introduced into the Assembly on 17 September 2024. The Bill contains 34 clauses and 4 schedules. It has four aims: to amend retention periods for DNA and biometric material; to make changes to bail and custody arrangements for children and young people; to improve services for victims and witnesses; and to improve the efficiency and effectiveness of aspects of the justice system.

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Executive Summary

The Justice Bill was introduced into the Assembly on 17 September 2024. It has four main aims which are to: amend retention periods for DNA and biometric material; make changes to bail and custody arrangements for children and young people; improve services for victims and witnesses; and improve the efficiency and effectiveness of aspects of the justice system.

Part 1 of the Justice Bill relates to the **retention of biometric data**.

- Currently, the legal framework allows for the indefinite retention of biometric materials, including DNA samples, profiles, fingerprints, and palm prints under Article 64 of the Police and Criminal Evidence (Northern Ireland) Order 1989.
- Different retention systems operate across the UK, with several databases holding biometric data, including the National DNA Database (NDNAD), the local Northern Ireland DNA database (NIDNADB), the National Fingerprint Database (IDENT1), and the PSNI Fingerprint Bureau.
- Two European Court of Human Rights judgments—*S & Marper v UK* (2008) and *Gaughran v UK* (2020)—highlighted that certain UK biometric retention policies contravened Article 8 (right to respect for private and family life).
- The Criminal Justice Act (NI) 2013 aimed to create a compliant retention regime, but implementation was delayed due to concerns about undermining investigations into unsolved Troubles-related deaths.
- The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 aims to address this, allowing biometric retention for use by the Independent Commission for Reconciliation and Information Recovery.
- Current arrangements for biometric retention and deletion are contained in a PSNI Interim Service Instruction from November 2023, outlining the role of the Biometric Ratification Committee.
- The Justice Bill introduces a ‘75/50/25-year model’ for retention based on age, severity of the offence, and the outcome of the case, replacing indefinite retention.
- The Bill does not clearly define ‘biometric data’ beyond fingerprints and DNA, and does not explicitly include custody photos. The detail of the review mechanism for long-term retained material will be established in future regulations.

- The Bill also contains provisions relating to a Northern Ireland Commissioner for the Retention of Biometric Material, responsible for reviewing existing and emerging biometric technologies used by law enforcement, including potential future technologies such as live facial recognition.

Part 2 of the Justice Bill covers provisions relating to **bail, remand and custody for children.**

- There are changes relating to police bail and court bail with amendments to the Police and Criminal Evidence (Northern Ireland) Order 1989 and Articles 12 and 13 of the Criminal Justice (Children) (NI) Order 1998. This aims to strengthen the existing presumption of bail for children and includes provisions which highlight that conditions must be proportionate and necessary.
- This part of the Bill also seeks to underpin arrangements relating to the separation of children and adults in custodial settings; it highlights the general principle that a child (under the age of 18) will only be held in a juvenile justice centre. The Bill also introduces a new youth custody and supervision order which replaces juvenile justice orders for children aged 14+ for less serious offences.
- The Department of Justice's Strategic Framework for Youth Justice 2022-2027 aligns with these legislative changes, emphasising that children should only be placed in custody as a last resort.
- More broadly, one of the key issues relating to children and young people in the criminal justice system is the Minimum Age of Criminal Responsibility which is currently set at age 10 in Northern Ireland as highlighted above. The Department of Justice consulted on raising the minimum age of criminal responsibility from age 10 to age 14 between October 2022 and December 2022. The results of the consultation showed clear support for increasing the minimum age to 14. This is not addressed in the Bill.

Part 3 of the Justice Bill relates to the **use of live links in police custody.**

- The Bill enables the PSNI to use live video links for various custody functions, including the extension of police detention, court extensions of detention, and suspect interviews. These changes build on existing legislation under the Police and Criminal Evidence (Northern Ireland) Order 1989.

- A Department of Justice consultation in 2020 found majority support for using live links for the extension of police detention, but there were concerns about using live links for suspect interviews. Objections centred on detainees' ability to understand proceedings and participate, particularly vulnerable individuals.

Part 4 of the Justice Bill covers a range of areas relating to the **administration of justice.**

- The Bill provides the Northern Ireland Policing Board with explicit delegation powers following the 2019 case of *McKee & Hughes v The Charity Commission for Northern Ireland*.
- It also removes the duty on the Comptroller & Auditor General to assess the Policing Board's performance plans, aligning Northern Ireland with England and Wales. The power to examine the Board's compliance with economy, efficiency, and effectiveness remains under Section 30 of the Police (Northern Ireland) Act 2000.
- Amendments to the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 correct a drafting error, transferring responsibility for consenting to conspiracies outside Northern Ireland from the Director of Public Prosecutions to the Advocate General for Northern Ireland.
- The Bill addresses a legal gap by amending Section 7 of the Domestic Violence, Crime and Victims Act 2004 to prevent a charge of murder or manslaughter from being "no billed" when linked to an offence of causing or allowing the death of a child or vulnerable adult.
- A technical amendment to Schedule 11 of the Land Registration Act (NI) 1970 clarifies that statutory charges under legal aid can be registered. The Department consulted on this in 2022 and effective communication with legal professionals on any changes will be important.
- Amendments to the Judicature (Northern Ireland) Act 1978 impose restrictions on the taxation of legal aid costs, anticipating the introduction of alternative remuneration methods. Possible issues include whether this will improve clarity, predictability, or delay payments to legal professionals and impact access to justice.

- Finally, the Bill updates Schedule 8A of the Police Act 1997 to comply with a 2019 Supreme Court ruling on the disclosure of non-court disposals for under-18s and extends Court Security Officer powers to all buildings where Tribunals sit.

Contents

Introduction

The Justice Bill was introduced into the Assembly on 17 September 2024. The accompanying Explanatory and Financial Memorandum produced by the Department of Justice states that it has four main aims which are to:

- Amend retention periods for DNA and biometric material;
- Make changes to bail and custody arrangements for children and young people;
- Improve services for victims and witnesses; and
- Improve the efficiency and effectiveness of aspects of the justice system.

Further amendments have been agreed by the Executive for development for planned inclusion in the Bill at the Consideration Stage. These are not included in the draft Bill or in the discussion contained in this paper as the text of any amendments is not yet available. However, these provisions will cover:

- Transferring the powers and functions contained in section 43 of the Justice and Security (Northern Ireland) Act 2007 from the Secretary of State to the Department of Justice to restart the accreditation process for organisations wishing to deliver Community Based Restorative Justice;
- Amending rehabilitation periods in the Rehabilitation of Offenders (NI) Order 1978 to shorten existing rehabilitation periods and to allow more convictions to be able to become spent;
- Facilitating the wider use of video and audio-conferencing systems (live links) in Criminal and Civil Courts and Tribunals to allow for the cessation of reliance on similar provisions in the Coronavirus Act 2020;
- Streamlining arrangements for the maintenance and ease of understanding of the existing list of over 1200 sexual and violent offences that cannot be filtered from disclosure certificates by AccessNI;
- New offences of directing and participating in serious organised crime;
- Repealing the Vagrancy Act 1824 and the Vagrancy (Ireland) Act 1847.

1 Biometric Data

1.1 Context

This section provides an overview of the current legislative and policy context for biometric data in Northern Ireland alongside acknowledging the different approaches to this complex issue taken in other jurisdictions. It will also seek to highlight some of the challenges and opportunities for the Committee to consider in an area which involves rapidly changing technology.

Part 1 of the Bill relates to retention periods for DNA and biometric material. Biometric data is defined in the UK General Data Protection Regulations 2018 (UK GDPR). The UK GDPR forms part of the data protection regime in the UK, together with the Data Protection Act 2018. Article 9(1) of the UK GDPR includes "*biometric data for the purpose of uniquely identifying a natural person*" within the list of special categories of personal data which are likely to be more sensitive. Other special categories covered within the UK GDPR include personal data revealing racial or ethnic origin, personal data revealing political opinions, personal data revealing religious or philosophical beliefs, personal data revealing trade union membership, genetic data, data concerning health, data concerning a person's sex life and data concerning a person's sexual orientation.

The UK GDPR further defines 'biometric data' in Article 4(14) as:

> "*personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic (fingerprint) data*".[1]

Biometric data is an evolving area but currently covers a broad range of materials, typically DNA, fingerprints and custody photographs in the context of policing. However, it is worth noting that custody photographs only become biometric if

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation) (Text with EEA relevance)

"*specific technical processing*" takes place where the data is then used "*for the purpose of uniquely identifying a natural person*".[2] Biometric data can also encompass new and emerging technologies, such as facial recognition software, which allow information about an individual's physical, physiological or behavioural characteristics to be used to establish the identity of an individual.

Biometric materials form a key part of the criminal justice process with academic literature in this area noting that "*DNA and fingerprint databases form the cornerstone of criminal investigative practices, providing police forces and national security agencies with a vital resource: a resource without which a significant number of cases could never be brought to trial*".[3] The importance of this material is also evident from the Forensic Information Databases (FIND) Strategy Board's Annual Report for 2022-2023 which highlighted that the overall DNA match rate (crime scene to subject) following the loading of a crime scene DNA profile was 64 per cent in 2022-23, a slight drop from 64.8 per cent in 2021-2022, in England and Wales.[4]

However, there is also a vital need to balance the public interest in collecting and retaining biometric samples to policing with individual citizen's rights; clear and transparent arrangements must ensure that any risks to civil liberties are weighed alongside the benefit that this data can bring. This relates specifically to the individual rights contained in Article 8 of the European Convention on Human Rights which provides overarching legal protections around ensuring respect for private and family life, home and correspondence.[5]

This is a qualified right meaning that the State can interfere with it in certain circumstances such as in the interests of national security and the prevention of crime. Furthermore, the State has a positive obligation to protect lives and prevent ill-treatment and, in this instance, the police store personal data in order to assist with the duty to prevent criminality and protect the public. However, a number of tests

[2] Information Commissioner's Office, The personal information results from specific technical processing

[3] K McGregor Richmond, 'Human Rights Compatibility of Biometric Data Retention on Shared UK Databases', *Criminal Law Review* (2022) 7, 545-561

[4] Home Office, Forensic Information Databases (FIND) Strategy Board's Annual Report for 2022-2023 (May 2024)

[5] Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8

must be satisfied for such an interference to be deemed lawful, including on the grounds of it being necessary in a democratic society, proportionate to the legitimate aim pursued and within the margin of appreciation granted to states.

Rulings from two cases at the European Court of Human Rights in 2008 and 2020 relating to the retention of biometric data highlighted that elements of the UK's biometric retention policies have contravened Article 8. These cases are explored further below but have helped to drive divergent approaches to this policy area which currently exist across the UK's jurisdictions.

McGregor Richmond notes that the landscape associated with biometrics across the UK is complex with a range of approaches currently taken as "*the management of biometric data within the UK has been characterised by an uneven process of development, traceable to diverging approaches, and the heterogeneous political contexts, subsisting within the UK's separate legal jurisdictions (England and Wales, Scotland, and Northern Ireland). The sporadic, and reflexive, evolution of biometric management - in response to both legal challenge and expert guidance - has thereby led to the emergence of an uneven legal and regulatory environment*".[6]

S and Marper v United Kingdom (2008)

This case saw the European Court of Human Rights consider the retention of fingerprint and DNA data of two people suspected but not convicted of offences in England and Wales. The court stated that the collection and retention of DNA from individuals charged with a recordable offence in England and Wales had been in accordance with the law and in pursuit of a legitimate aim. However, it was not found to be necessary in a democratic society as the "*blanket and indiscriminate*" power of retention, regardless of the nature or gravity of the offence, the absence of any time limit alongside the lack of independent review and restricted possibilities for acquitted individuals to have the data removed or materials destroyed were seen as contributing to the violation of Article 8.[7]

[6] K McGregor Richmond, 'Human Rights Compatibility of Biometric Data Retention on Shared UK Databases', *Criminal Law Review* (2022) 7, 545-561

[7] L Campbell, 'Non-Conviction' DNA Databases and Criminal Justice: A Comparative Analysis', *Journal of Commonwealth Criminal Law* (2011) vol. 1, pp. 55-77

Gaughran v United Kingdom (2020)

This case involved an applicant with a spent conviction for driving with excess alcohol in Northern Ireland. This individual was banned from driving for 12 months and fined; he subsequently made a complaint about the indefinite retention of personal data by the PSNI through his DNA profile, fingerprints and photograph. The Northern Ireland High Court held that the interference with Article 8 was justified and not disproportionate which was upheld by the UK Supreme Court.

However, the European Court of Human Rights (ECtHR) held that there had been a violation of Article 8, finding that the indiscriminate nature of the powers of retention of the DNA profile, fingerprints and photograph of the applicant as a person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention and in the absence of any real possibility of review, failed to strike a fair balance between the competing public and private interests.[8]

Consequently, the United Kingdom had overstepped the acceptable margin of appreciation and the retention at issue constituted a disproportionate interference with the applicant's right to respect for private life, which could not be regarded as necessary in a democratic society.[9] This case was also the first time the ECtHR had held that the taking and retention of custody photographs amounted to an interference with Article 8.

The Court considered that for convicted persons, the duration of retention regimes is not necessarily conclusive in assessing whether a State has overstepped the margin of appreciation. However, it is evident from the judgment that any data retention regime must properly consider the seriousness of the offending, the need to retain the data, whether appropriate safeguards are in place and the implementation of a review mechanism.

[8] *Gaughran v UK* (2020) ECHR 144, para 96

[9] Ibid, para 97

1.2 Legal Framework in Northern Ireland

The current law in Northern Ireland relating to the retention of materials is contained within Article 64 of the Police and Criminal Evidence (NI) Order 1989, specifically DNA samples and any DNA profiles derived from DNA samples, fingerprints and palm prints. The legislation highlights that the Police Service of Northern Ireland (PSNI) may indefinitely retain the DNA and fingerprints taken in connection with a recordable offence irrespective of whether it results in a conviction.

Article 61 of PACE NI provides the police with powers to take a person's fingerprint information without their consent if they have been arrested, charged or bailed for a recordable offence. Article 64A of PACE NI provides the police with powers to take the photograph of anyone who is detained at a police station with or without their consent.

The legislation also creates a distinction between 'intimate' and 'non-intimate' DNA evidence. Article 53 in Part VI of PACE NI defines 'intimate' DNA as including blood, semen, dental impressions and urine samples. 'Non-intimate' DNA includes skin impressions, samples from under nails and saliva samples.

Article 62 allows the police to take an 'intimate' DNA sample from a person in police detention only if an officer of at least the rank of Inspector deems it necessary and the suspect has given consent. Article 63 allows the police to take a 'non-intimate' DNA sample without consent if the individual has been arrested, charged or convicted for a recordable offence. Article 64A provides the police with the power to photograph suspects who are detained at a police station.

There are a number of databases which hold biometric data obtained by the police:

- National DNA Database (NDNAD);
- Local Northern Ireland DNA database (NIDNADB). This is a local DNA database with records that cannot be added to the national database because the quality threshold of those specific records is too low for inclusion;[10]
- National Counter Terrorist DNA Database (NCT DNADB);

[10] Northern Ireland Policing Board, Human Rights Review of Privacy and Policing (July 2023), page 20

- National Fingerprint Database (IDENT1) holds fingerprint information;
- Paper fingerprint sets are held locally in the PSNI Fingerprint Bureau;[11] and
- National Counter Terrorist Fingerprint Database (NCT FPDB).

Police also use other criminal databases and intelligence systems, including:

- The Police National Computer (PNC) holds information uploaded by the PSNI where an individual is or has been investigated for one or more recordable offences as defined by PACE NI. This is accessible by all UK Police Forces, law enforcement agencies and other registered bodies across the United Kingdom for policing and other regulated processes.[12]
- The Police National Database (PND) also allows for the sharing of intelligence and other operational information across UK Police Forces. This also holds custody photos.

At a UK national level, most recent data from 31 March 2023 show the NDNAD holds the DNA of 5.9 million individuals. Profile records from 26,956 crime scenes were uploaded to NDNAD in 2022-2023. In the same period, NDNAD matched 22,371 routine crime scenes to subject DNA profiles. This included 476 homicides (including murder, manslaughter and attempted murder) and 519 rapes.[13] Data from 31 March 2023 also shows IDENT1 holds fingerprint records relating to 8.7 million individuals.[14] The number of subject DNA profile records relating to Northern Ireland held is 204,227. Note, that this figure may include duplicates of an individual already sampled.

The Northern Ireland Assembly passed the Criminal Justice Act (NI) 2013 (CJA). Schedule 2 of the Act made provision for a new regime covering the retention and destruction of DNA samples, DNA profiles and fingerprints taken under PACE NI. Schedule 2 of CJA sets out a series of rules under new Articles 63B to 63P of PACE

[11] Ibid

[12] PSNI Website, Enacting Other Rights Under Data Protection Legislation

[13] There are two types of DNA profile records: crime scene DNA profile which is a DNA profile derived from a crime scene sample (taken from a crime scene) and a subject DNA profile which is a DNA profile derived from a subject sample (taken from an individual, often from their cheek).

[14] Home Office, Forensic Information Databases (FIND) Strategy Board's Annual Report for 2022-2023 (May 2024)

NI for the retention of DNA and fingerprints taken by police based on the seriousness of the offence, the age of the person from which the material was obtained, whether the person was convicted or not convicted and the person's criminal history. The basic premise was that DNA and fingerprints must be destroyed unless the material can be retained under any power conferred by Articles 63C to 63M.

However, it was not possible for the Department to bring these provisions into operation. This is because a large volume of DNA and fingerprints related to non-convicted persons would have required deletion from the PSNI databases under the provisions of CJA. Prior to the planned commencement of the legislation in 2015, the Department was informed by the Chief Constable at the time of a potential risk that the deletion of this material could undermine the investigation of unsolved Troubles-related deaths. Former Justice Minister David Ford took the decision to suspend commencement of the CJA until a solution could be developed to mitigate the risk.[15]

Since then it is worth noting that Section 35(1) of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 provides for the Secretary of State by regulations to "*(a) designate a collection of biometric material, or part of such a collection, for the purposes of this section; (b) provide for biometric material in designated collections not to be destroyed if destruction of the material would otherwise be required by any of the destruction provisions; (c) provide for preserved material to be retained; (d) provide for preserved material to be used for the purposes of, or in connection with, the exercise of any ICRIR function except the function of producing the historical record; (e) provide for preserved material to be destroyed*". Section 35(4) notes that "biometric material" means a record of (a) a DNA profile based on a DNA sample taken before 31 October 2013, or (b) fingerprints taken before 31 October 2013.

The Independent Commission for Reconciliation and Information Recovery (Biometric Material) Regulations 2024[16] came into force on 01 May 2024 and apply across England and Wales, Scotland and Northern Ireland. The first designated

[15] Department of Justice, A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in Northern Ireland: Summary of Responses (October 2020)

[16] The Independent Commission for Reconciliation and Information Recovery (Biometric Material) Regulations 2024

collection included in the 2024 Regulations is material taken in Northern Ireland before 31 October 2013. The second collection is material taken in England and Wales or Scotland from individuals arrested for, or convicted, between the dates of 01 January 1966 and 10 April 1998 relating to an offence under the Explosives Substances Act 1883; the Prevention of Terrorism (Temporary Provisions) Act 1974; the Prevention of Terrorism (Temporary Provisions) Act 1976; the Prevention of Terrorism (Temporary Provisions) Act 1984; and the Prevention of Terrorism (Temporary Provisions) Act 1989. The material will be time limited to the life span of the Independent Commission for Reconciliation and Information Recovery (ICRIR) and is not to be used for any other purpose or by any other body other than the ICRIR.

1.2.1 PSNI Interim Service Instruction on the Retention and Deletion of PACE Biometrics

The Committee should be aware that the PSNI is currently operating an Interim Service Instruction on the Retention and Deletion of PACE Biometrics which was issued in November 2023.[17] This is designed to define the Service's responsibilities around ensuring compliance with the Police and Criminal Evidence (Northern Ireland) Order 1989, the Data Protection Act 2018 (which is the UK's implementation of the GDPR) and the PSNI's obligations following the *Marper* and *Gaughran* judgments.

This Interim Service Instruction states that the Service's Biometrics Ratification Committee (BRC) will consider applications for deletion from both local and national biometrics databases. This will cover an applicant's DNA samples, DNA profile derived from any sample, fingerprints, palm prints and any custody photographic images.

The Interim Service Instruction also explains that the PSNI has developed a software system that can calculate the biometric retention periods under different legislative frameworks. Each offence receives an individual biometric retention calculation based on the final disposal for that offence and a Biometric Retention Date (BR Date) can be recorded on NICHE (the PSNI's internal Crime Management system). The

[17] Police Service of Northern Ireland, Retention and Deletion of PACE Biometrics Interim Service Instruction SI0422 (November 2023)

PACE NI Biometric Retention Date for PACE NI biometrics currently displayed in NICHE is calculated adopting the methodology provided in the un-commenced biometric retention provisions in the Criminal Justice Act (Northern Ireland) 2013. The Interim Service Instruction notes that these calculations will be reworked to reflect the lawful maximum retention periods prescribed in any future Northern Ireland biometric legislation.

It is also worth noting that where an applicant's PACE Biometric Retention Date has already expired at the date of application for deletion, the BRC will direct deletion unless there are exceptional circumstances that justify retention. However, in a case where an applicant's Biometric Retention Date has not expired, the BRC can consider whether a number of grounds for deletion have been sufficiently evidenced (including mistaken identity, unlawful arrest, unlawfully taken, need for police retention etc.) The BRC will direct deletion unless there are exceptional circumstances that justify retention.

This allows the BRC to retain biometric data if the deletion would represent an unacceptable risk to the public. This includes circumstances where a person has been arrested or charged for a qualifying offence but not convicted of that offence and the biometrics might otherwise be destroyed. Article 63D(2) of the CJA notes that if a person arrested for or charged with a qualifying offence has previously been convicted of a recordable offence which is not an excluded offence[18] then the material may be retained indefinitely. The PSNI's BRC may also direct the retention of any PACE biometric material in the exceptional circumstance of a risk to national security.

Despite the work of the BRC, it is worth noting that the Council of Europe's Committee of Ministers published a review on the UK's execution of the *Marper* and *Gaughran* judgments in December 2023.[19] This highlighted that the provisions under Article 64 of the Police and Criminal Evidence (Northern Ireland) Order 1989 remain unchanged and still allow for the indefinite retention of biometric material taken by the

[18] Excluded Offence: as defined in Article 63(D)14 which is a recordable offence which (i) is not a qualifying offence (ii) is the only recordable offence of which the person has been convicted (iii) was committed when the person was aged under 18 and (iv) for which the person was not given a custodial sentence of five years or more

[19] Council of Europe, CM/Notes/1483/H46-43 (07 December 2023)

police in connection with a recordable offence irrespective of whether it results in a conviction.

The report states that "*it remains a matter of profound concern that a framework with appropriate safeguards for retention of biometric data for persons arrested but ultimately not convicted is yet to be established 15 years after Marper became final. While the PSNI early deletion procedure of biometric material and custody images does cover certain grounds for application which are relevant following Marper, this procedure does not allow for deletion of biometric material or custody images for those arrested and ultimately convicted as relevant for Gaughran. In the absence of any examples in practice, there is nothing to demonstrate that the current framework has improved… Furthermore, no information has been provided about a regular review policy (similar to the one in Scotland) operated by law enforcement authorities in Northern Ireland which could prevent biometric material and photographs from being retained indefinitely in practice*".

1.3 Justice Bill Proposals

Part 1 of the Bill amends the Police and Criminal Evidence (NI) Order 1989 and the Criminal Justice Act (Northern Ireland) 2013 in light of the two rulings from the European Court of Human Rights considered above.

This section of the Bill follows a consultation by the Department of Justice which ran for eight weeks from July 2020 to August 2020[20] which proposed changes to Schedule 2 of the Criminal Justice Act (Northern Ireland) 2013. This Schedule, which has not yet come into force, removes the indefinite retention of DNA and fingerprints and creates rules for retention based on: the severity of the offence; the age of the person; whether a conviction was obtained or not; and the person's criminal history.

As noted above, this Schedule was not enacted as planned as the Department was made aware in 2015 that large-scale deletions of the PSNI database might impact the investigation of unsolved Troubles-related deaths.[21] According to the DoJ,

[20]Department of Justice, A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in Northern Ireland: Summary of Responses (October 2020)

[21] Ibid

Schedule 2 is also not compliant with the *Gaughran* ruling and therefore this Bill is intended to address this by replacing indefinite retention with maximum retention periods for biometric data based on age, severity of the offence, and disposal/sentence alongside the introduction of a requirement for a review of long term retained material.

The consultation document set out the following maximum time periods for the retention of biometric material as below:

- 75 years retention period for DNA and fingerprints for all convictions associated with serious violent, sexual and terrorism offences (otherwise known as a qualifying offence, as set out in Section 53A of PACE NI);
- 50 years retention period for adult convictions for recordable offences that do not fall within the serious category; and
- 25 years retention for two or more juvenile non-serious convictions which do not involve a custodial sentence of more than five years (an under 18 conviction for a non-serious offence involving a custodial sentence of more than 5 years will attract a 50 years retention period).

It also highlights that the 75/50/25 model was developed following consideration of the Sunita Mason review of criminal records in Northern Ireland which recommended that criminal record information should be kept until the subject reaches the age of 100.[22]

The consultation received 34 responses from individuals and organisations, 33 of which were included in the quantitative analysis.[23] Around half of respondents were broadly supportive of the Department's proposals with a number who disagreed favouring either indefinite retention or contending that the retention periods proposed were excessive. There was also strong support for the role of the Northern Ireland Commissioner for the Retention of Biometric Material. The Department subsequently proposed to:

[22] Department of Justice, A Managed Approach: A Review of the Criminal Records Regime in Northern Ireland by Sunita Mason (December 2011)

[23] Ibid

- Amend the proposal in order that material relating to adult convictions for non-qualifying offences that do not involve a custodial sentence should fall within the 25-year band rather than 50 years. Material for adult convictions that attract a custodial sentence will remain within the 50 years band;
- Delete all biometric material 10 years after the death of a person (note that this does not currently appear to be specifically referenced in the draft Bill or EFM);
- Provide additional statutory provision within the CJA to include scope for the Commissioner to keep under review the operation of the scheduled review process and to consider applications made by the Chief Constable to retain material beyond the death + 10 years period but only in exceptional circumstances (note that applications relating to the retention of material beyond death does not currently appear to be specifically referenced in the draft Bill or EFM).

1.3.1 Part 1: Retention of fingerprints and DNA profiles

Part 1, along with Schedules 1 and 2 of the Bill, amend Part 6 of PACE NI to insert new Articles 63B to 63Z1. They detail a set of rules which will determine how long biometric material may be retained by the Police for the purposes of the prevention and detection of crime.

It is worth noting that the term 'biometric data' does not currently appear in PACE NI. **Article 63B** of the Justice Bill refers to fingerprints and DNA profiles meaning "Article 63B material". The text of the Justice Bill does not specifically define the meaning of 'biometric data' beyond fingerprints and DNA profiles as noted in Article 63B with the Northern Ireland Commissioner for the Retention of Biometric Material also tasked with keeping "*under review the use and development of existing and new biometric technologies used by, or capable of being used by, law enforcement authorities for the prevention and detection of crime in Northern Ireland (including technologies that are being used or developed outside the United Kingdom)*" under **Article 63Z(4).**

Article 64(A) of PACE NI provides police with the authority for the photographing of suspects but images are also not specifically referenced within the scope of the retention regime of the Justice Bill. Schedule 2 of the Criminal Justice Act (Northern Ireland) 2013 which has not been commenced due to the legacy issues previously

highlighted also referred to DNA profiles and fingerprints but with no reference to images. However, as highlighted previously the PSNI's Interim Service Instruction on the 'Retention and Deletion of PACE Biometrics' notes the establishment of a Biometrics Ratification Committee which will consider applications for deletion. It notes that "*where a person's fingerprints, palm prints or DNA are being deleted under the policies within this Interim Service Instruction and the PSNI also holds custody images of the person, those images will also be deleted*".[24]

The Department of Justice's 2020 consultation acknowledged that custody photos were not considered as part of this exercise. It stated that the PSNI policy on the retention and deletion of custody images has been to include them in the regime governing the lawful retention and deletion of biometrics which ensures that they are reviewed and deleted in line with the CJA. It noted that this "*approach is proportionate"* and the DoJ "*doesn't believe that any additional legislation is required at this time*".[25] The Committee may wish to explore this issue in further detail with the Department.

Meanwhile **Article 63C** states that biometric material must be destroyed if it is not being retained under the new rules contained in Articles 63D to 63U. Specific regard must be paid to Article 63F and the Chief Constable must destroy material if it was gathered unlawfully or the arrest was unlawful or based on mistaken identity. However, this does not apply if investigations/proceedings are ongoing as per **Article 63F**. This means that Article 63B material (fingerprints/ DNA) which may be of potential evidential value can be retained until the conclusion of any investigation or associated criminal proceedings; a court will also be able to take a decision on the admissibility of material into evidence and can consider any potential illegality as part of this work. Article 63C also outlines that speculative searches of fingerprint and DNA databases can be used to confirm an individual's identity using Article 63B material.

[24] Police Service of Northern Ireland, Retention and Deletion of PACE Biometrics Interim Service Instruction SI0422 (November 2023)

[25] Department of Justice, A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in Northern Ireland: Summary of Responses (October 2020) paragraph 2.24

Article 63D relates to consensual material which will only be retained until it is no longer needed and will not be added to a DNA or fingerprint database. This relates to material provided by a person with their consent, for example, during the investigation of a major crime where the police may request a large number of samples similar to the person(s) they are looking for.

Article 63E relates to non-consensual material taken under the powers in Part 6 of PACE NI. It provides that the material can be kept until the end of the latest retention date applying to any offence associated with an individual, for example if they are arrested or convicted of multiple offences. Paragraph 4 notes that non-consensual material retained under Articles 63G to 63S must be destroyed on the day after the last retention date. However, Paragraph 5 provides that material retained under **Article 63F** (retention of Article 63B material pending investigations or proceedings) must be destroyed as soon as reasonably practicable but within 14 days beginning with the last retention date. This will allow a period of time for an acquittal decision by a Court to be communicated with the PSNI's system and deletion to take place. Paragraphs 9 and 10 relate to the definitions with absolute and conditional discharges being treated as a conviction for the purpose of this Bill. Likewise, cautions, including informed warnings and restorative cautions, should be treated as convictions for these Articles.

The table below outlines the proposed retention periods for different offences and age groups covering **Article 63G to Article 63Q**. A comparison is also offered with the retention periods contained with the CJA where relevant. It is worth noting that a list of qualifying offences is currently found in Article 53A of PACE NI and typically includes offences such as murder, manslaughter, serious violent or sexual offences, burglary/aggravated burglary and terrorism offences. Recordable offences are generally offences punishable with imprisonment.

Table 1: Overview of Retention Periods contained in Justice Bill

Article	Context	Justice Bill Retention Period	Position in CJA
63G & 63H	• Arrested for a qualifying offence (other than an excepted offence[26]) as per Article 53A PACE NI but not charged • Charged with any qualifying offence but not convicted • Charges not left on the books[27] • Applicable to adults and under 18s	• Three years from date of charge. • However, if an individual is arrested but not charged then retention will require the consent of the NI Commissioner for the Retention of Biometric Material. • Retention period can be extended by up to two years on application by the Chief Constable to a District Judge for an order. Appeal against an order or refusal to make an order permitted to the County Court.	• Article 63D covered three-year retention period for an individual arrested for, or charged with, a qualifying offence but not convicted. • However, 63(D)(2) states that material may be retained indefinitely for a person with a previous conviction "*which is not an excluded offence*"[28] which has not been replicated in the Justice Bill to address *Gaughran*.

[26] A terrorism-related qualifying offence or a national-security qualifying offence

[27] Left on the Books: When some or all of the offences before the Crown Court are not proceeded with but can be reactivated at a later stage, subject to permission from the Crown Court or the Court of Appeal

[28] Excluded Offence: A recordable offence which (i) is not a qualifying offence, (ii) is the only recordable offence of which the person has been convicted, (iii) was committed when the person was aged under 18 and (iv) for which the person was not given a custodial sentence of 5 years or more.

Article	Context	Justice Bill Retention Period	Position in CJA
63I	• Charged with a recordable offence • Charged with the offence in a count on indictment and the Crown Court orders that the count is to be left on the books. However, this does not apply if an individual is convicted of a recordable offence in the same proceedings in which the count is ordered to be left on the books. • Applicable to adults and under 18s	• Three years if the offence relates to a qualifying offence • Twelve months if it is a recordable offence other than a qualifying offence	• Reference to individuals with recordable offence count left on the books not included in CJA.
63J	• Convicted of a qualifying offence • Applicable to adults and under 18s	• 75 years from date of conviction	Article 63F provided for material to be retained indefinitely for individuals convicted of recordable offences.

Article	Context	Justice Bill Retention Period	Position in CJA
63K	• Convicted of a recordable offence other than a qualifying offence and a custodial sentence (including a suspended sentence) • Applicable to adults	• 50 years from date of conviction	Article 63F provided for material to be retained indefinitely for individuals convicted of recordable offences.
63K	• Convicted of a recordable offence other than a qualifying offence (no custodial sentence) • Applicable to adults	• 25 years from date of conviction	Article 63F provided for material to be retained indefinitely for individuals convicted of recordable offences.
63L	• Convicted of a recordable offence other than a qualifying offence and a custodial sentence (including a suspended sentence) of five years or more • Applicable to under 18s • Not applicable if first minor offence applies	• 50 years from the date of conviction	Article 63F provided for material to be retained indefinitely for individuals convicted of recordable offences.

Article	Context	Justice Bill Retention Period	Position in CJA
63L	• Convicted of a recordable offence other than a qualifying offence and a custodial or non-custodial sentence (including a suspended sentence) of less than five years • Applicable to under 18s • Not applicable if first minor offence applies	• 25 years from the date of conviction	Article 63F provided for material to be retained indefinitely for individuals convicted of recordable offences.

63M	• Convicted of a recordable offence other than a qualifying offence • First minor offence - this means a person with no previous convictions for a recordable offence, no previous convictions for a recordable offence outside Northern Ireland, no previous cautions (including informed warnings and restorative cautions) in respect of a recordable offence, no previous completion of a diversionary youth conference process or a community-based restorative justice scheme process in respect of a recordable offence and no previous penalty notices for a recordable offence. • Custodial sentence (including a suspended sentence) of more than five years • Applicable to under 18s	• 50 years from the date of conviction	Article 63H provided for an exception for persons under 18 convicted of a first minor offence. However, 63H(3) stated that material may be retained indefinitely where the person is given a custodial sentence of five years or more in respect of the offence.

Article	Context	Justice Bill Retention Period	Position in CJA
63M	• Convicted of a recordable offence other than a qualifying offence • First minor offence as described above • Custodial sentence (including a suspended sentence) of less than five years • Applicable to under 18s	• Term of the sentence plus five years from the date of conviction	Article 63H provided for an exception for persons under 18 convicted of a first minor offence. 63H(2) also provided that the material may be retained until the end of the period consisting of the term of the sentence plus 5 years.
63M	• Convicted of a recordable offence other than a qualifying offence • First minor offence as described above • No custodial sentence • Applicable to under 18s	• Five years from the date of conviction	Article 63H provided for an exception for persons under 18 convicted of a first minor offence. 63H(4) provided that material could be retained for 5 years in the case of fingerprints and DNA where a person is given a sentence other than a custodial sentence.

Article	Context	Justice Bill Retention Period	Position in CJA
63N	• Conviction for an offence outside of Northern Ireland, including: - A qualifying offence where the offence would constitute a qualifying offence if done in NI; or - A recordable offence where the offence would constitute a recordable offence if done in NI but would not constitute a qualifying offence. • Applicable to adults and under 18s	• Relevant retention periods detailed in Articles 63J to 63M	Article 63G covered this issue but allowed for the retention of material indefinitely.
63O	• Caution only (or an informed warning or a restorative caution) • Applicable to under 18s	• Five years from the date of the caution	Article 63I covered persons under 18 given a caution. Fingerprints and DNA could be retained for 5 years.
63P	• Diversionary Youth Conference or community-based restorative justice scheme • Applicable to under 18s	• Five years from end of conference/scheme	Article 63J covered diversionary youth conferences. Fingerprints and DNA could be retained for 5 years.

Article	Context	Justice Bill Retention Period	Position in CJA
63Q	• Penalty notice under section 60 of the Justice Act (Northern Ireland) 2011 in respect of a recordable offence • Applicable to adults	• Two years	Article 63K covered penalty notices. Fingerprints and DNA could be retained for 2 years.

Furthermore, beyond the information outlined in the table there are a number of additional articles which make provision for the retention of material in specific circumstances. **Article 63R** relates to people subject to a notification requirement (for example under the Sexual Offences Act 2003 or the Protection from Stalking Act (Northern Ireland) 2022) and states that their material can be held until the end of the notification period. Furthermore, if Articles 63F to 63S provide for a later date then material can be retained until that later date.

Meanwhile **Article 63S** provides the power for a court to extend the retention period for Article 63B material held under 63I to 63R. The Chief Constable can apply to a District Judge for an extension which is limited to two years at a time. The Judge must be satisfied that there are substantial grounds for believing that the retention of the material will assist in achieving the purpose of: protecting life or preventing serious harm to an individual, preventing serious crime or disorder and identifying an individual (including an individual who is dead or missing). The continued retention of the material must also be a proportionate means of achieving that purpose.

Article 63T relates to the requirement for the Chief Constable to review the continued retention of material pending the investigation of offences every five years. The Chief Constable must consider whether an individual remains, or should remain, a suspect in the investigation and whether the biometric material has, or may have, evidential value in the investigation or in any proceedings. Any review which finds that the material should no longer be retained must result in it being destroyed. It is worth noting that the Department of Justice may make regulations under 63T(5) to specify further factors which the Chief Constable must have regard to in conducting a review.

Furthermore, **Article 63U** notes that the Department must make regulations that require the Chief Constable to conduct reviews of the continued retention of long-term retained material covering Articles 63J to 63M where material is held for 25 years and over. 63U(3) sets out that the regulations may make provision for:

- When and in what circumstances the review should be conducted
- Enabling the individual concerned the right to request a review
- Notifying the individual about the outcome of the review

- Conferring a right of appeal

Articles 63(V), 63(W) and 63(X) relate to the destruction of copies and samples. DNA samples must also be destroyed as soon as a DNA profile is obtained (and no later than six months from the date on which it was taken) except in specific circumstances. 63X notes restrictions on the use of fingerprints, DNA and other samples. Retained material cannot be used in evidence against a person at any stage after it should have been destroyed.

Furthermore, **Article 63Y** states that the preceding Articles do not apply to any material taken under the applicable sections of the Terrorism Act 2000, the International Criminal Court Act 2001, the Terrorism Prevention and Investigation Measures Act 2011, the Counter-Terrorism and Border Security Act 2019, the National Security Act 2023, the Immigration Act 1971, the Immigration and Asylum Act 1999 and material which could become disclosable under the Criminal Procedures and Investigations Act 1996.

1.3.2 Northern Ireland Commissioner for the Retention of Biometric Material

Article 63Z of the Justice Bill provides that the Department must appoint a Commissioner for the Retention of Biometric Material to keep under review the biometric retention framework, including the gathering, retention and use of biometric material and the development of existing and new biometric technologies which might be used by law enforcement authorities for the prevention and detection of crime. The Commissioner is required to report to the Department of Justice on an annual basis; the Department, after consultation with the Commissioner, can exclude any part of a report from publication if it considers it not to be in the public interest. The Commissioner will be appointed for a four-year term for a maximum of two terms. Further discussion on the role of the Commissioner can be found in the next section.

1.3.3 Further Considerations

There are a number of issues relating to the retention of biometric data arising from this section of the Bill which the Committee may wish to consider. These issues are detailed below and summarised in a list of potential questions at the end of this section.

Retention Periods

As noted above, the Justice Bill seeks to replace the indefinite retention of personal data with a '75/50/25-year model'. The Northern Ireland Human Rights Commission (NIHRC) has contended that this model is "*too broadly constituted, disproportionate and is not compatible with Article 8*". It has argued for a model that is more tailored and proportionate to the offence and the circumstances as it notes that the proposed model "*allows for the retention of biometrics for less serious offences for an overly excessive length of time*".[29] By way of example, the NIHRC states that a "*drunk driving offence could result in that individual's biometrics being retained for up to 50 years*" and describes this as a "*disproportionate length of time for such an offence*".[30]

Therefore, the Committee may wish to consider whether the 75/50/25 model aligns with the jurisprudence of the ECtHR. It may wish to consider whether this model, which largely takes a blanket approach to offences, properly takes account of the seriousness of the offending and the necessity of retaining the data, as held in *Gaughran*. The relevant retention periods contained in legislation in other parts of the UK are detailed further in the section below on oversight arrangements in other jurisdictions.

Review of Data Retention

As noted above, **Article 63T** of the Justice Bill provides that the retention of personal data must be reviewed every five years pending the investigation of offences. Further details on the substance of the review mechanism can be provided by way of regulations under 63T(5). The Article does not differentiate the review period based on offence type/severity or the complexity of certain types of investigation. However, it is possible that this could be specified in further detail through future regulations. The Committee may wish to consider whether it is proportionate to apply a period of five years to suspects for all types of offences.

[29] Northern Ireland Human Rights Commission, NIHRC Rule 9 Submission to the Council of Europe Committee of Ministers in Relation to the Supervision of the Execution of Judgments and of Terms of Friendly Settlement: Gaughran v. the United Kingdom (13 December 2023)

[30] Ibid

Article 63U provides that a review must be conducted in relation to the long-term retention of material for individuals convicted of an offence. The Article confers a power on the Department of Justice to specify details of the review mechanism in regulations, including when and in what circumstances the review must be conducted. Given the importance of a review mechanism in ensuring compliance with Article 8 and given the significant period of time for which personal data may be retained (75, 50 or 25 years respectively), the Committee may wish to consider whether more details around the review mechanism should be defined in the Bill.

Article 63U(3)(d) refers to "*conferring a right of appeal against a determination made on a review and about the procedure on such appeals (including the payment of fees)*". 63(Z)(7)(b) notes that regulations under 63U(3)(d) "*may confer functions on the Commissioner*". This appears to suggest that any role for the Commissioner for the Retention of Biometric Material in relation to individual cases will be detailed in regulations at a future point. The Committee may wish to clarify the rationale for this and whether the Bill could be strengthened by providing a procedure in statute allowing an individual to make a complaint to the Commissioner in relation to their biometric data.

Looking elsewhere and the Scottish Biometrics Commissioner Act 2020 provides for the Commissioner to prepare a Code of Practice on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes. Section 15 of the Act also provides a complaints function for the Commissioner allowing a mechanism for complaints to be made by members of the public, or someone acting on their behalf, in circumstances where they consider that Police Scotland has failed to comply with the Code of Practice. Section 16 of the Act also includes powers to gather information from Police Scotland and the Scottish Police Authority in relation to this via a written information notice. Section 17 of the Act caters for any failure to comply with an information notice without reasonable excuse, and for any obstruction of the Commissioner's complaints investigation function, to be reported by the Commissioner to the Court of Session.

Custody Photographs

The ECtHR recognised in *Gaughran* that taking and retaining custody photographs can interfere with a person's Article 8 rights. However, as highlighted previously the

Justice Bill does not specifically cover custody photographs and considers only DNA profiles and fingerprints under Article 63B material. The Information Commissioner's Office notes that photographs only become biometric if "*specific technical processing*" takes place where the data is then used "*for the purpose of uniquely identifying a natural person*".[31]

The PSNI's Interim Service Instruction on the 'Retention and Deletion of PACE Biometrics' published in November 2023 makes clear that it will operate the same retention policy for custody images on a non-statutory basis. The Council of Europe's Committee of Ministers highlighted in its December 2023 review of the UK's execution of the *Marper* and *Gaughran* judgments that the PSNI biometric and photograph deletion policy was under review.[32] The Justice Committee may wish to seek further information from the PSNI on the progress or outcome of this review.

The absence of any consideration of custody photographs is potentially a gap in the Bill's scope. The rationale for this is unclear given that one of the legislative aims of the Bill is to ensure that the law in Northern Ireland aligns with the judgments in *Marper* and *Gaughan* and given that the PSNI intends to apply the framework in the Bill to custody photographs. The Committee may wish to seek further information from the Department of Justice on why provision for custody photographs has not been included in the Bill.

Looking to other jurisdictions and the term 'biometric data' is specifically defined within the Scottish Biometrics Commissioner Act 2020 to include photographs and recordings. Section 34(1) states "*information about an individual's physical, biological, physiological or behavioural characteristics which is capable of being used, on its own or in combination with other information (whether or not biometric data), to establish the identity of an individual*". Section 34(2) states that "*for the purposes of subsection (1), "biometric data" may include (a) physical data comprising or derived from a print or impression of or taken from an individual's body, (b) a photograph or other recording of an individual's body or any part of an individual's*

[31] Information Commissioner's Office, The personal information results from specific technical processing

[32] Council of Europe, CM/Notes/1483/H46-43 (07 December 2023)

body, (c) samples of or taken from any part of an individual's body from which information can be derived, and (d) information derived from such samples".

This broad Scottish definition clearly includes all computerised biometric data records, corresponding manual prints, impressions, photographs, recordings and biological samples or materials used for criminal justice and police purposes from which identity information about an individual can be derived. Section 35 also gives Scottish Ministers the power by regulations to "*modify section 34 so as to change, or clarify, the meaning of "biometric data" in this Act*" which provides further scope for oversight as technology develops.

Meanwhile in England and Wales the Home Office conducted a Custody Image Review in 2017 which highlighted that people who have been acquitted or where charges have been dropped may apply for their custody images to be deleted from law enforcement databases.[33] This triggers a review of the image retention allowing the police to retain the image on their system under certain specified circumstances against a presumption of deletion. The Review cites Lord Clarke in *Gaughran v Chief Constable of the Police Service of Northern Ireland* [2015] UKSC 29 in support of this, highlighting that "*the rights and expectations of convicted individuals differ significantly from those of unconvicted individuals. The striking of a balance between the public interest and the rights of a convicted or an unconvicted individual will inevitably be appreciably different".*

The primary legislation governing biometrics in Scotland, the Criminal Procedure (Scotland) Act 1995, is silent on retention of images and photographs for convicted persons. However, the Scottish Biometrics Commissioner's Code of Practice published in 2022 established a presumption of deletion for biometric data (in circumstances where the subject has no previous convictions) following the expiry of the relevant retention periods as prescribed or permitted in law.[34] Police Scotland applies the same retention policy for fingerprints and DNA to images and photographs; this means that images of persons arrested and not subsequently

[33] Home Office, Review of the Use and Retention of Custody Images (February 2017)

[34] Scottish Biometrics Commissioner, Code of Practice (January 2022)

convicted (and who have no previous conviction) are removed from the Police National Database by Police Scotland as soon as possible.[35]

The Custody Image Review also considered whether there would be a benefit in applying a regime similar to the one that operates for fingerprints and DNA, as set out in the Police and Criminal Evidence Act 1984 as amended by the Protection of Freedoms Act 2012. This noted that an image can be considered to be "*less intrusive*" than a DNA or fingerprint sample, as faces are generally not private but are, for most people, on display all of the time (with cultural and religious exceptions). This is reinforced by the large number of publicly available facial images on social media. A further consideration is that an individual's DNA profile and fingerprints stay the same indefinitely, whereas generally the usefulness of a custody image decreases over time. Custody images are also used in different ways by the police as compared to fingerprints and DNA, such as for briefing frontline officers and the identification of suspects by witnesses.[36] It concluded that there is no 'one size fits all' rules as to how long an image will remain useful and that Police Forces should continue to have discretion to delete the images of both convicted and unconvicted individuals.[37]

The College of Policing issued updated Authorised Professional Practice guidance in 2018 to Police Forces on the retention, review and disposal of custody images to support the implementation of the Review.[38] This document highlights advice to Police Forces on how they should review images, decide whether they should be retained and process requests for their deletion. The Home Office's Biometrics Strategy also highlights that the Police National Computer (PNC) and Police National Database (PND) are due to be replaced by the cloud-based Law Enforcement Data Service (LEDS) which "*will enable more efficient review and where appropriate,*

[35] Scottish Biometrics Commissioner, Assurance Review of the acquisition, use and retention of images and photographs for criminal justice and police purposes (March 2024), page 18

[36] Home Office, Review of the Use and Retention of Custody Images (February 2017), page 15

[37] Ibid, page 16

[38] College of Policing, Authorised Professional Practice on Custody Images (February 2018)

automatic deletion of custody images by linking them to conviction status, more closely replicating the system for DNA and fingerprints".[39]

However, this service has been subject to a number of delays with the Public Accounts Committee noting in 2021 that the Home Office had "*wasted both vital time and scarce funding without making any meaningful progress in replacing the PNC and PND*".[40] It is currently expected to be operational by 2026 and will only replace the PNC. Given these differing approaches, it may also be worth the Committee considering the possibility that custody images uploaded by Police Forces from England and Wales of unconvicted individuals are not being routinely weeded from PND meaning that the PSNI (or Police Scotland) could be searching against such images on retrospective facial search.

Technology Developments

There are a range of emerging policing methods which may potentially gather personal data of relevance in this area. Police Forces are also increasingly relying on video footage from body worn video, drones, doorbell cameras and dash cameras when gathering evidence for suspected offences. Significant human rights concerns have been expressed around the use of facial recognition technology in England and Wales with three Police Forces (Metropolitan Police Service, South Wales Police, Northamptonshire Police) using live facial recognition to date.[41] The Court of Appeal found that South Wales Police's use of the live facial recognition technology breached privacy rights, data protection laws and equality laws in 2020.[42] The PSNI does not currently use live facial recognition technology but can utilise the Police National Database (PND) for the purposes of retrospective facial recognition.

Furthermore, the PSNI Facial Identification Project Board was established in September 2022 to ensure any new facial identification technology being considered

[39] Home Office, Biometrics Strategy - Better Public Services: Maintaining Public Trust (June 2018), page 11

[40] House of Commons Committee of Public Accounts, The National Law Enforcement Data Programme (November 2021), page 3

[41] Home Office, Police use of Facial Recognition: Factsheet (October 2023)

[42] *R (on the application of Edward Bridges) v The Chief Constable of South Wales Police* [2020] EWCA Civ 1058

by the Home Office Biometrics Strategic Facial Matching Project would be introduced to PSNI in a controlled manner ensuring full consultation, compliance with human rights and governance are in place in advance. The PSNI is also currently developing Guidance on Usage of Retrospective PND Facial Searching.[43] The Committee may wish to consider the issue of facial recognition technology further with the Police Service.

More broadly, discussions are ongoing globally around how best to regulate AI technology. A study published by the Centre for Emerging Technology and Security at the Alan Turing Institute in 2020 highlighted that "*over the next five to ten years, the type of biometric systems and data available are likely to broaden dramatically. Moving beyond prevailing purposes of uniquely identifying or verifying individuals, the same technology may be used for making inferences about someone's behaviour, emotional state, or classifying them into demographic groups, despite significant concerns over the scientific validity and potential benefits of such use cases. New developments such as frictionless biometric formats that require little or no physical contact, and multimodal systems which combine multiple biometric data sources, could also improve the reliability of biometric systems and, in turn, enhance law enforcement capabilities*".[44]

The ECtHR observed in *Marper* back in 2008 that "*the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests*".[45] The Policing Board's Human Rights Review of Privacy and Policing published in July 2023 also noted that "*given the progress in areas such as voice analytics, gait analysis and AI-driven surveillance technology, the [existing] legislation is looking increasingly anachronistic"*.[46]

[43] Northern Ireland Policing Board, Human Rights Review of Privacy and Policing (July 2023), page 45

[44] Centre for Emerging Technology and Security at the Alan Turing Institute, The Future of Biometric Technology for Policing and Law Enforcement: Informing UK Regulation (March 2020)

[45] *S and Marper v the UK* (Applications nos. 30562/04 and 30566/04), paragraph 112

[46] Northern Ireland Policing Board, Human Rights Review of Privacy and Policing, (July 2023), page 31

The Scottish Biometrics Commissioner took up office in 2021 and Dr Brian Plastow recently called for a "*strategic reset of UK Government Biometric Strategy which has not been refreshed since 2018*". He also highlighted that the "*UK's legal framework (and strategy) for biometrics is inadequate and in need of reform principally because it is failing to keep pace with rapid changes to biometric technology*".[47] Furthermore, the Office of the Biometrics and Surveillance Camera Commissioner's Annual Report published in January 2024 highlighted concerns around "*the narrow focus that the Home Office applies to biometrics in concentrating almost exclusively on DNA and fingerprints. In my view, there is far too little engagement with emerging issues and new technologies*".[48]

As noted previously, the Justice Bill attempts to deal with this issue through Article 63Z(4) which provides that the NI Commissioner for the Retention of Biometrics Material would be required to keep under review "*the use and development of existing and new biometric technologies used by or capable of being used by law enforcement authorities for the prevention and detection of crime*". The Bill does not specifically provide in statute that this role relates to the work of the PSNI but the EFM states that this means technology used by the PSNI and other bodies such as the Police Ombudsman and National Crime Agency.

It is worth noting that the previous UK Government took a decision to abolish the role of the Biometrics and Surveillance Camera Commissioner for England and Wales through the Data Protection & Digital Information (No.2) Bill but this did not complete its legislative journey in advance of the General Election in July 2024; this would have provided for general oversight of biometrics and surveillance cameras falling under the remit of the Information Commissioner through its existing data protection powers. During this period the Equality and Human Rights Commission called for the Government to "*bring forward proposals for a robust and dedicated legal framework*

[47] B. Plastow, UK Biometrics Strategy: Time for a Reset?, *UK Security Journal*, (July 2024)

[48] Commissioner for the Retention and Use of Biometric Material, Annual Report April 2022 – March 2023 and Surveillance Camera Commissioner, Annual Report April 2022 – March 2023 (January 2024)

for police use of biometric technologies" to "*give the public confidence that these technologies are used safely and responsibly*".[49]

The spotlight is likely to remain on the future regulatory models pursued across the UK for emerging biometric systems as technology continues to develop in this area. The Justice Committee may wish to consider whether the Bill goes far enough to protect the personal data of suspects and persons convicted of an offence given the ever-evolving nature of evidence-gathering methods which increasingly rely on personal data.

Data Ethics Framework

The Northern Ireland Policing Board's Human Rights Review of Privacy and Policing published in July 2023 referred to Police Scotland's development of a Data Ethics Framework. It recommended that the PSNI should develop a Data Ethics Governance Framework to "*ensure policing is driven by effective and efficient use of data in an ethical way*" by January 2024. It also called for the PSNI to produce a Data Ethics Strategy "*engaging with external stakeholders and the wider public on the value of data driven technology, its development and use and how ethical and privacy safeguards will be effectively addressed*" by April 2024.[50] The Committee may wish to seek an update from the PSNI and Policing Board on any action taken in relation to these recommendations.

In addition, the Policing Board recommended that the PSNI should consider how to increase public awareness of the procedures available to challenge the retention of DNA and other personal data because "*there is almost no public information available*".[51] The Committee may also wish to seek further information on this around how the public will be informed of changes to the use, retention and deletion or personal data as a result of the legislative changes contained in this Bill.

[49] Equality and Human Rights Commission, Financial monitoring, biometrics and surveillance in the Data Protection and Digital Information Bill (19 April 2024)

[50] Northern Ireland Policing Board, Human Rights Review of Privacy and Policing (July 2023), page 11

[51] Ibid, page 12

Children's Personal Data

Article 63L provides that where a child (a person under 18) is convicted of an offence which results in a non-custodial or custodial sentence (including a suspended sentence) of less than five years, their data can be retained for 25 years from the date of conviction. This increases to 50 years from the date of conviction if they receive a custodial sentence (including a suspended sentence) of five years or more. Under 18s also fall within the scope of Article 63J which allows for material taken from individuals convicted of a qualifying offence to be retained for 75 years.

Article 63M provides that the personal data of children who commit a first minor offence may be retained for five years if either the sentence is less than five years or a custodial sentence is not received (including a suspended sentence). However, if the custodial sentence is more than five years (including a suspended sentence) then the data retention period increases to 50 years. Separately, the personal data of children given a caution may be retained for five years under Article 63O.

The data of child suspects also appears to be captured under Article 63G and 63H which provides that the material of individuals arrested but not charged with a qualifying offence can be held for three years. The Scottish Police Authority and the Scottish Biometrics Commissioner highlighted in a 2023 report that the low age of criminal responsibility results in children's biometric data being captured upon arrest.[52] Northern Ireland's age of criminal responsibility at 10 years old is even lower than that of Scotland which is 12 years. The report noted that "*[the United Nations Convention on the Rights of the Child] General Comment No. 25 underlines that interference with a child's privacy is only permissible if it is neither arbitrary nor unlawful. Any such interference should therefore be provided for by law, intended to serve a legitimate purpose, uphold the principle of data minimisation, be proportionate and designed to observe the best interests of the child. This means that interferences with this right must not conflict with the provisions, aims or objectives of the UNCRC*".[53]

[52] Scottish Biometrics Commissioner and Scottish Police Authority, Joint Assurance Review of the Acquisition of Biometric Data from Children arrested in Scotland (2023)

[53] Ibid, page 22

The Committee may wish to review whether the data retention periods in the Bill for persons aged under 18 serve a legitimate purpose, uphold the principle of data minimisation, are proportionate and observe the best interests of the child in relation to the requirements under the UNCRC (but note the UNCRC has not yet been incorporated into domestic NI law). Furthermore, for wider context it is worth noting that the Department of Justice published a Strategic Framework for Youth Justice 2022-2027 which refers to the rejection of a recommendation from the 2011 Youth Justice Review for a blanket removal of children's criminal records, leading to a clean slate at 18.[54] A consultation was also held by the Department of Justice in 2022 seeking views on whether the age at which a child can be held criminally liable should be increased from 10 years to 14 years.[55]

Oversight Arrangements: Position in the UK and Republic of Ireland

The oversight arrangements for biometric materials differ across UK jurisdictions with a number of Commissioners and Regulators involved. The **Forensic Information Databases Strategy Board** provides governance and oversight over the operation of the National DNA Database (NDNAD) and the National Fingerprint Database (IDENT1).[56] This includes representation from the National Police Chiefs' Council, Home Office, Association of Police and Crime Commissioners, Biometrics and Forensics Ethics Group, Forensic Science Regulator, Information Commissioner's Office, Biometrics and Surveillance Camera Commissioner and Scottish Biometrics Commissioner with representatives from the police and devolved administrations of Scotland and Northern Ireland also invited to attend quarterly meetings.

The NDNAD holds profile records from all UK Police Forces but only profile records belonging to England and Wales forces are subject to the retention schedules detailed in the Police and Criminal Evidence Act (PACE) 1984 and **Protection of Freedoms Act 2012**. In accordance with the 2012 Act, if an adult is convicted of a recordable offence (or for under 18s a qualifying offence) then their DNA profile

[54] Department of Justice, Strategic Framework for Youth Justice 2022-2027 (March 2022)

[55] Department of Justice, Summary of Responses - Increasing the Minimum Age of Criminal Responsibility in Northern Ireland (June 2023)

[56] UK Government, Overview of Forensic Information Databases Strategy Board

and/or fingerprints may be kept indefinitely. Individuals (adults and under 18s) who have not been convicted of a crime may have their information held for up to five years depending on the circumstances.[57] According to guidance, this means in practice that biometric records are kept as long as there is a retained criminal record so until the person reaches 100 years of age, or until death, whichever is sooner.[58] Requests for early deletion can also be made to Police or through the ACRO Criminal Records Office.

The **Home Office Biometrics and Surveillance Camera Commissioner** was established by the 2012 Act and acts as an independent reviewer who is required to produce an annual report on police and national security use of DNA and fingerprints; the roles of the Biometrics Commissioner and the Surveillance Camera Commissioner were combined in 2021 with the postholder also producing a Surveillance Camera Code of Practice.

Looking to Scotland and the **Scottish Biometrics Commissioner** established through the Scottish Biometrics Commissioner Act 2020 is tasked with keeping under review the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data by specified bodies which are Police Scotland and the Scottish Police Authority. This followed a 2018 review conducted by the Independent Advisory Group on the use of biometric data in Scotland.[59] It notes that the Criminal Procedure (Scotland) Act 1995 is silent on retention of DNA profiles and fingerprints for convicted persons (adults and under 18s) and so these can be retained indefinitely on the basis of a single criminal conviction for any type of offence. However, Police Scotland's policies do not in practice allow for indefinite retention of biometric data and photographs without periodic review.[60] The Code of Practice,

[57] House of Commons Library, Retention of Fingerprints and DNA Data (November 2015)

[58] National Police Chiefs' Council, Deletion of Records from National Police Systems (PNC/NDAND/IDENT1) (2018)

[59] Scottish Government, Use of biometric data: report of the independent advisory group (March 2018)

[60] In addition, data from individuals prosecuted for certain sexual and violent offences may be retained for three years (whether or not they are convicted), with the Chief Constable able to apply to the Sheriff Court for further two-year extensions (there is no limit on the number of two-year extensions that can be granted in respect of a person's data). Beyond this, data from individuals arrested for any offences (and who have no previous convictions) must be destroyed immediately if they are not convicted or if they are given an absolute discharge. Data from children dealt with through the Children's Hearings System may be retained only where the grounds for referral are established

established by the Scottish Commissioner, was brought into effect on 16 November 2022.[61] It requires, among other things, the Commissioner to set retention periods where none currently exist in law and a review is currently ongoing in relation to this.[62]

According to the academic literature, the statutory provisions for the Scottish Commissioner and Home Office Commissioner gave them jurisdiction for regulating samples for their 'home force area' despite there being **national databases** (UK NDNAD and IDENT1) which are hosted in England but also used by Police Forces in Scotland and Northern Ireland. McGregor Richmond notes that this creates a *"regulatory lacuna*" and states "*the central question of who, if anyone, is responsible for Scottish and Northern Irish biometric samples uploaded to UK databases in England remains unaddressed, either by the extant legislative provisions or in the reports of the commissioners*". Therefore, once data from Northern Ireland is in the UK system then other Police Forces and law enforcement agencies will be able to access and use it as required. The Committee may wish to explore the oversight arrangements for data from NI uploaded to UK systems in greater detail.

The **Forensic Science Regulator** also has a function in the biometrics space through monitoring and maintaining standards in forensic science services across the criminal justice system; it is involved in the setting of, and monitoring compliance with, quality standards applying to the National DNA Database. Forensic Science Northern Ireland nominates a representative on the regulator's Forensic Science Advisory Council. Beyond this, it is worth noting that the Information Commissioner's Office also plays a role in this area around upholding information rights in the public interest across the UK, including in relation to policing.

(whether through acceptance by the child at such a hearing or a finding in court) in relation to a prescribed sexual or violent offence. Such data can only be retained for three years unless the police apply for, and are granted, an extension by a sheriff. For less serious offences, where grounds are not established, or where the child is under the age of criminal responsibility, there is no retention in relation to children. Taken from SPICe Briefing, Scottish Biometrics Commissioner Bill (September 2019)

[61] Scottish Biometrics Commissioner, Code of Practice (November 2022)

[62] Scottish Biometrics Commissioner, Review of the Laws of Retention for Biometric Data Taken for Criminal Justice and Policing Purposes: Update Report (December 2023)

A further dimension relates to the UK-wide remit of the Home Office Biometrics and Surveillance Camera Commissioner around **National Security Determinations** in relation to the retention and use of biometrics in matters of national security under Section 20 of the Protection of Freedoms Act 2012 (this is not something which the Scottish Commissioner or any future NI Commissioner has a role in). A national security determination is made if a Chief Constable determines that it is necessary for biometric data to be retained for the purposes of UK national security; a separate, discrete database is maintained for DNA profiles for national security and counter-terrorism purposes. Section 20(2)(a)(vi) of the 2012 Act notes that this role extends to every national security determination made or renewed under paragraph 7 of Schedule 1 of this Act which covers material subject to the Police and Criminal Evidence (Northern Ireland) Order 1989 retained for purposes of national security. Section 20 also makes provision for the Commissioner to keep under review national security determinations made in Scotland under section 18G of the Criminal Procedure (Scotland) Act 1995. A national security determination has effect for a maximum duration of five years following changes introduced under the Counter-Terrorism and Border Security Act 2019.[63]

In summary, this is a complex area with a myriad of oversight and governance arrangements and it is evident that there is some uncertainty around oversight of the biometric materials uploaded to the NDNAD from the devolved jurisdictions which the Committee may want to explore. McGregor Richmond notes this issue when observing that "*clarity is not aided by the fact that control of biometric material samples sits at the centre of a legislative thicket of intertwining jurisdictions, criminal and anti-terror legislation, human rights and data protections issues. This is an unavoidably technical area. However, it is also a topic of immediate relevance to a significant population of data subjects and to police forces across the length and breadth of the UK*".[64]

Meanwhile the **Republic of Ireland** currently does not appear to have an equivalent role of Biometrics Commissioner. The retention and destruction of DNA samples and

[63] Home Office, Protection of Freedoms Act 2012: Revised guidance on the making or renewing of national security determinations allowing the retention of biometric data (August 2020)

[64] K. McGregor Richmond, 'Human Rights Compatibility of Biometric Data Retention on Shared UK Databases', *Criminal Law Review* (2022) 7, 545-561

profiles for the DNA Database System in the Republic of Ireland is governed by Part 10 of the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014. It is the responsibility of the Commissioner of An Garda Síochána to ensure that these requirements are adhered to in accordance with legislation. Section 76 provides that an intimate or non-intimate sample will be destroyed within three months if proceedings for a relevant offence are not instigated within 12 months of taking the sample or proceedings have been instigated and the person is acquitted, the charge has been dismissed or the proceedings have been discontinued.

Section 77 notes that an intimate or non-intimate sample will not be destroyed if the Commissioner decides that a range of circumstances apply: a decision has not been taken whether to instigate proceedings against the person, the investigation of the offence has not been concluded, the sample or results from it is likely to be needed for the prosecution of an offence connected with the event or it is necessary to retain the sample in the investigation taking into account certain reasons. This can include convictions for similar offences, the nature and seriousness of the relevant offence, whether any alleged victim was: a child, a vulnerable person, or associated with the person at the time of the offence, or other matter that the Commissioner considers appropriate. The Commissioner can authorise an extension of the retention period by 12 months which can be extended by at least a further 12 months if necessary. However, the Commissioner must notify the person and they have a right to appeal.

Section 71 of the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 also provides for the establishment of the DNA Database System Oversight Committee which oversees the management and operation of the DNA Database System for the purposes of maintaining its integrity and security.

It is worth noting the Irish Human Rights and Equality Commission set out concerns in May 2024 in relation to the proposed General Scheme of the Garda Síochána (Recording Devices) (Amendment) Bill which amends the Garda Síochána (Recording Devices) Act 2023. It seeks to introduce the use of facial recognition technology by An Garda Síochána. The submission to the Justice Minister notes that the "*highly intrusive nature of facial recognition technology requires strong rules and justifications, heightened protection in law, and robust safeguards to protect*

fundamental rights…the proposed legislation does not go far enough to ensure that these rights are protected".[65]

1.4 Summary of Issues

- Have all aspects of the proposed legislation been subject to consultation, including the Department's new proposals? Are there plans for any further engagement on these issues?
- Given the complexity of this area, to what extent has the Department mapped all existing legislation and taken into consideration oversight arrangements and other developments across the UK?
- Does the legislation meet the standards and principles set out in the ECtHR judgments of *Marper* and *Gaughran*?
- How does the legislation compare to the provisions set out in the Criminal Justice Act (Northern Ireland) 2013 and the procedures currently operated under the PSNI's Interim Service Instruction on the Retention and Deletion of PACE Biometrics?
- Is the scope of biometric data sufficiently clear within the legislation? Should it be further defined? Should custody photographs be explicitly included?
- Does the legislation adequately provide for the use of emerging technologies by law enforcement in the future, for example live facial recognition? How does this relate to the role of the Commissioner? Is tasking the Commissioner with keeping under review the use and development of existing and new biometric technologies adequate? What will this look like in practice?
- Are the retention periods of 75/50/25 years proportionate? How were these determined? Are they overly complex/appropriate? Is the retention period of 10 years after death adequate? In what circumstances might this material be used? And does the legislation as drafted adequately provide for all biometric material to be deleted 10 years after the death of a person? How will this work in practice in terms of PSNI being notified of a person's death? Will a service level agreement

[65] Irish Human Rights and Equality Commission, Submission to the Minister for Justice on the General Scheme of the Garda Síochána (Recording Devices)(Amendment) Bill (May 2024)

be developed between PSNI and the General Register Office for Northern Ireland?

- What are the likely implications of different retention systems in place across the UK in terms of a) the retention of NI biometrics on UK-wide databases (NDNAD and IDENT1) b) different retention periods c) national security issues? Are there any gaps in oversight?
- Will the new legislation place administrative burdens on the Police? How will the Service meet the financial challenges associated with the design of new IT systems to analyse and review the updated retention periods?
- How will the reviews of long-term retained material work in practice? Is it sufficient that the detail of this will be contained in future regulations? Is there any risk that the default option will be to keep the data? Are there sufficient safeguards against the data being retained inadvertently or unlawfully? What will the role of the Commissioner be in this area and is it envisaged that individuals will be able to make complaints under future regulations? Will the Commissioner have any powers to ensure compliance with any complaint's investigation mechanism?
- The Commissioner's functions relate to keeping under review the law and policy around the handling, retention and destruction of biometric material but what remit will the Commissioner have around promoting public awareness and understanding of these powers and duties?
- Are there sufficient safeguards for children and vulnerable adults? Does the retention of biometric data from children align with requirements under the UN Convention on the Rights of the Child? Are there any other equality issues?
- Are there any outstanding issues in terms of legacy investigations since the Independent Commission for Reconciliation and Information Recovery (Biometric Material) Regulations 2024 came into force? Does this align with the new biometrics retention framework detailed in the Justice Bill? What practical steps are being taken by Police to ensure that any material that is retained for use in legacy investigations is held in a way that is ECtHR compliant?

2 Children

Part 2 of the Justice Bill relates to the treatment of children in the criminal justice system; bail, custody on sentencing, custody on remand or committal, and some supplementary articles. According to the accompanying Explanatory and Financial Memorandum (EFM), the provisions in this section have not been put out to consultation directly as they are "*aimed at delivering on a range of recommendations from relevant reports and reviews*" relating to the youth justice system. According to the DoJ, the purpose of this section is to enhance compliance with Article 37 of the United Nations Convention on the Rights of the Child (UNCRC) which relates to children in detention.

The United Nation's Committee on the Rights of the Child has raised concerns in the past on the treatment of children in the justice system in the UK. The Concluding Observations contained in its 2023 report on the United Kingdom highlighted concerns around children in the justice system:

> "*The Committee is deeply concerned about the draconian and punitive nature of the State party's child justice system and the limited progress made in implementing the Committee's previous recommendations to bring the child justice system in line with the Convention, in particular:*
>
> *(a) The low minimum ages of criminal responsibility, set at 10 or 12 years, throughout all jurisdictions of the State party and the State party's position that "children aged 10 can differentiate between bad behaviour and serious wrongdoing";*
>
> *(b) That children who are 16 and 17 years of age are not always treated as children in the justice system*
>
> *(c) That children can be remanded into police custody, sometimes staying overnight in prison cells*
>
> *(d) The continued use of solitary confinement for children and segregation and isolation in child detention facilities, and that legislation allows for life imprisonment for children*

(e) The overrepresentation of children belonging to ethnic minority groups in detention

(f) The large number of cases of violence, including sexual abuse, committed by staff against children in the child justice system and the findings of the independent inquiry into child sexual abuse that such complaints are rarely investigated".[66]

2.1 Bail

Table 2 below summarises the main changes in this section which relate to amendments to police bail under the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE NI). It also summarises changes to court bail for children and replaces existing legislation under Articles 12 and 13 of the Criminal Justice (Children) (Northern Ireland) Order 1998.

[66] United National Convention on the Rights of the Child, Concluding observations on the combined sixth and seventh periodic reports of the United Kingdom of Great Britain and Northern Ireland (June 2023)

Table 2: Overview of Amendments to Police Bail and Court Bail

Clause	Theme	Amendment
4	Duties of custody officer after charge	Amends Article 39 PACE NI to require the custody officer to take into account the juvenile's age, maturity and needs and their capacity to understand and comply with any condition of bail
5(1) and (2)	Police bail after arrest	Amends Article 48 PACE NI to add in a consideration that there should be no serious threat to public order and inserts a new Article relating to the bail of an arrested juvenile and the decision-making of the custody officer i.e. they must have regard to (in summary): the nature and seriousness of the offence; character, community ties and previous history; strength of evidence; age, maturity and needs; capacity to understand and comply etc.
5(3)	Police bail after arrest	A condition of bail should be proportionate

6	Court bail	**Article 10E** replaces Article 12 of the Criminal Justice (Children) (NI) Order 1998 which provides that where a child is charged with an offence, they should be released on bail in all but very specific circumstances. These include; where it is necessary to protect the public because the offence is violent, sexual or very serious (attracting 14+ years or more imprisonment for adults); or if the child was on bail or already found guilty of a serious offence within the past two years. Article 13 provides that the court will give reasons in open court where it decides not to release a child on bail; there is no time limit on the remand period although any remand period extending beyond 3 months requires reasons to be provided in open court. Articles 12 and 13 appear to already enshrine the automatic presumption to bail in legislation. These articles will be repealed and replaced by clause 6 with **Article 10E** aiming to strengthen legislation in this area by placing a duty on courts to release a child on bail subject to specified exemptions. **Article 10E** does not apply if the child is convicted of the offence (this includes a finding of guilt, a finding that the child is not guilty by reason of insanity, a finding that the child is unfit to be tried and that the child did the

Clause	Theme	Amendment
		act or made the omission charged will be treated as a conviction) or is in custody having been refused bail in respect of another offence.
6	Court bail	**Article 10F** gives courts the right to refuse bail under Article 10E if the following two conditions are both met: • A custodial sentence is very likely to be imposed on conviction; and • There are substantial grounds that remanding the child in custody is necessary to prevent: the child failing to surrender to custody; committing an offence while on bail; interfering with witnesses or posing a serious threat to public order.
6	Court bail	**Article 10G** relates to the imposition, variance and removal of conditions attached to bail decisions. However, it also allows for conditions to be imposed or varied under specific circumstances but these must be necessary and proportionate (to prevent the child from failing to surrender to custody; committing an offence while on bail; interfering with witnesses or posing a serious threat to public order). The court must also remove a condition of bail if it is satisfied that the condition is no longer necessary on these grounds.

Clause	Theme	Amendment
6	Court bail	**Article 10H** brings in a number of considerations that a court must take into account when deciding whether or not to r release a child on bail or impose, vary or remove conditions of bail under Articles 10E and 10F. This includes the nature and seriousness of the current offence, the strength of evidence against the child, the child's character and history, the child's community ties and associations, the child's age, maturity and needs and the child's capacity to understand and comply with bail conditions.
6	Court bail	**Article 10I** provides that decisions around the refusal of bail, or the imposition or varying of bail conditions, are stated in court and that a record of them can be made available to the child upon request.
7	Arrest for absconding or breaking conditions of bail	Amends Article 6 of the Criminal Justice (Northern Ireland) Order 2003 to require a Constable to consider the seriousness of any breach or likely breach of bail conditions before deciding to arrest a child. In circumstances where a Constable decides not to arrest a child, a record of the breach must be provided at the next scheduled court hearing. This allows for the continuation of bail for the child.

Clause	Theme	Amendment
8	Accommodation considerations	Makes two amendments to the existing legislation on police bail (currently governed by Article 39 PACE NI) and court bail (currently governed by Article 12 of The Criminal Justice (Children) (Northern Ireland) Order 1998) to prevent children being detained in custody and refused bail because of a lack of suitable accommodation. The Committee may wish to consider whether this will work in practice and how it will be supported by statutory partners before the implementation of legislative change; at present a lack of appropriate alternative accommodation can be a factor in the use of custody.

2.2 Custody on Sentencing

This section of the Bill relates to custody orders for children following sentencing. Clause 9 introduces the general principle that a child (under the age of 18) will only be held in a juvenile justice centre. Clause 10 amends Article 45 of the Criminal Justice (Children) (Northern Ireland) Order 1998 to clarify that this is the case even for children involved in serious offences. Clause 11 raises the minimum age for detention in a young offenders' centre to 18 and removes custody care orders (which were not commenced under the Justice (NI) Act 2002) for younger children aged 10 to 13. It also removes all provisions relating to juvenile justice centre orders in the Criminal Justice (Children) (Northern Ireland) Order 1998 (Articles 39-44).

Clause 12 introduces a new youth custody and supervision order which replaces juvenile justice orders for children aged 14+ for less serious offences. It inserts a series of provisions (38A to 38G) into the Criminal Justice (Children) (Northern Ireland) Order 1998 which:

- **Article 38A:** Details when the orders can be used: i.e. the child was aged 14+ when the offence was committed and the offence is one which is punishable with imprisonment in the case of an adult. The order provides for the child to be subject to a period of detention followed by a period of supervision.
- **Article 38B:** The duration of the orders will be for a minimum of six months and a maximum of two years (with a maximum of four years in certain cases for children aged 16+). The detention period cannot be for less than three months and cannot be more than half of the period of the order.
- **Article 38C:** This covers a range of practicalities when a child has been sentenced to a youth custody and supervision order. The court must send a record of all the information about the child that would be needed by the juvenile justice centre to the centre. Anyone who harbours or hides the child after they are due to be sent to the centre is guilty of an offence.
- **Article 38D:** The centre must inform the child about the date of their release, who will be their supervisor and the requirements that they will need to fulfil at the centre.
- **Article 38E:** Breaches of the supervision requirements are dealt with under Schedule 3 of the Bill which makes changes to Schedule 1B of the Criminal

Justice (Children) (Northern Ireland) Order 1998. This can include a further period of detention or the issue of a fine not exceeding £1,000.

- **Article 38F:** Only one youth custody and supervision order can be made where a court is dealing with an offender for two or more associated offences.
- **Article 38G:** Provides detail around how a court should deal with a situation where it intends to impose a custodial sentence on an individual already serving a youth custody and supervision order. A court must revoke the existing order so that only one order is in force at any one time.

2.3 Custody on Remand and Committal

Clause 13 states that any child that is remanded or committed to custody must be held in a juvenile justice centre. This applies to any child that has been arrested for, charged with or convicted of an offence. However, there is an exception for remanding a child to customs detention for drug trafficking offences provided for under Section 152 of the Criminal Justice Act 1988.

Clause 14 adds that a court must openly state its reasons for remanding a child in custody for more than three months. Clause 15 highlights that the time that a child has spent in custody on remand should be taken into account as part of sentencing if convicted.

Clause 16 provides that any child who is ordered to be detained in custody for contempt of court is held in a juvenile justice centre; this covers a circumstance not already dealt with by clauses 9 and 13. Clause 17 amends the Treatment of Offenders Act (Northern Ireland) 1968 to raise the age limit for being committed to or remanded in a young offenders' centre to 18; it also removes a provision from the Criminal Justice (Children) (Northern Ireland) Order 1998 to place a child on remand for the purpose of obtaining information about them.

2.4 Further Considerations

The Committee may wish to consider the rationale for the various amendments contained in this section and whether they will adequately address outcome 3 of the Department's Strategic Framework for Youth Justice 2022-2027 which states that 'children will only ever be placed in custody as a last resort'. This framework

acknowledged "*the high numbers of children admitted to custody each year on remand for offending or breaching their bail, and the low numbers who subsequently go on to serve a custodial sentence, would therefore suggest that the legislative presumption in favour of bail for children is not operating as well as we would like in practice*".[67] It also notes that the independent Youth Justice Review 2011, the Northern Ireland Law Commission's Report on Bail in Criminal Proceedings 2012 and inspection reports from Criminal Justice Inspection Northern Ireland have all concluded that children should not be held in custody for any period if they are unlikely to receive a custodial sentence as a result of their offending.[68]

The Committee may also wish to seek an update from the Department of Justice and Department of Health on the development of the Regional Care and Justice Campus and the role that it will potentially play in impacting the delivery of outcome 3 and the proposals contained within this section of the Bill.

Furthermore, the Committee will be aware that one of the key issues relating to children and young people in the criminal justice system is the Minimum Age of Criminal Responsibility, currently set at age 10 in Northern Ireland as highlighted above. The Committee on the Rights of the Child has stated that a minimum age below 12 "*is considered by the Committee not to be internationally acceptable*" and it recommends between 14-16.[69] The Department of Justice consulted on raising the minimum age of criminal responsibility from age 10 to age 14 between October 2022 and December 2022. The summary of the findings was published in June 2023.[70] The results of the consultation showed clear support for increasing the minimum age to 14.

However, it also noted that "*whilst efforts have been made by Justice Ministers, most recently by Minister Long, to secure cross-Executive agreement to raise the*

[67] Department of Justice, Strategic Framework for Youth Justice 2022-2027 (March 2022)

[68] Ibid

[69] UN Committee on the Rights of the Child (CRC), General comment No. 10 (2007): Children's Rights in Juvenile Justice (25 April 2007)

[70] Department of Justice, Increasing the Minimum Age of Criminal Responsibility in Northern Ireland from 10 Years to 14 Years: Summary of Consultation Responses (June 2023)

minimum age of criminal responsibility, there has been insufficient support to progress this issue to date".[71] The Justice Minister updated the Assembly on this issue in June 2024 during which she noted that Departmental officials have developed an options paper following the public consultation and that this is due to be shared with the Executive.[72] The Committee may wish to consider this broader issue for reform of youth justice in the context of the Justice Bill.

2.4 Summary of Issues

- Could the Department clarify the reports that were used to inform each of these clauses? And any associated public consultation?
- Are there timely statistics on the frequency of children being detained in custody because of a lack of suitable accommodation for bail? What will the impact of clause 8 be and will statutory partners be in a position to potentially support the provision of alternative accommodation?
- Does this section of the Justice Bill align with the vision and principles outlined in the Strategic Framework for Youth Justice, specifically emphasising the importance of placing children in custody only as a last resort? How will progress in this area be measured going forward?
- The Strategic Framework for Youth Justice also highlights the need to simplify key elements of the youth court process. Does the Justice Bill help to do this? A range of community and custodial orders are already available across youth justice but do the new youth custody and supervision orders under clause 12, which replace juvenile justice orders, assist in simplifying the landscape in this area? How do the new youth custody and supervision orders differ from juvenile justice orders?
- The Bill raises the age limit for being committed to or remanded in a young offenders' centre to 18 but will this have any impact on capacity and resourcing?
- Does this legislation meet the concerns of the UNCRC in relation to the treatment of children in the justice system in the UK? Should this legislation address the

[71] Ibid

[72] Northern Assembly Official Report, Criminal Responsibility: Minimum Age AQO 588/22-27 (17 June 2024)

UNCRC's concerns about the minimum age of criminal responsibility on which the DoJ consulted in 2022?

3 Live Links

3.1 Public Consultation

This section of the Bill relates to the use of live links in police interviews and detentions. It follows a six week consultation undertaken by the Department of Justice in 2020 which aimed to gather views on proposed amendments to the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE NI).[73] The amendments are intended to enable video-conferencing technology ('live links') to be used by the PSNI for a number of custody functions, including the extension of police detention, court extension of police detention and interviews with suspects.

The consultation paper highlights that live links have been operating in a range of court processes for a number of years, including in courts 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 cases.[74]

Article 41 of PACE NI 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. Article 41A of PACE NI 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, with the Department proposing to update this terminology to replace the term 'video-conferencing' with 'live link'.

At present Article 43 PACE NI provides that a superintendent or above can authorise the extension of a person in police custody from 24 hours to 36 hours in person only. Article 44 PACE NI permits a District Judge to extend the detention up to 96 hours

[73] Department of Justice, The use of Live Links for Police Detention/Interviews (April 2020)

[74] Legislation found in Part 3 of the Criminal Justice (Northern Ireland) Order 2004, Articles 79 to 83 of the Criminal Justice (Northern Ireland) Order 2008, Part 2 of the Justice Act (Northern Ireland) 2011, Part 7 of the Justice Act (Northern Ireland) 2015

with both the detainee and a police officer in court. This means that Police Officers, detainees and legal representatives may have to travel considerable distances across Northern Ireland. The use of live links for these functions is intended to make these processes more efficient in terms of time and resources.

The consultation paper states that the Chief Constable must be satisfied that the live link system is fit for purpose and provides accurate and secure communication between the detainee, their solicitor, an appropriate adult, a registered intermediary and an interpreter as required. The amendments are intended to include a number of safeguards:

- A custody officer considers that the use of live links is appropriate (i.e. due to the location of the police station)
- The detainee has received advice from a solicitor on the use of the live link
- It is not contrary to the interest of justice in the case of a court extension
- The appropriate consent to the use of the link has been given – with additional safeguards for under-18s and vulnerable adults

There were 10 responses to the targeted consultation exercise.[75] The responses to the proposals around remote police interviews were mixed. The majority of respondents were supportive of the use of live links for the extension of PACE NI detention by a Superintendent or above. The majority of respondents were also supportive of the use of live links for extension of PACE NI detention by the courts. Additional comments in relation to both of these focused on ensuring that the rights of the detainee would not be undermined during the process. However, a proposal to amend Article 40 of PACE NI to enable the PSNI, if necessary, to carry out a police interview via live link received a number of objections. Concerns were raised around the ability of the detainee to understand the proceedings and participate effectively as well as the necessary safeguards for vulnerable individuals.

The Department noted the Children's Law Centre describing live links as "*fundamentally unsuitable*" for proceedings involving children or young people. The Department responded that live links are well established in statute and already exist

[75] Department of Justice, The use of Live Links for Police Detention/Interviews: Summary of Responses (June 2020)

between the Juvenile Justice Centre and courts. In addition, safeguards (consent and the presence of an appropriate adult) will be introduced into the Codes of Practice.

The clauses included in the Bill relating to live links for interviews and detention are considered further below.

3.2 Interviews

Clause 20 amends Article 40 of PACE NI entitled “responsibilities in relation to persons detained” which states that all detainees are treated in accordance with PACE NI and the associated Codes of Practice. The purpose of these amendments is to enable remote interviewing using live link so that a police officer can interview a suspect from a different location. The current Bill substitutes the following phrase in 2(a) Article 40 of PACE NI: “another police officer at the police station where the person is in police detention, for the purpose of an interview that is part of the investigation of an offence for which the person is in police detention or otherwise in connection with the investigation of such an offence” for the existing “a police officer investigating an offence for which that person is in police detention”.

Article 40(3) makes clear that a custody officer can transfer physical custody of a detained person to an officer who is not involved in the investigation and whose responsibility would be to facilitate the live link interview with the investigating officer. This Article also highlights that an investigating officer conducting the interview who is not at the police station has the same duties towards the detainee as an officer who is present.

Furthermore, it defines a live link as any arrangement by which the officer who is not present at the police station can see and hear (and also be seen and heard by) the detainee, their legal representative if relevant and the officer who has custody of the detainee.

3.3 Detention

This clause amends various areas of Part 5 of the Police and Criminal Evidence (Northern Ireland) Order 1989 by adding new clauses relating to the use of live links for the extension of detention periods. Article 46ZA states that an officer operating remotely can undertake their functions if:

- A custody officer thinks it is appropriate
- The arrested person has had a solicitor's advice on the use of live links
- Appropriate consent has been given (dependent on age as consent of a parent/guardian will be required for under 18s and must be given in the presence of an appropriate adult for those aged 14+ but under 18 as well as vulnerable adults).

It also defines what is meant by an appropriate adult for persons under the age of 18 (but 14+) or for a vulnerable adult. There are also similar provisions for the use of live links in Magistrates' Courts under Article 46ZB for the purposes of a hearing for a warrant authorising further detention, and again, this changes the terminology from videoconferencing to live links.

3.4 Summary of Issues

- Do the proposals provide an appropriate balance between the efficient use of resources and the needs of the detained persons?
- Do we need to implement any additional safeguards for individuals undergoing live link interviews in police custody? Do the changes ensure that live link technology will only be used when a detained person is accompanied by their legal advisor? Will this apply to every category of offence? Is there a possibility that planning for the use of this technology could delay a detained person getting access to support? Are there any other steps that can be taken to ensure that detained persons fully understand the right to request a face to face interview? Will there be a cost to the PSNI in terms of training Police Officers in the use of live link technology?
- How will the new arrangements be monitored and should they be subject to review following introduction?
- Are there any further logistical factors that need to be considered in terms of the use of technology, cybersecurity and data protection?
- Has the Department considered any whether there has been any impact on access to justice for detained persons in other jurisdictions where similar live link technology has been introduced for police custody interviews, reviews and hearings?

4 Administration of Justice

4.1 Police Functions

Clause 22 adds a paragraph to the Police (Northern Ireland) Act 2000 (Schedule 1) relating to the constitution of the Policing Board to allow the Board to delegate any functions of the Board to a committee of Board members or to one or more members of Board staff.

According to the Explanatory and Financial Memorandum accompanying the Bill, the purpose of this is to allow the delegation of decision-making on issues such as "pensions forfeiture, ill-health retirement, injury on duty and other miscellaneous benefits". This follows the High Court judgment in *McKee & Hughes (and others) v The Charity Commission for Northern Ireland* from May 2019, subsequently confirmed by the Court of Appeal in February 2020, which found that the Charity Commission for NI did not have the power to delegate its functions to staff.[76]

Meanwhile clause 23 removes the requirement for the Comptroller and Auditor General (C&AG) to audit the Policing Board's performance plan and performance review under Section 29 of the Police (Northern Ireland) Act 2000. However, the potential to undertake an examination of the Board's compliance around having regard to economy, efficiency and effectiveness remains under Section 30 of Police (Northern Ireland) Act. This clause is taken from a recommendation contained in a 2023 Northern Ireland Audit Office report and will align NI with England and Wales. The report states that:

"*The role of the C&AG defined in the 2000 Act in respect of continuous improvement in Northern Ireland now appears to be unique in the UK with the Department finding that many of the corresponding provisions to the Police (Northern Ireland) Act 2000 in the UK have been repealed and, for the most part, 'best value' arrangements in England and Wales no longer apply to the police"*.[77]

[76] *McKee & Hughes (and others) v The Charity Commission for Northern Ireland* [2020] NICA 13

[77] Northern Ireland Audit Office, Continuous Improvement Arrangements in Policing (August 2023)

4.1.1 Summary of Issues

- Are there any further lessons to be learnt from the Charity Commission or other bodies around the delegation of functions following the *McKee* decision?

4.2 Criminal Proceedings

Clause 24 amends existing legislation under the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 relating to conspiracy to commit offences outside Northern Ireland to require the consent of the Advocate General for Northern Ireland when starting criminal proceedings in Northern Ireland. This corrects a drafting error and transfers this function from the Director of Public Prosecutions to the Advocate General for Northern Ireland. According to the EFM, this brings Northern Ireland in line with England and Wales.

Clause 25 (death of child or vulnerable adult: limitation of power to "No Bill" alternative charge) aims to close a gap in the law in relation to the offence of causing or allowing a child or vulnerable adult to die (under section 5 of the Domestic Violence, Crime and Victims Act 2004) and section 7 of the Act which provides special rules for trials in NI where a defendant is charged, within the same proceedings, with the section 5 offence and murder or manslaughter for the same death.

The "No Bill" procedure is a judicial tool under the Grand Jury (Abolition) Act (Northern Ireland) 1969 to dismiss charges in the Crown Court before trial when evidence is insufficient. The proposed amendment to the Domestic Violence, Crime and Victims Act 2004 addresses a procedural gap in this "No Bill" process, specifically related to cases involving the death of a child or vulnerable adult. It provides that a judge can enter a "No Bill" on a charge such as murder or manslaughter only if the judge also enters a "No Bill" on the related charge under section 5 of the Act (causing or allowing a child or vulnerable adult to die).

At present it is possible that a judge could dismiss (enter a "No Bill" on) a murder or manslaughter charge without also having to dismiss the related section 5 offence (causing or allowing a child or vulnerable adult to die). This could lead to a situation where serious charges like murder or manslaughter are dismissed but the defendant

still faces the lesser section 5 charge. The new provision being added (subsection 3A) states that a judge's power to dismiss charges of murder or manslaughter under the "No Bill" procedure can only be exercised if the judge also dismisses the related lesser section 5 offence.

Clause 26 relates to the examination of a defendant in criminal proceedings through an intermediary. The proposed changes to the Criminal Evidence (Northern Ireland) Order 1999 aim to address a specific gap in the provision of Registered Intermediaries for defendants with communication difficulties during appeal proceedings. Article 21BA of the Criminal Evidence (Northern Ireland) Order 1999 currently allows for the examination of defendants through a Registered Intermediary in Magistrates' Courts and Crown Courts. This provision helps defendants with communication difficulties to participate effectively in court proceedings by assisting them in understanding and responding to questions during the trial.

The current legislation does not extend the provision of Registered Intermediaries to defendants during appeal proceedings when giving oral evidence. The proposed amendment seeks to close this gap by extending the provision of Registered Intermediaries to appeal hearings. This means that Registered Intermediaries will now be available for defendants in:

- Magistrates' Courts
- Crown Courts
- County Courts (on appeal under Articles 140 or 141 of the Magistrates' Courts (Northern Ireland) Order 1981)
- Court of Appeal (on appeal under Sections 1 or 8 of the Criminal Appeal (Northern Ireland) Act 1980)

It is worth noting that this amendment was proposed after discussions within the Department's Victim and Witness Steering Group (VWSG) which includes senior leaders from criminal justice organisations and victim representative groups. The group identified this gap and agreed on the necessity of this legislative change. Given the extensive engagement with relevant stakeholders through the VWSG, it was deemed unnecessary to conduct further consultation. The stakeholders agreed that no other option would effectively close this gap in provision.

4.2.1 Summary of Issues

- Is there a need to clarify the rationale behind the amendment under Clause 25? There was no consultation on this clause and so it may be worth querying whether there have there been instances where this has been an issue before?

4.3 Legal Aid

Clause 27 makes a technical amendment to Schedule 11 of the Land Registration Act (Northern Ireland) 1970 to include charges created by Article 12(5) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 and charges created in favour of the Department of Justice by Article 17(7) of the Access to Justice (Northern Ireland) Order 2003. The amendment allows the Legal Services Agency to register such charges in the **Statutory Charges Register**.

The charges referred to are statutory charges, which are legal claims placed on a person's property or financial assets by law. These charges typically arise when the Government provides some form of financial assistance or service, such as legal aid or social care, and there is a mechanism to recover the costs from the recipient if they gain financially or acquire property. The Statutory Charges Register is an official record maintained to track and manage these charges. It ensures transparency and legal enforceability, allowing interested parties, such as potential buyers or creditors, to be aware of any existing charges on a property.

The Legal Services Agency (LSANI) administers both civil and criminal legal aid, ensuring that eligible individuals receive the legal assistance they need for their cases. This includes funding for legal representation in court and legal advice.

Schedule 11 of the Land Registration Act (Northern Ireland) 1970 provides a comprehensive legal framework for the registration, effect and enforcement of statutory charges. It ensures that these charges are publicly recorded and enforceable, protecting the Government’s ability to recover public funds and ensuring transparency in property transactions.

Article 17(7) of the Access to Justice (Northern Ireland) Order 2003 ensures that when civil legal services funded by the Department result in financial or property gains for the individual, the Department can recover its costs before the individual

benefits from those gains. This process is referred to in the legislation as a 'first charge'.

Article 12(5) specifies that where a person who has received legal aid under the order recovers money or property through legal proceedings, the amount recovered must be used to reimburse the costs of the legal aid provided. The provision applies to various forms of recovery, including monetary awards ordered by the court, settlements reached between parties or any other means by which the aided person gains money or property as a result of the legal proceedings.

Both mechanisms help sustain the legal aid system by recouping expenses and ensuring that public funds are used efficiently, fairly and equitably. The amendment will allow the LSANI to register true statutory charges against property recovered or preserved through proceedings funded by civil legal aid, rather than registering such charges on the folio (an individual section of the Title Register that records the title to a specific property) of the property recovered or preserved.

The Department conducted a 12-week public consultation on the amendment to the Land Registration Act 1970 in 2022 which received one response from the Law Society of Northern Ireland. This queried whether the amendment would allow for any additional transparency in this process and noted that it could bring about unintended consequences for conveyancing practice and for the powers and remedies of the Department / LSANI in respect of the monies owed.[78] A query was also raised around whether statutory provision for the Department to register a statutory change could potentially detrimentally impact the interest of any other joint legal owner(s) by automatically severing a joint tenancy.[79]

Meanwhile clause 28 outlines proposed changes to the **taxation of legal aid costs** in Northern Ireland and inserts Section 59A into the Judicature (Northern Ireland) Act 1978. The aim of this appears to be to restrict the role of the court via the Taxing Master in determining payment for legal aid work where the basis for payment is set

[78] Department of Justice, Post Consultation Report: Legal Aid - Taxation Reform and Statutory Charge Registration (May 2024)

[79] Ibid

out in a remuneration order made under the Access to Justice (Northern Ireland) Order 2003.

It is envisaged that this change will support the future introduction of alternative methods of determining the remuneration payable in relevant legal aid cases. The EFM states that the provisions will not be commenced and will only take effect on a project-by-project basis to ensure the proper operation of any new systems.

The Department conducted a consultation on this issue in 2022 and highlighted that this proposed change stems from a Report on Managing Legal Aid produced by the Assembly's Public Accounts Committee in 2016.[80] This recommended a review of how expenditure currently adjudicated by the Taxing Master can be properly brought under the purview of the Accounting Officer. Therefore, the objective of clause 28 is to preclude the High Court and Court of Appeal from granting orders for taxation of legal aid costs if:

- The costs are for civil or criminal legal services funded by the Department of Justice;
- The costs have not been ordered to be paid by any party other than the Department of Justice.

The Department takes the view that it should be able to determine the amount that it pays. However, it will be possible for the practice to continue where the LSANI will step in and pay the costs of a winning legally-assisted party in instances where the losing party in a High Court/Court of Appeal case has been ordered to pay the winner's costs, those costs have been taxed and the losing party has defaulted on payment.

The change also introduces some provisions for partial cost orders:

- Where a court orders that part of the legal aid costs should be paid by a party other than the Department of Justice or the person receiving legal aid, the Department of Justice can still determine the amount it will pay for the remaining

[80] Northern Ireland Assembly Public Accounts Committee, Report on Managing Legal Aid (November 2016)

legal aid costs independently and either before or after the detailed assessment of the other costs is completed.

- If a court orders that some or all of the costs of criminal defence services funded by the Department should be paid by the person receiving those services, the Department of Justice can determine its contribution to any of those costs independently of the court's determination of the sum payable by the person, including any amount that the person is required to reimburse.

The legislative provisions also make an amendment to section 32, specifically, it removes the requirement that the expenses of a solicitor or counsel assigned to a respondent in vexatious-litigant order applications be taxed and paid out of the legal aid fund. It also adds that the services of solicitors or counsel assigned under this context are to be treated as civil legal services under the Access to Justice (Northern Ireland) Order 2003. The DoJ is required to fund these services with no payment required from the person receiving them.

4.3.1 Summary of Issues

- What is the practical impact of changes to the Statutory Charges Register and how does this improve the transparency of the process and increase efficiency?
- How will the Department and LSANI communicate changes in relation to the Statutory Charges Register associated with legal aid across the legal professions and other stakeholders ahead of them being implemented?
- Will clause 28 result in greater clarity and predictability around legal aid payments for both the Department and the legal professions? Or is there a risk that it will remove an important independent function through the Taxing Master who is ultimately legally bound to protect the legal aid fund? What impact will removing the remit of the Taxing Master in these cases have on the judiciary?
- Is there a potential that the changes to taxation under clause 28 could ultimately result in increased payment delays for the legal professions and consequent impacts on access to justice for the communities they serve?
- How will the Department ensure that any new systems of remuneration developed for legal aid cases properly recognise the time and skill required for the services provided by the legal profession given that clause 28 envisages the Taxing Master no longer having a role in determining payment in most cases? How will

the criteria contained in Article 47 of the Access to Justice (Northern Ireland) Order 2003 and Article 37 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 be relevant?

- How will the changes envisaged under clause 28 be subject to monitoring and evaluation once they are commenced? What is the timeframe for the amendment taking effect and alternative methods for determining remuneration being in place? What resources will be required for this?
- Will the Taxing Master still be able to hear appeals against a determination by the LSANI in future? For example, in Crown Court cases involving determinations made by LSANI in relation to Certificates of Exceptionality?

4.4 Criminal Records Certificates

4.4.1 Context

Clause 29 relates to the automatic review of certain criminal records certificates. The changes in the Bill highlight that all certificates containing spent convictions or other disposals of a person under 18 can be automatically considered by the Independent Reviewer (IR).

The proposed change is as a direct result of the outcome of a UK Supreme Court case in January 2019 where a number of cases relating to different areas of the criminal records disclosure regime were heard in the Supreme Court.[81] The current legislation that restricts automatic reviews of 'other disposals' to certificates where all information to be disclosed occurred when a person was under 18, would not comply with the judgment.

The judgment found that two aspects of the regime were disproportionate and therefore in breach of Article 8 of the European Convention on Human Rights. Firstly, the multiple conviction rule which provided that if a person had more than one conviction then their records had to be disclosed regardless of how old or minor the convictions might be. Secondly, the disclosure of reprimands and warnings given to younger offenders.

[81] *R (on the application of P, G and W) (Respondents) v Secretary of State for the Home Department and another (Appellants)* [2019] UKSC 3

The UK Government has amended the filtering rules that govern what is automatically disclosed through standard and enhanced criminal records certificates issued by the Disclosure and Barring Service (DBS). The amended filtering rules remove the requirement for disclosure of:

- Youth cautions, reprimands and warnings (any out of court disposal issued to young offenders that were replaced by youth cautions in 2013); and
- All convictions where the individual has more than one conviction (except where disclosed under the other rules).[82]

Disclosure of unspent convictions, convictions receiving a custodial sentence, a conviction or adult caution for an offence specified as 'serious' (the 'never filter' list of offences), where less than 11 years have passed (5.5 years for convictions received under age 18) and all adult cautions where less than 6 years have passed will continue to be disclosed.[83]

However, it should be noted that despite these changes, it is still possible for facts related to youth cautions, warnings or reprimands to still be disclosed on an enhanced DBS certificate if the Police feel the information is "relevant".

In Northern Ireland, AccessNI can filter some information, particularly some minor and old convictions, from a standard or enhanced criminal record disclosure certificate. In 2015, the legislation was amended by Schedule 4 to the Justice Act (Northern Ireland) 2015 (inserted as Schedule 8A to the Police Act 1997) to allow an individual to seek an independent review (IR) of the information that has not been filtered from their certificate. The legislation also provides that the review process should be carried out by an Independent Reviewer, appointed by the DoJ. Furthermore, the legislation provides that the Independent Reviewer must consider DoJ's 'Guidance for the Operation of the Criminal Records Filtering Review Scheme' in exercising his or her functions under the Schedule.[84]

[82] Home Office, Government plan new changes to criminal records disclosure regime (July 2020)

[83] Ibid

[84] Department of Justice, Guidance for the Operation of the Criminal Records Filtering Review Scheme (updated March 2022)

Prior to the Supreme Court judgement in 2019, the review mechanism in Northern Ireland was designed so that, in cases where all the information disclosed relates only to convictions or disposals awarded when the applicant was aged under 18, and there is no unspent conviction information, there will be an automatic referral to the Independent Reviewer. This means that the Independent Reviewer can consider whether or not it is appropriate to decide not to disclose information prior to the certificate being issued.

As a result of the Supreme Court ruling in 2019, the Independent Reviewer must now also consider, before the issue of a certificate, all non-court disposals awarded when an applicant was under 18, regardless of whether they have convictions or disposals awarded after the applicant was 18.

The Independent Reviewer, Caroline Conway, has been undertaking this function since 16 March 2020. The Independent Reviewer's annual report for 2023/24 noted that she reviewed 165 cases involving youth diversions, removing information in 159 of these cases and retaining information in the remaining five cases. She also reported that she had the benefit of police information on the background to the relevant offences. In the 6 cases where information was retained, it was determined that the incidents were of a nature so grave that disclosure was required in order to ensure that the safeguarding of children and vulnerable groups was protected.[85] The DoJ guidance on the Filtering Review Scheme was also updated in 2022 to reflect the Supreme Court changes.[86]

Where the Independent Reviewer concludes that information should not be disclosed on an enhanced certificate, he/she must inform the police so that they can assess whether or not they would wish to include in the certificate, the information he/she has decided not to disclose, using the powers available to them under Section 113B (4) of the 1997 Police Act.

The 1997 Act, as amended, requires that, when adding information, the chief officer must reasonably believe it to be relevant for the purpose for which the certificate is

[85] Department of Justice, Independent Reviewer of Criminal Record Information Annual Report 2023-24 (June 2024)

[86] Department of Justice, Guidance for the Operation of the Criminal Records Filtering Review Scheme (updated March 2022)

sought, and that it ought to be included in the certificate. Where the IR has concluded that information should not be disclosed on an enhanced criminal record certificate, the police should take that into account, and should not normally consider including that information, unless there is a very specific purpose for doing so.

A statutory Code of Practice has been introduced for police to use when disclosing police information within the criminal records process.[87] This guidance was published in November 2015 under section 113B(4A) of the 1997 Act in order to assist chief officers when providing information from local police records for inclusion in enhanced criminal record certificates.

Police must also have regard to the Quality Assurance Framework (QAF) which is a set of processes and more detailed guidance covering the disclosure of local police information under the Act.[88] An Independent Monitor function also allows for a dispute to be raised in relation to a police decision.[89]

4.4.2 Stakeholder Views

Recommendation 21 of the Youth Justice Review (YJR) published in 2011 highlighted that:

"*Policy and legislation relating to the rehabilitation of offenders should be overhauled and reflect the principles of proportionality, transparency and fairness. Specific actions should include:*

- *Diversionary disposals should not attract a criminal record or be subject to employer disclosure*
- *Young offenders should be allowed to apply for a clean slate at age 18; and*
- *For those very few young people about whom there are real concerns and where information should be made available for pre-employment checks in the future, a transparent process for disclosure of information, based on a risk assessment*

[87] Department of Justice, Statutory Disclosure Guidance for Chief Officers (July 2021)

[88] Disclosure and Barring Service, Applicant's introduction to the decision-making process for enhanced criminal record checks (March 2014)

[89] NI Direct, Disputing an AccessNI certificate

and open to challenge, should be established. The decision to disclose and the assessment on which it is based should be regularly reviewed".[90]

Both Criminal Justice Inspection Northern Ireland[91] and the UN Committee on the Rights of the Child[92] have confirmed that youth disposals should not form criminal records and as such should not be shared. The Northern Ireland Commissioner for Children and Young People and other groups that represent ex-offenders, such as the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO), have previously highlighted that they would prefer, as an alternative to any scheme to filter out old and minor youth non-court disposals, to see the full implementation of Recommendation 21 of the 2011 Youth Justice System Review in Northern Ireland.[93]

Furthermore, NICCY reported concern about the overriding ability of the PSNI to disclose information that may have been filtered or the subject of a successful review. In their 2015 *'Advice to the Department of Justice regarding Draft Guidance for the operation of the Criminal Records Filtering Review Mechanism'* NICCY recommended that a protocol be established between PSNI, Access NI, the Independent Reviewer and the Independent Monitor and reflected in the Statutory Disclosure Guidance for Chief Officers.[94]

The Department's Strategic Framework for Youth Justice highlighted the plans for primary legislation to underpin current filtering arrangements following the 2019 Supreme Court ruling in terms of the changes to the Independent Reviewer's role in relation to all youth diversionary disposals.[95] It also noted the rejection of the

[90] A Review of the Youth Justice System in Northern Ireland (2011)

[91] Criminal Justice Inspection Northern Ireland, Youth Diversion: A Thematic Inspection of Youth Diversion in the Criminal Justice System in Northern Ireland (July 2011)

[92] United Nations Convention on the Rights of the Child, General Comment No. 10 Children's Rights in Juvenile Justice (2007), para 27

[93] NIACRO, Off the Record: The Impact of Old and Minor Youth Convictions (January 2015) and Northern Ireland Commissioner for Children and Young People, Advice to the Department of Justice regarding Draft Guidance for the operation of the Criminal Records Filtering Review Mechanism (September 2015)

[94] Northern Ireland Commissioner for Children and Young People, Advice to the Department of Justice regarding Draft Guidance for the operation of the Criminal Records Filtering Review Mechanism (September 2015)

[95] Department of Justice, Strategic Framework for Youth Justice 2022-2027 (March 2022)

recommendation for a blanket removal of children's criminal records, leading to a clean slate at 18, contained in the 2011 Youth Justice System Review.

This is reiterated in the Bill's Explanatory and Financial Memorandum where it is highlighted that instead of implementing recommendation 21, a previous Justice Minister determined that a scheme of filtering out old and minor convictions and other disposals should be introduced, with specific safeguards built in for those with convictions and other disposals that occurred at a time when they were aged under 18.

In bringing forward an amendment to the legislation, the current Justice Minister, Naomi Long MLA, considers that a blanket policy of not disclosing any other disposals occurring when a person was aged under 18 in any circumstances could potentially create safeguarding risks to vulnerable groups.

The EFM notes that clause 29 will reduce the number of such disclosures and in all cases disclosure of any other disposal occurring from a time when a person was under 18 will only be made where the Independent Reviewer believes that it should be permitted. This is in line with a recommendation made by the Independent Reviewer in her 2020 Annual Report.[96]

4.5 Court Security

Clause 30 relates to the security at buildings used for courts and tribunals. The changes to the Justice (Northern Ireland) Act 2004 enhance security measures at buildings used for courts and tribunals in Northern Ireland.

The amendment extends coverage of Court Security Officers to cover all relevant buildings where tribunals sit. The DoJ is also granted the authority to specify which buildings are considered "relevant buildings". A building is considered relevant if it meets certain criteria (ownership, usage by judicial officers, specified in regulations by the DoJ).

[96] Department of Justice, Independent Reviewer of Criminal Record Information Annual Report 2019-20 (June 2020)

The DoJ can also specify that only certain parts of a building, used in connection with the sittings of a judicial officer, are covered by security provisions, presumably allowing for targeted security measures in multi-purpose buildings.

The amendment defines “judicial officer” to include anyone holding a “listed judicial office” (as per the Justice (Northern Ireland) Act 2002) or individuals exercising judicial or quasi-judicial functions.

The provisions are sought on foot of security recommendations and in consultation with the Chief Operating Officer of the Northern Ireland Courts and Tribunals Service and the President of the Appeal Tribunals. No formal consultation was considered necessary on this occasion.

5 Glossary

BR Date	Biometric Retention Date
BRC	Biometrics Ratification Committee
C&AG	Comptroller and Auditor General
CJA	Criminal Justice Act (Northern Ireland) 2013
DBS	Disclosure and Barring Service
DNA	Deoxyribonucleic acid
DOJ	Department of Justice
ECtHR	European Court of Human Rights
EFM	Explanatory and Financial Memorandum
Excepted Offence	A terrorism-related qualifying offence or a national-security qualifying offence
FIND	Forensic Information Databases
ICRIR	The Independent Commission for Reconciliation and Information Recovery
IDENT1	National Fingerprint Database
IR	Independent Review
Left on the Books	When some or all of the offences before the Crown Court are not proceeded with but can be reactivated at a later stage, subject to permission from the Crown Court or the Court of Appeal
LSANI	Legal Services Agency Northern Ireland
NCT DNADB	National Counter Terrorist DNA Database
NCT FPDB	National Counter Terrorist Fingerprint Database
NDNAD	National DNA Database
NIACRO	Northern Ireland Association for the Care and Resettlement of Offenders
NICHE	PSNI's internal Crime Management system
NIDNADB	Northern Ireland DNA Database
NIHRC	Northern Ireland Human Rights Commission
PACE NI	Police and Criminal Evidence (NI) Order 1989
PNC	Police National Computer
PND	Police National Database
PSNI	Police Service of Northern Ireland
QAF	Quality Assurance Framework
Qualifying Offence	Section 53A of PACE NI defines serious violent, sexual and terrorism offences
Recordable Offence	Offences recorded by Police and generally can be punishable by imprisonment
UK GDPR	UK General Data Protection Regulations 2018
UNCRC	United Nations Convention on the Rights of the Child