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Justice Bill: Biometrics Amendments

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This paper provides an overview of the amendments to the Justice Bill relating to biometrics.

This information is provided to Members of the Legislative Assembly (MLAs) in support of their duties, and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as professional legal advice, or as a substitute for it.

Key Points

This set of amendments to the Justice Bill covers the additional provisions relating to Part One on the framework for the retention and destruction of DNA and fingerprints in Northern Ireland. In summary, they aim to:

- Make seven changes to Schedule 2 of the Justice Bill which updates terminology in the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE NI) based on changing the term “reported” to “a complaint being laid” against a person;
- Insert new Article 63NA into Clause 1 relating to persons completing a restorative justice process;
- Provide a grace period of 28 days for DNA and fingerprints being held for individuals under investigation in order to allow the PSNI adequate time at the conclusion of an investigation to delete these from the relevant databases or apply to the Biometrics Commissioner for continued retention;
- Provide a lawful basis for the PSNI to retain DNA and fingerprints being held for individuals arrested for a qualifying offence until a determination can be made by the Biometrics Commissioner for a continued retention period of three years; and
- Introduce new clause 23A and Schedule 5 relating to the power to photograph certain persons at a Police Station and new clause 23B which gives the Police the power to specify a date and time for attendance. The Committee may wish to consider getting further detail on how the PSNI will operationalise the power to specify a date and time for individuals arrested, charged or convicted to attend a police station for fingerprints, non-intimate samples and photographs to be taken.
- The Committee may also wish to consider whether the biometrics amendments comply with the European Court of Human Rights judgments in *S & Marper v UK* (2008) and *Gaughran v UK* (2020). It may also be worth considering any engagement that the Department has had with the Northern Ireland Human Rights Commission on the biometrics amendments. Further potential scrutiny points can be found in section 4 below.

1 Overview

The Justice Minister highlighted during the Justice Bill's Second Stage debate on 01 October 2024 that some amendments and additions had been identified during the drafting process. These amendments aim to “*provide greater clarity and ensure the effective operation of the provisions*”.¹ The Minister also stated that the biometrics amendments came from the Department's “*stress-testing of the legislation with the PSNI*” and would “*further improve*” the Bill.

Department of Justice officials attended a Justice Committee meeting on 26 September 2024. They advised that the biometrics amendments did not change the policy intent of the Bill and that no “*significant new policy content*” was being added. They explained that the amendments are designed to ensure that the provisions in the Bill “*operate as intended*” rather than changing the policy approach of the legislation as drafted.² The Committee received the text of the biometrics amendments on 28 October 2024 and the sections below cover these in further detail. This paper should also be read in conjunction with the Research and Information Service Bill Paper on the Justice Bill (NIAR 089-2024).³

2 Justice Bill Amendments

The Justice Bill introduces a ‘75/50/25-year model’ for the retention of biometric data based on age, severity of the offence and the outcome of the case. This replaces indefinite retention currently provided for under PACE NI. The Bill also contains provisions and functions relating to the Northern Ireland Commissioner for the Retention of Biometric Material which will have oversight of the new retention system.

A number of amendments have been identified which are aimed at assisting the operation of the new framework. These are:

¹ Northern Ireland Assembly Official Report, [Justice Bill: Second Stage](#) (01 October 2024)

² Northern Ireland Assembly Official Report, [Justice Bill: Department of Justice Minutes of Evidence](#) (26 September 2024)

³ Northern Ireland Assembly Research and Information Service, [Justice Bill Paper](#) (16 September 2024)

2.1 Replacement of term ‘reported’ with ‘complaint being laid’

There are seven changes to Schedule 2 of the Justice Bill which update terminology in the PACE NI to **change the term “reported” to “a complaint being laid” against a person.**

Part VI of the PACE NI contains various references to a person being “charged with an offence” or “informed that he will be reported for an offence”. The use of the term “reported for an offence” refers to the stage at which a police file is submitted to the Public Prosecution Service (PPS) for a decision following an investigation. At this point a Police Officer will inform a person that the step of reporting to the PPS for the offence in question has taken place.

However, there has been some confusion around the use of the term “informed that he will be reported” with different interpretations used for the taking and retention of DNA and fingerprints. The PSNI has indicated that it is only at the point where a complaint is laid, so once the PPS takes a decision to prosecute, that a person is deemed to have been informed that they are to be “reported”.⁴

The amendments in Schedule 2 are aimed at clarifying timing and reflecting operational procedures across the biometric provisions. They remove references to “reported” and change this to reflect that a person being “charged with an offence” includes “where a complaint has been laid against the person”. Article 53 on the interpretation of Part VI is amended to insert that “references to a complaint being laid against a person for an offence are references to a complaint being made, as mentioned in Article 20 of the Magistrates’ Courts (Northern Ireland) Order 1981, that the person has (or is suspected of having) committed the offence, without the person having been charged with that offence”.

For example, an amendment is made to Schedule 2 of the Bill which will substitute “or informed that he will be reported” for “or a complaint has been laid against him” in Article 61 of PACE NI relating to fingerprinting. If the amendments are passed, Article 61 will therefore state that: “(4) the fingerprints of a person detained at a police station may be taken without the appropriate consent if (a) he has been charged with

⁴ Department of Justice, [Appendix A: Biometrics Amendments](#) (December 2024)

a recordable offence **or a complaint has been laid against him**; and (b) he has not had his fingerprints taken in the course of the investigation of the offence by the police”.

A similar amendment is made to Article 61A on impressions of footwear which, if passed into legislation, will read: “(3) where a person is detained at a police station, an impression of his footwear may be taken without the appropriate consent if (a) he is detained in consequence of his arrest for a recordable offence, or has been charged with a recordable offence, **or a complaint has been laid against him**; and (b) he has not had an impression taken of his footwear in the course of the investigation of the offence by the police”.

Similar amendments are made to the terminology used in Article 63 relating to non-intimate samples and Article 63A on fingerprints and samples: supplementary provisions. There is also an amendment to Schedule 2A of PACE NI on the power to require attendance at police station for fingerprinting and samples. This part of the legislation, inserted by Section 12 of the Crime and Security Act 2010, has not yet been commenced. The amendments are aimed at replacing the terminology of “or informed that he would be reported” with “or the complaint was laid” in 4 sub-paragraphs.

There is similar provision under Section 18(3) of the Protection of Freedoms Act 2012 in England and Wales which amended the Police and Criminal Evidence Act 1984. The explanatory notes state that the definition of persons who are “charged with an offence” includes those who are informed that they will be reported to a Magistrates’ Court for the issue of a summons to begin criminal proceedings.⁵

2.2 Restorative Justice Schemes

What is Restorative Justice?

- Restorative justice represents a flexible, responsive, participatory and problem-solving process which seeks to

⁵ Protection of Freedoms Act 2012, [Explanatory Notes](#), paragraph 109

involve victim, offender, other affected parties and the wider community in addressing and repairing the harm caused by crime.⁶

- In Northern Ireland, statutory provision for formal restorative disposals has existed within the youth justice system in Northern Ireland for a number of years, both diversionary and as part of court-ordered community sentences. For example, through youth conferencing under the Criminal Justice (Children) (NI) Order 1998. However, no statutory basis currently exists for the use of restorative approaches in the adult justice system. Despite this, examples of good practice exist such as the Probation Board for Northern Ireland's Enhanced Combination Order initiative as an alternative to short-term prison sentences under 12 months.⁷ The PPS Guidelines for the Use of Diversionary Disposals also provide for the use of restorative justice schemes in limited circumstances.⁸ A number of recent reviews of the justice system have recommended new statutory provision for restorative justice for over 18s, including Judge Marrinan's Review of Hate Crime Legislation and the Department's Review of Sentencing Policy. These changes may be forthcoming in the Department's Sentencing Bill.

New Article 63NA is inserted into the Bill by the amendments which applies where an individual has completed a restorative justice process. At present Article 63P in the Justice Bill provides a 5 year retention period covering both persons completing

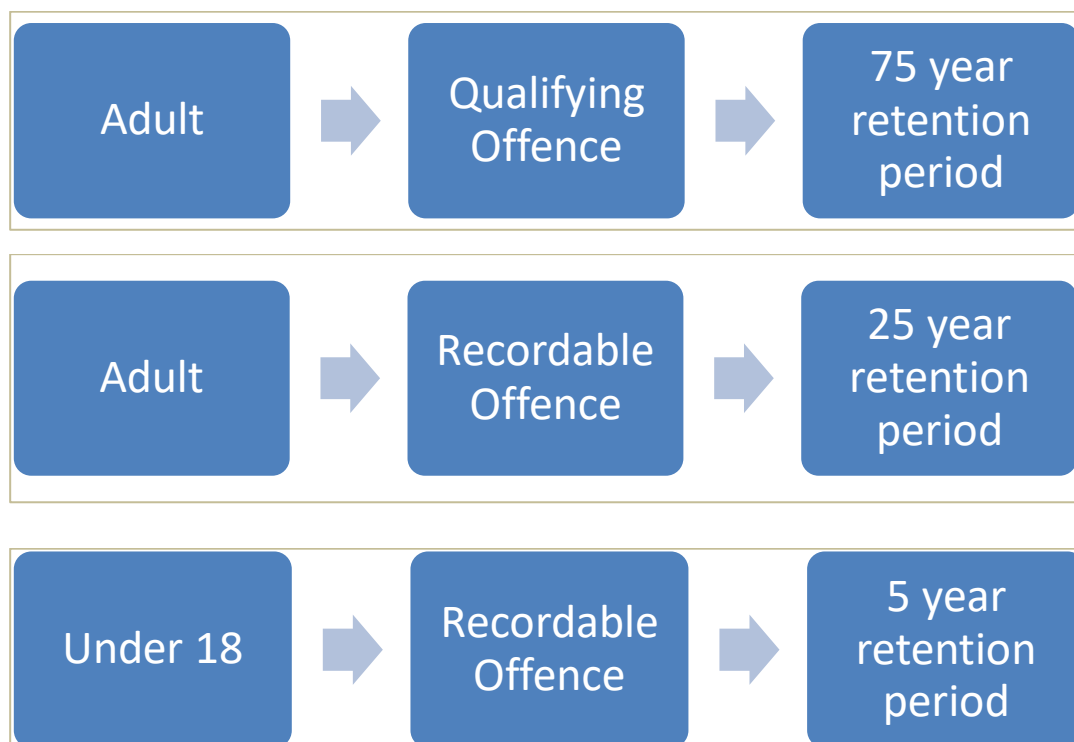
⁶ Council of Europe, [Recommendation CM/Rec\(2018\)8 of the Committee of Ministers to Member States concerning Restorative Justice in Criminal Matters](#) (October 2018)

⁷ Probation Board for Northern Ireland and Northern Ireland Statistics and Research Agency, [The Enhanced Combination Order October 2015 to November 2018](#) (March 2019)

⁸ Public Prosecution Service, [Guidelines for the Use of Diversionary Disposals](#) (June 2021), paragraph 3.4.11

diversionary youth conferences and restorative justice schemes. However, new Article 63NA is designed to distinguish that restorative justice schemes can be available for both under 18s and adults directed by the Public Prosecution Service.⁹ Article 63P is also amended to only refer to diversionary youth conferences with the 5 year retention period remaining for these. Therefore Article 63NA provides retention periods covering three scenarios:

Figure 1: Amendments to restorative justice retention periods



Restorative justice schemes appear to attract the same retention period as a caution. Article 53B(1) of the Justice Bill provides that for the purposes of Part VI of PACE NI, any reference to a person aged 18 or over who is convicted of an offence includes a caution, which, at the time of the caution, the person has admitted. Therefore the 75 year and 25 year retention periods provided under Articles 63J and 63K can apply to adults given a caution or completing restorative justice schemes. The provision of a 5 year retention period for under 18s who have completed a restorative justice scheme is the same as the 5 year period for under 18s receiving a caution under Article 63O.

⁹ Ibid

2.3 Grace period relating to individuals under investigation

Article 63E(5) in the Justice Bill provides for a grace period of 14 days for DNA and fingerprints being held for individuals under investigation for an offence by virtue of Article 63F. A grace period is required to allow adequate time for PSNI systems to be updated and for DNA and fingerprints to be deleted from the databases following the conclusion of an investigation.

14 days is now considered to be insufficient if the PSNI also needs to make an application to the Northern Ireland Commissioner for the Retention of Biometric Material under Article 63G. Therefore the proposed amendment to Article 63E(5) increases the **grace period to 28 days** for DNA and fingerprints being held for individuals under investigation in order to allow the PSNI further time at the conclusion of an investigation to delete these from the relevant databases or apply to the Northern Ireland Commissioner for the Retention of Biometric Material for continued retention.

2.4 Applications to the Northern Ireland Commissioner for the Retention of Biometric Material

Article 63G of the Justice Bill provides that the PSNI can apply to the Northern Ireland Commissioner for the Retention of Biometric Material for a 3 year retention period for individuals arrested but not charged with a qualifying offence and where prescribed circumstances apply. New paragraph 4A replaces Article 63G(4)(c) and highlights that the Commissioner must consent to the retention of the DNA and fingerprint material under 63G(5).

This part of the Bill already contains provision for delegated legislation as Article 63G(4)(b) provides for regulations to be made about the ‘prescribed circumstances’, including the procedure to be followed in relation to any application to the Commissioner. These regulations must be laid before and approved by a resolution of the Assembly before coming into operation.

Furthermore, paragraph 6A is added into Article 63G by the amendments to this section clarifying that if an application is made under Article 63G(5) in relation to an individual arrested but not charged for a qualifying offence and, their material would

be required to be destroyed before the application is determined, then it may be retained until proceedings on the application have been concluded.

Figure 2: Process for individuals arrested but not charged for a qualifying offence



More broadly, the Protection of Freedoms Act 2012 in England and Wales amended the Police and Criminal Evidence Act 1984 to insert Article 63F on the retention of DNA and fingerprint material relating to individuals arrested for or charged with a qualifying offence but not convicted. In a scenario where an adult has previously been convicted of a recordable offence then the legislation states that material may be retained indefinitely. However, if there are no previous convictions then material may be retained for a period of 3 years with the consent of the Biometrics Commissioner.

Further detail on the operation of this can be found in Article 63G where an application can be made by Police to the Commissioner in a range of circumstances, including if it is considered necessary “to assist in the prevention or detection of crime”. The Police must also give notice of the application to the person to whom the material relates and the right to make representations within a period of 28 days. The detail of the operation of an application to the Northern Ireland Commissioner for the Retention of Biometric Material is left to regulations in Northern Ireland.

2.5 Powers to photograph certain persons at a police station

Article 64A of PACE NI gives the PSNI the power to take photographs from a person who has been detained in a police station and/or arrested. However, there is currently no power in the legislation providing the PSNI with the power to require a person to attend a police station at a later stage for a photograph to be taken. The amendments to the Justice Bill insert new clause 23A and Schedule 5 providing the PSNI with this power.

Schedule 5 inserts further detail into Article 64A of PACE NI to provide that this relates to scenarios where a person has been arrested, charged or a complaint has been laid against them for a recordable offence. Furthermore, it provides that one of two conditions must be met which are that either the person has not been photographed in the course of the investigation of the offence by the police or the photograph is “unavailable or inadequate”. It also makes similar provision for individuals convicted of a recordable offence or given a caution in respect of a recordable offence.

This section also makes provision for take photographs of individuals in relation to offences committed outside Northern Ireland where this offence would constitute a qualifying offence if committed locally. Detail is also included around the meaning of a photograph being “unavailable” covering it being “lost or destroyed”. A photograph considered “inadequate” will include those which are “unclear, incomplete, no longer an accurate representation of the subject’s appearance and failing to meet quality or technical standards”. It also provides that a person may only be photographed with the authorisation of an Officer at the rank of Inspector or above who is satisfied that it is necessary to “assist in the prevention or detection of crime”. In addition, it provides that an Officer must explain and record the reason for taking the photograph and the power by virtue of which it is taken.

2.6 Power to specify a date for attendance at a Police Station

People who are arrested and taken to a custody suite can generally have fingerprints, DNA samples and a photograph taken straight away. However, there may be cases where this is not possible. The Crime and Security Act 2010 inserted Schedule 2A of PACE NI to address this but this has not yet been commenced. The Schedule sets out the powers to require attendance at a police station in respect of the taking of DNA samples and fingerprints. For each power in PACE NI to take material from those no longer in police detention, there is a power to require a person to attend a police station for the purpose of taking the material, and for a Constable to arrest a person who does not comply with a requirement to attend.

Schedule 2A was designed to replace Paragraphs 4-8 of Article 63A relating to scenarios where it has not been possible for a sample to be taken in the course of

the investigation or where it has been taken, it is not suitable for analysis or “proved insufficient”. This section of Article 63A currently states that a person can be required to attend a police station at a particular time but not a particular day, only any day within a 7 day period. This wording, providing an open power for individuals to go back to a police station, is also replicated in Part 4 of prospective Schedule 2A as it is currently drafted.

The amendments covered in clause 23B to the Justice Bill seek to address this by allowing the PSNI to specify a date and time for individuals arrested, charged or convicted to attend for fingerprints, non-intimate samples and photographs to be taken within the prospective Schedule 2A. Part 3A is added into Schedule 2A covering photographs which are not currently included within the scope of Schedule 2A. This provides for scenarios in which a photograph taken previously is “unavailable”, “inadequate” or where one has not previously been taken. This amendment appears to put photographs on a similar footing to DNA and fingerprints in terms of the recall power to specify attendance.

In England and Wales, a similar amendment allowing the police to specify the date and time was made to Schedule 2A of the Police and Criminal Evidence Act 1984 by the Police, Crime Sentencing and Courts Act 2022. Police Forces had indicated that it was difficult to manage processes around always making an Officer or Staff Member available in case an individual attended following a recall notice.¹⁰

In summary, clause 23B should assist the PSNI in being able to deploy Police Officers to take the fingerprints, non-intimate samples and photographs on a specific date and time. In practice, this will allow opportunities to take fingerprints, DNA and photographs to be maximised which will potentially help to detect crimes that an individual may have committed in the past or may commit in future. However, it may be worth the Committee seeking further information from the PSNI around how it will seek to operationalise this power and whether there will be any degree of flexibility for individuals who are recalled. Members of the Committee expressed some

¹⁰ Department of Justice, [Appendix A: Biometrics Amendments](#) (December 2024)

concerns around this issue during the evidence session with Departmental officials on 16 January 2025.¹¹

3 Developments in England and Wales

The post of Home Office Biometrics and Surveillance Camera Commissioner currently remains vacant following the resignation of Tony Eastaugh in August 2024. The former UK Government had planned to abolish the post in England and Wales under the Data Protection and Digital Information Bill. This did not proceed due to the UK election in July 2024. Some of the Commissioner's work related to national security was to be taken on by the Investigatory Powers Commissioner and Investigatory Powers Commissioner's Office. The King's Speech in July 2024 referenced a Digital Information and Smart Data Bill but no further clarity has been provided around the detail of this or whether elements of the Data Protection and Digital Information Bill could be taken forward as part of it. Therefore, the future remit of the Home Office Biometrics and Surveillance Camera Commissioner remains unclear.

The Scottish Biometrics Commissioner has called for the appointment of a new Commissioner, highlighting that there has been "*limited independent oversight activity in England and Wales during 2023/24 and since August, the Commissioner's post has not been filled meaning that National Security Determinations (including in Scotland) are stacking up with no independent oversight being exercised*".¹²

4 Scrutiny Points

- Does the Department believe that the biometrics amendments comply with the European Court of Human Rights judgments in *S & Marper v UK* (2008) and *Gaughran v UK* (2020)? Has the Departmental Solicitor's Office completed its

¹¹ Northern Ireland Assembly, Official Report: Minutes of Evidence, [Justice Bill: Department of Justice Amendments \(Part 1: Biometrics, Restorative Justice, AccessNI Filtering and Serious Organised Crime\)](#) (16 January 2025)

¹² Scottish Biometrics Commissioner, [Commissioner welcomes Annual Report for England and Wales and calls for end to UK Government indecisiveness](#) (06 December 2024)

work around “human rights compliance and Windsor framework considerations”¹³ on the biometrics amendments given that an indicative suggestion was previously provided to the Committee that this would be completed towards the end of February 2025?

- Has the Department sought the views of stakeholders in relation to these amendments, including the Northern Ireland Human Rights Commission? If so, what are its views on the issues addressed?
- How will the PSNI operationalise the powers around specifying a date and time for individuals arrested, charged or convicted to attend a police station for fingerprints, non-intimate samples and photographs to be taken? Will there be any flexibility around this for individuals who are recalled for this purpose?
- Are the DoJ or PSNI in a position yet to provide a detailed estimate to the Committee of the projected cost of the Justice Bill’s biometrics provisions? Has any progress has been made on developing a business case associated with this or, if not, when will it be possible to provide an update around this? Are there likely to be any financial implications associated with the further biometrics amendments?
- Can the Department provide any information on engagement it has had with the Home Office around the future role of the Home Office Biometrics and Surveillance Camera Commissioner and what impact this could have, if any, for Northern Ireland?

¹³ Northern Ireland Assembly, Official Report: Minutes of Evidence, [Justice Bill: Department of Justice Amendments \(Part 1: Biometrics, Restorative Justice, AccessNI Filtering and Serious Organised Crime\)](#) (16 January 2025)