



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Briefing to Committee for Justice on 'Justice Bill
07/22-27'**

November 2024

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Summary of Recommendations

- 2.18** The NIHRC recommends that compliance with Windsor Framework Article 2 be considered during the remaining stages of the Bill, particularly with regard to any amendments to be brought forward.
- 2.19** The NIHRC recommends that the Department of Justice publish detailed consideration of compliance with Windsor Framework Article 2, including relevant EU law on data protection and victims' rights, in memoranda and human rights impact assessment to accompany the Justice Bill.
- 3.19** The NIHRC recommends that the Committee for Justice invite the Department of Justice to share their update to the CoE Committee of Ministers and maintain a watching brief over deliberations at the Committee of Ministers.
- 3.29** The NIHRC recommends that the Committee for Justice scrutinises the proportionality of the proposed retention regime in respect of each category of person. In particular, the NIHRC recommends that the Committee for Justice ascertains how the retention lengths reflect current re-offending patterns.
- 3.30** The Committee may wish to ask the Department of Justice to provide details on the criteria used to arrive at the specified periods for retention of biometric data in order to satisfy itself that the safeguards provided by the Article 5 of the EU Law Enforcement Directive have been satisfied.
- 3.34** The NIHRC recommends that the Committee for Justice closely scrutinises the proposed periods for the retention of a child's biometric material. In particular, the Committee for Justice should assure itself that every effort has been taken to ensure that children are not unnecessarily stigmatised.
- 3.40** The NIHRC recommends that the Committee for Justice assures itself that the proposed retention periods for the biometrics of

adults and children who have not been convicted of an offence are proportionate to the aim of detecting and preventing crime.

- 3.43 The NIHRC advises that to ensure compliance with the Law Enforcement Directive the proposed Article 63U should set out the time frame for periodic reviews of biometric material.**
- 3.45 The NIHRC advises the Committee for Justice to explore whether to include in the proposed Article 63U(3) a duty on the Chief Constable to consider the proportionality of the retention of a person's material.**
- 3.47 The NIHRC advises that the Committee for Justice explore the potential to include a duty on the Chief Constable to consider the individual circumstances of an applicant in the proposed Article 63(U)(4) contained in clause 1 of the Justice Bill.**
- 3.49 The NIHRC advises the Committee for Justice explore whether further provision for the right to appeal a determination by the Chief Constable can be included within the proposed Article 63U(3)(d) contained in clause 1 of the Justice Bill.**
- 3.51 The Committee may wish to ask the Department of Justice for more detail on how the current clauses of the Justice Bill concerning the review of biometric data respect the data protection safeguards laid down by the EU Law Enforcement Directive.**
- 3.54 The NIHRC advises that the Committee for Justice explores the interplay between the Data Protection Act 2018 and the proposed reforms in the Justice Bill, in particular the right to review. The Committee for Justice should ascertain how individuals whose biometrics are retained will be made aware of their rights under the Data Protection Act 2018.**
- 3.57 The Committee may wish to ask the Department of Justice for more detail on how the Justice Bill satisfies the "right to erasure" and the "right to information" requirement to erase biometric data without undue delay when the storage of such data is no**

longer needed and enable the data subject to have access to information about their biometric data.

- 3.59 The NIHRC considers that the Biometrics Commissioner is well placed to perform a role in considering applications for destructions from individuals or appeals from initial decisions relating to applications for destruction. The NIHRC advises that the proposed Article 63Z contained in clause 1 of the Justice Bill should refer to the Biometric Commissioner performing a role in considering individual applications.**
- 3.62 The NIHRC recommends that the Committee explore with the Department how the proposed biometric data retention framework will comply with the EU Law Enforcement Directive including in respect of the rights of data subjects, duties on data controllers and supervisory authorities and remedies for breach of rights.**
- 4.22 The NIHRC welcomes the Department of Justice’s proposal to include provisions within the Justice Bill that ensure that a child is only held in pre-trial detention as a measure of last resort, guided by the express mention of the principle of necessity within the legislation.**
- 4.23 The NIHRC recommends that the Department of Justice includes provisions within the Justice Bill that impose a statutory duty that suitable accommodation is provided within a reasonable time if a child is released on bail.**
- 4.24 The NIHRC continues to recommend that the Department of Justice and Department of Health ensure that a range of non-custodial accommodation arrangements are available for children awaiting trial who cannot return to their homes.**
- 4.38 The NIHRC recommends that the Department of Justice ensures that the Justice Bill includes express mention of the best interests of the child principle, as appropriate, within the clauses regarding bail and remand of children in NI. This is particularly relevant regarding clauses 5(3), 5(5) and 5(6) of the Justice Bill.**

- 4.43** The NIHRC recommends that the Department of Justice considers and sets out a clear plan for specialised training, guidance and long-term funding to ensure that implementation of the provisions of the Justice Bill related to the bail and remand of children adheres to international human rights standards, particularly the UN CRC.
- 4.56** The NIHRC welcomes the Department of Justice’s proposals to include clauses within the Justice Bill that ensure there is a statutory duty to prevent children from being imprisoned with adults in NI.
- 4.62** The NIHRC recommends that the Department of Justice considers how it can expand express reference to a child-centred and trauma informed approach within the Justice Bill, as appropriate, for the purposes of ensuring such an approach expands across a child’s journey through the criminal justice system in NI.
- 4.67** The NIHRC welcomes the Department of Justice’s proposals to include clauses within the Justice Bill that ensure clarity regarding the application of provisions related to the bail and remand of children, and to ensure that children are not imprisoned with adults.
- 5.16** The Committee may wish to ask the Department of Justice to outline its plans to ensure guidance and training is provided to all relevant personnel on the circumstances in which live links can be used and the safeguards that should be in place to ensure such technology is accessible and used appropriately.
- 5.17** The NIHRC recommends that the Committee ask the Department of Justice what research and monitoring has been or will be commissioned, to identify individuals for whom “live links” technology is not suitable, particularly in the context of reviews, hearings or police interviews.
- 5.18** The NIHRC recommends that the Committee for Justice continues to keep the use of live links in the criminal justice system in NI under their consideration, in particular in relation to individuals held in custody.

6.5 The NIHRC recommends that the Committee for Justice consider if the test applied by the independent reviewer is clearly defined and accessible. Furthermore, the Committee for Justice should consider how an individual will be informed of their ability to make representations.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to sections 69(1), 69(3) and 69(4) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. The NIHRC is also required, by section 78A(1), 78A(5) and 78A(6) of the Northern Ireland Act 1998, to monitor the implementation of Windsor Framework Article 2. In accordance with these functions, the following briefing is submitted to the Committee for Justice to inform its consideration of the Justice Bill.
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:
- CoE European Convention on Human Rights 1950 (ECHR);¹
 - UN International Covenant on Civil and Political Rights 1966 (UN ICCPR);²
 - UN Convention on the Rights of the Child 1989 (UN CRC);³ and
 - UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD).⁴
- 1.3 Windsor Framework Article 2(1), is a UK Government commitment to ensure there is no diminution of the rights, safeguards and equality of opportunity covered by the relevant section of the Belfast (Good Friday) Agreement, as a result of the UK's withdrawal from the EU.⁵
- 1.4 This is given effect in UK law by section 7A of the EU (Withdrawal) Act 2018.⁶ Section 6 of the NI Act 1998 prohibits the NI Assembly from

¹ Ratified by the UK in 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECtHR).

² UK ratification 1976.

³ Ratified by the UK in 1989.

⁴ UK ratification 2009.

⁵ The Windsor Framework was formerly known as the Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement and all references to the Protocol in this document have been updated to reflect this change. See Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework.

⁶ European Union (Withdrawal) Act 2018.

making any law which is incompatible with Windsor Framework Article 2. Section 24 of the 1998 Act also requires all acts of NI Ministers and NI Departments to be compatible with Windsor Framework Article 2. The relevant EU law in this context includes:

- EU General Data Protection Regulation;⁷
- EU Data Protection Law Enforcement Directive;⁸
- EU Interpretation Directive;⁹ and
- EU Victims' Rights Directive.¹⁰

- 1.5 In preparing this advice the NIHRC has been conscious of the legislative competence of the NI Assembly, which is circumscribed by the European Convention on Human Rights. In addition, the NIHRC notes recent statements of the UK Government which has underscored its support for the Human Rights Act 1998 and for its retention in its current form.
- 1.6 The NIHRC notes that the Justice Bill contains several proposed provisions which are being undertaken to ensure compliance with judgments of the European Court of Human Rights (ECtHR) and the UK Supreme Court relating to the protection of rights. The NIHRC has considered both the implications of these judgments and current trends in jurisprudence in developing this advice.
- 1.7 The NIHRC welcomes the Committee for Justice's commitment to provide detailed scrutiny of the proposals contained within the Justice Bill. The Justice Bill contains several complex human rights matters. The NIHRC recalls that the UK Government has developed a practice of publishing a detailed human rights memorandum alongside Bills with significant human rights implications.¹¹ The NIHRC considers that the development of a similar practice in the NI Assembly would inform deliberations and assist consideration of the human rights implications of legislative measures.

⁷ Regulation 2016/679/EU, 'Regulation of the European Parliament and Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data' (EU GDPR), 27 April 2016.

⁸ Directive 2016/680/EU, 'Directive of the European Parliament and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and on the Free Movement of Such Data', 27 April 2016.

⁹ Directive 2010/64/EU, 'Directive of the European Parliament and of the Council on the Right to Interpretation and Translation in Criminal Proceedings', 20 October 2020.

¹⁰ Directive 2012/29/EU, 'Directive of the European Parliament and of the Council Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA', 25 October 2012.

¹¹ See NI Office, 'NI Troubles (Legacy and Reconciliation) Bill: ECHR Memorandum' (NIO, 2023).

2.0 Windsor Framework Article 2

- 2.1 Windsor Framework Article 2 requires the UK Government to ensure that no diminution of rights, safeguards and equality of opportunities contained in the relevant part of the Belfast (Good Friday) Agreement 1998 occurs as a result of the UK's withdrawal from the EU. This includes an obligation to "keep pace" with any changes made to the six Annex 1 equality directives¹² which improve the minimum levels of protection available.¹³
- 2.2 For other EU obligations which underpin the rights, safeguards and equality of opportunity in Windsor Framework Article 2, the UK Government commitment to ensure 'no diminution' is measured by the relevant EU standards as they were on the 31 December 2020.¹⁴ The NIHRC, alongside the Equality Commission for NI, have published a working paper setting out their view as to which EU laws and obligations underpin the rights and safeguards in the relevant part of the Belfast (Good Friday) Agreement.¹⁵
- 2.3 The NI Court of Appeal has confirmed that Windsor Framework Article 2 has direct effect, meaning its protection can be asserted before the courts.¹⁶ The Court observed it is then a question of law for the court considering whether there has been a breach of that obligation, whether the relevant right or safeguard falls within the relevant chapter of the 1998 Agreement.¹⁷ The section of the Belfast (Good Friday) Agreement entitled "Human Rights" contains a general commitment to the "civil rights and religious liberties of everyone in the community" and a non-exhaustive list of rights "affirmed in particular", as well as a commitment to the

¹² These are the Racial Equality Directive (Directive 2000/43/EC, 'Council Directive on Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin', 29 June 2000); the Employment Equality (Framework) Directive (Directive 2000/78/EC, 'Council Directive on Establishing a General Framework for Equal Treatment in Employment and Occupation', 27 November 2000); the Gender Goods and Services Directive (Directive 2004/113/EC, 'Council Directive on Implementing the Principle of Equal Treatment between Men and Women in the access to and supply of goods and services', 13 December 2004); Gender Equality (Employment) Directive (Directive 2006/54/EC, 'Directive of European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)', 5 July 2006); the Self-Employment Equality Directive (Directive 2010/41/EU, 'Directive of the European Parliament and of the Council on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-employed Capacity', 7 July 2010); and the Equality in Social Security Directive (Directive 79/7/EEC, 'Council Directive on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security', 19 December 1978).

¹³ Article 13, Windsor Framework to the UK-EU Withdrawal Agreement.

¹⁴ UK Government, 'UK Government Commitment to No-diminution of Rights, Safeguards and Equality of Opportunity in Northern Ireland' (NIO, 2020), at para 13.

¹⁵ NI Human Rights Commission and Equality Commission NI, 'Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol' (ECNI and NIHRC, 2022).

¹⁶ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NICA 59, at para 83-85.

¹⁷ *Ibid*, at para 83.

incorporation of the ECHR with direct access to the courts and remedies for breach.

- 2.4 The Court of Appeal in NI has confirmed that the relevant chapter of the Belfast (Good Friday) Agreement was intended to extend further than the rights specifically listed and it encompassed a “broad suite of rights”.¹⁸ The Court noted that “there is no reason to construe the broad language of the [Rights, Safeguards and Equality of Opportunity] chapter restrictively”.¹⁹ The NI High Court has also found that ‘civil rights’ encompasses the political, social and economic rights which can be upheld by the court.²⁰ The High Court held that, “a narrow interpretation of ‘civil rights’ undermines the forward-facing dimension of the non-diminution commitment in article 2(1)”.²¹ It is the NIHRC’s considered opinion that the chapter represents a wide-ranging commitment to civil, political, economic, social and cultural rights and equality of opportunity.²²
- 2.5 The Court of Appeal in NI relied upon the position of the Supreme Court in *Allister*²³ in finding that section 7A of the EU Withdrawal Act 2018, which incorporates the Withdrawal Agreement into domestic law, has “powerful legal effects within the UK, including the possibility of prevailing over primary legislation.”²⁴ Provisions of primary legislation, incompatible with Windsor Framework Article 2, have been disapplied on this basis.²⁵
- 2.6 The NIHRC considers that the full range of rights in the ECHR, to the extent that they are underpinned by EU law in force in NI on or before 31 December 2020, fall within scope of the non-diminution commitment in Windsor Framework Article 2.²⁶

¹⁸ Ibid, at para 115; *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 540.

¹⁹ Ibid, at para 115.

²⁰ *In the Matter of an Application by NI Human Rights Commission for Judicial Review* [2024] NIKB 35, at para 70, confirming Colton J in *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 543.

²¹ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NIKB 11, at para 554.

²² NI Human Rights Commission and Equality Commission for NI, ‘Working Paper: The Scope of Article 2(1) of the Ireland/ Northern Ireland Protocol’ (NIHRC and ECNI, 2022).

²³ *In the Matter of an Application by James Hugh Allister and Others for Judicial Review* [2022] NICA 15.

²⁴ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NICA 59, at 69.

²⁵ Ibid, at 154.

²⁶ NI Human Rights Commission and Equality Commission for NI, ‘Working Paper: The Scope of Article 2(1) of the Ireland/ Northern Ireland Protocol’ (NIHRC and ECNI, 2022). See also the NI Court of Appeal confirming that “the trial judge was right to identify that victims’ rights are promoted and given effect by civil rights available to all victims of crime, including articles 2, 3, 6 and 14”. See *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NICA 59, at 117.

- 2.7 Biometric data is personal data that relates to an individual and allows for the identification of that individual.²⁷ As noted below in Section 3, the ECtHR has recognised that the protection of personal data is a fundamental human right and a key component of the right to privacy, enshrined in Article 8 of the ECHR.²⁸ Furthermore, the right to data protection is enshrined in Article 7 and Article 8 of the EU Charter of Fundamental Rights.
- 2.8 As detailed below in sections 3 and 4 of the briefing, several EU law provisions establishing minimum standards of protection for privacy rights, victims' rights and court users' rights in the context of criminal justice system, therefore fall in the scope of Windsor Framework Article 2 and are relevant to the Justice Bill.
- 2.9 In relation to biometric data, the key EU laws are the EU GDPR²⁹ and the EU Law Enforcement Directive.³⁰ In relation to "live links" technology, the EU Victims' Rights Directive and the EU Interpretation Directive respectively establish minimum standards on victims' rights protection in the context of the criminal justice system and in relation to the right to interpretation for all court users.
- 2.10 The NI Court of Appeal has affirmed the continued relevance of the EU Charter for Windsor Framework Article 2 and has adopted the position that relevant EU law provisions should be interpreted in light of the provisions of the Charter.³¹
- 2.11 Independent research on the interaction between the EU Charter of Fundamental Rights and the NI legal framework commissioned by the NIHRC has highlighted that the non-diminution obligation in Windsor Framework Article 2 "must include rights contained in the Charter in so far

²⁷ Article 4(14), Regulation 2016/679/EU, 'Regulation of the European Parliament and Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data' (EU GDPR), 27 April 2016.

²⁸ *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (2015) ECHR 713, at para 137.

²⁹ Regulation 2016/679/EU, 'Regulation of the European Parliament and Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data' (EU GDPR), 27 April 2016.

³⁰ Directive 2016/680/EU, 'Directive of the European Parliament and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and on the Free Movement of Such Data', 27 April 2016.

³¹ *In the Matter of an Application by Martina Dillon and Others for Judicial Review* [2024] NICA 59, at 137.

as they would have protected individuals before Brexit and in so far as the additional requirements of Article 2 are met”.³²

- 2.12 Lock et al further elaborated that according to Article 52(3) of the Charter, those Charter rights that have an ECHR equivalent must be understood as having the same meaning and scope as the ECHR rights they correspond to.³³ Consequently, those Charter rights that correspond to an ECHR right must be interpreted in light of the case-law of the ECtHR, which establishes the minimum rights protection standard.³⁴
- 2.13 Lock, Frantziou and Deb note in their report that, unlike in a common law system, CJEU case law is understood to clarify existing EU law (primary or secondary) rather than creating new law or positively extending it in any novel way. As a result, the legal effect of a post-Brexit CJEU judgment interpreting a pre-Brexit provision of EU law in light of the EU Charter will be to clarify what the law has always been, rather than what the law is from the date of such a judgment.³⁵
- 2.14 Lock, Frantziou and Deb conclude that “the pre-Brexit EU law which is engaged by the wider non-diminution guarantee may be required to be given legal effect in Northern Ireland in accordance with post-Brexit CJEU case law concerning such EU law”.³⁶
- 2.15 In January 2024, the CJEU summarised the EU framework for the lawful processing of biometric data, including the retention of such data in a case concerning the periods of retention of biometric data and the right of the data subject for their data to be erased, in the key case of *Direktor na Glavna*.³⁷
- 2.16 The CJEU established a general framework under the EU Law Enforcement Directive “to ensure, inter alia, that the storage of personal data and, more specifically, the period of storage, are limited to what is necessary for the purposes for which those data are stored”.³⁸ In *Direktor na Glavna*, the

³² Tobias Lock et al, ‘The Interaction between the EU Charter of Fundamental Rights and general principles with the Windsor Framework’ (NIHRC, 2024), at 55.

³³ Ibid, at 17.

³⁴ Ibid.

³⁵ Ibid, at 63.

³⁶ Ibid, at 65.

³⁷ *Direktor na Glavna Direktsia „Natsionalna Politsia” Pri MVR – Sofia* [2024], Case C-118/22, 30 January 2024.

³⁸ Ibid, at para 52.

CJEU relied on Article 4(1)(c) to determine that Member States should ensure that the personal data collected must be adequate, relevant and not excessive in relation to the purposes for which it is processed.³⁹

- 2.17 In order to ensure compliance with the non-diminution commitment, the NIHRC advises that Windsor Framework Article 2 should be considered throughout the development of any law or policy engaging human rights and equality.
- 2.18 **The NIHRC recommends that compliance with Windsor Framework Article 2 be considered during the remaining stages of the Bill, particularly with regard to any amendments to be brought forward.**
- 2.19 **The NIHRC recommends that the Department of Justice publish detailed consideration of compliance with Windsor Framework Article 2, including relevant EU law on data protection and victims' rights, in memoranda and human rights impact assessment to accompany the Justice Bill.**

3.0 Part 1 - Biometric Data: Retention Etc

- 3.1 The ECtHR has recognised that the protection of personal data is a fundamental human right and a key component of the right to privacy, enshrined in Article 8 of the ECHR.⁴⁰ The ECtHR has consistently held that the retention of an individual's biometric data, including fingerprints and DNA profiles is an interference with Article 8 of the ECHR.⁴¹
- 3.2 Article 8 of the ECHR provides for the right to respect for private and family life. It states that:
- 1) everyone has the right to respect for his private and family life, his home and his correspondence.

³⁹ *Direktor na Glavna direktsia „Natsionalna politsia“ pri MVR – Sofia* [2024], Case C-118/22, 30 January 2024, at para 41.

⁴⁰ *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* (2015) ECHR 713, at para 137.

⁴¹ *Gaughran v UK* (2020) ECHR 144; *S and Marper v UK* (2008) ECHR 880.

2) there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

3.3 The primary purpose of Article 8 of the ECHR is to protect against arbitrary interferences with private and family life, home, and correspondence by a public authority.⁴²

3.4 Conditions upon which a State may interfere with the enjoyment of a protected right are set out in Article 8(2) of the ECHR. Limitations are allowed if they are "in accordance with the law" or "prescribed by law" and are "necessary in a democratic society" for the protection of one of the objectives set out in Article 8(2) of the ECHR.

3.5 In order to determine whether a particular infringement of Article 8 of the ECHR is necessary in a democratic society, the ECtHR balances the interests of the State against the right of the applicant. The ECtHR has clarified that 'necessary' in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question.

3.6 The ECtHR has found that the retention of fingerprint and DNA retention seeks to address the pressing social need and pursues the legitimate purpose of the detection and, therefore, prevention of crime.⁴³

3.7 In 2008, the ECtHR found that the provisions relating to DNA and fingerprint retention in the UK were in violation of Article 8 of the ECHR.⁴⁴ In the case of *S and Marper v UK* (2008) the ECtHR concluded that:

the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences...

⁴² *Libert v France* (2018) ECHR 185.

⁴³ *S and Marper v UK* (2008) ECHR 880, at para 100.

⁴⁴ *Ibid.*

fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard.⁴⁵

- 3.8 In response to this judgment, the Department of Justice brought forward amendments contained in the Criminal Justice Act (NI) 2013.⁴⁶ The NIHRC provided advice to the Committee for Justice during the passage of the 2013 Act.
- 3.9 In December 2017, the NIHRC issued judicial review proceedings against the Police Service of NI on behalf of an individual.⁴⁷ The individual first approached the NIHRC in early 2017 regarding the refusal of the Police Service of NI to erase fingerprints and DNA, which were retained following an arrest in 2009. The person was arrested for assault occasioning actual bodily harm after intervening to keep the peace in a neighbourhood dispute. The police accepted that the individual had been seeking to keep the peace. No charges or prosecution were brought against the person. However, as the individual had been fined for an offence 17 years previously, for which no biometric material had been retained, the Police Service of NI decided to retain the individual's DNA.
- 3.10 The NIHRC argued that the Police Service of NI is entitled to retain DNA, fingerprints and other material provided that their approach is governed by law and proportionate, balancing the legitimate aim of solving crime and a person's right to privacy. The NIHRC's challenge was based on the current law being incompatible with Article 8 of the ECHR, the lack of a clear and accessible policy on finding out whether such material is held and the absence of a meaningful and accessible review process with a reasonable prospect of changing a decision to retain biometric material.⁴⁸
- 3.11 The NIHRC entered into correspondence with the Police Service of NI to have the individual's data destroyed. The Police Service of NI informed the NIHRC that they were retaining the data due to the conviction from 1992 and consequently refused to destroy it.

⁴⁵ Ibid, at para 119.

⁴⁶ Department of Justice, 'A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI' (DoJ, 2020), at para 2.5.

⁴⁷ NI Human Rights Commission, 'Press Release: Human Rights Commission secures settlement in DNA fingerprint retention case', 9 January 2019.

⁴⁸ Ibid.

3.12 In January 2019, the case was settled without the Police Service of NI admitting liability on the human rights compliance of existing provisions.⁴⁹ As part of the settlement of the case, the Police Service of NI agreed to destroy the applicant's biometric material, produce a formal public policy on the retention of biometric data and review process based on the provisions in the Criminal Justice Act (NI) 2013 which were never commenced.⁵⁰ The policy was to expressly take into account Article 8 of the ECHR and provide guidance to the public on how they can find out if their DNA or fingerprints have been retained, why this is so, and how to challenge the decision if necessary. Part of the settlement was also to provide members of the public with guidance as to how they can seek to have their biometric data destroyed. This policy was never published due to the ECtHR's judgment in *Gaughran v UK* (2020).⁵¹

***Gaughran v UK* (2020)**

3.13 In *Gaughran v UK* (2020), the applicant had a spent conviction for driving with excess alcohol in NI. He was banned from driving for 12 months and fined £50 as a result. He made a complaint about the indefinite retention of personal data of his DNA profile, fingerprints and photograph.

3.14 In 2012, the High Court of Justice in NI ruled that whilst the indefinite retention of Mr Gaughran's DNA profile was an interference with Article 8 of the ECHR the interference was justified and proportionate. As a result, there was no breach of Article 8 of the ECHR.⁵²

3.15 In 2015, the UK Supreme Court agreed with the NI Divisional Court and dismissed the applicant's appeal. The UK Supreme Court's judgment was then appealed to the ECtHR.⁵³

3.16 On 13 February 2020, the ECtHR ruled that the current policy and practice of the indefinite retention of DNA profiles, fingerprints and photographs, of individuals convicted of a criminal offence was a violation of Article 8 of the ECHR.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ *Gaughran v UK* (2020) ECHR 144.

⁵² *Gaughran v Chief Constable of the Police Service of NI* [2012] NIQB 88.

⁵³ *Gaughran v Chief Constable of the Police Service of NI* [2015] UKSC 29.

- 3.17 The ECtHR held that there had been a violation of Article 8 of the ECHR, 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. Consequently, the UK 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.⁵⁴
- 3.18 The CoE Committee of Ministers has maintained supervision of the UK Government's efforts to bring about compliance with the ECtHR judgment in *Gaughran*. The NIHRC made a submission to the Committee of Ministers in 2023, setting out the intended reforms.⁵⁵ The Committee of Ministers have asked the UK Government to provide an update by December 2024.
- 3.19 **The NIHRC recommends that the Committee for Justice invite the Department of Justice to share their update to the CoE Committee of Ministers and maintain a watching brief over deliberations at the Committee of Ministers.**

Windsor Framework Article 2 and biometric data retention

- 3.20 In relation to biometric data, the key EU laws are the EU GDPR⁵⁶ and the EU Law Enforcement Directive.⁵⁷ The EU GDPR sets out in detail the rights of data subjects and the principles that govern the handling of personal data, which include lawfulness, fairness and transparency. The EU Law Enforcement Directive lays down safeguards for the protection of personal data in the context of law enforcement, consistent with EU GDPR. These

⁵⁴ *Gaughran v UK* (2020) ECHR 144, at para 97.

⁵⁵ NI Human Rights Commission, 'Rule 9 Submission to the CoE Committee of Ministers in Relation to the Supervision of the Execution of Judgments and of Terms of Friendly Settlement: *Gaughran v UK* Application No 45245/15' (NIHRC, 2023).

⁵⁶ Regulation 2016/679/EU, 'Regulation of the European Parliament and Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data' (EU GDPR), 27 April 2016.

⁵⁷ Directive 2016/680/EU, 'Directive of the European Parliament and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data by Competent Authorities for the Purposes of the Prevention, Investigation, Detection or Prosecution of Criminal Offences or the Execution of Criminal Penalties, and on the Free Movement of Such Data', 27 April 2016.

measures remain relevant to the NI legal order since protection of personal data is a fundamental human right protected by Windsor Framework Article 2 as outlined above. The UK took additional steps to incorporate the EU Law Enforcement Directive into UK law via Part 3 of the Data Protection Act 2018, which sets out rules on the processing of personal data for criminal law enforcement purposes.

- 3.21 Article 4(1) of the EU Law Enforcement Directive provides important safeguards for the human rights of data subjects by establishing the principles for the lawful processing of personal data, such as biometric data. Personal data must be processed lawfully and fairly; must be collected for specified, explicit and legitimate purposes; must be adequate, relevant, non-excessive, accurate and kept up to date; and must allow for the identification of the individual for no longer than necessary.
- 3.22 Article 5 of the EU Law Enforcement Directive requires Member States to set appropriate time limits for the storage of biometric data or for periodic reviews assessing the need to continue storing the data.
- 3.23 Article 10 of the EU Law Enforcement Directive specifies that biometric data is 'special category data' and therefore only to be collected "where strictly necessary" provided for by law "to protect the vital interests of the data subject or of another natural person."

Proposed periods of retention for convicted persons

- 3.24 The Justice Bill does not make provision for the indefinite retention of biometric data, which is a welcome development. Clause 1 of the Justice Bill proposes to make amendments to the Police and Criminal Evidence (Northern Ireland) Order 1989 to provide a retention model with a maximum period of retention extending to 75 years for a person convicted of a qualifying offence. Biometrics of an adult convicted of a non-qualifying recordable offence will be retained for 50 years if they receive a custodial sentence or for 25 years if no custodial sentence is imposed.
- 3.25 As set out above, the ECtHR has made clear that States are permitted to put in place regimes providing for the retention of biometrics in pursuit of the legitimate purpose of the detection and, therefore, prevention of crime. However, any regime must be proportionate to these aims. A regime which disproportionately interferes with the right to private life of individuals

whose biometrics are retained will be found to be non-compliant with the ECHR and will require reform. The ECtHR has dismissed challenges to retention regimes which adequately take into account the gravity of the offence(s) committed and which provide an opportunity for an individual to challenge the continued retention of their biometrics.⁵⁸

- 3.26 In *Gaughran*, the ECtHR highlighted that in assessing the proportionality of a biometrics retention regime a relevant consideration is “whether the regime takes into account the seriousness of the offending and the need to retain the data”.⁵⁹ The proposed regime for the retention of the biometrics of convicted people includes consideration of the seriousness of the offence and the length of sentence imposed to determine the period of detention.
- 3.27 In *Direktor na Glavna*, the CJEU found that “a ‘time limit’ for the erasure of stored data, within the meaning of Article 5 of Directive 2016/680, ...can be regarded as ‘appropriate’ only in specific circumstances which duly justify it.”⁶⁰ The appropriateness of the retention periods and the extent to which they respect the data protection safeguards provided by the EU Law Enforcement Directive, is currently unclear, due to the lack of detail on the criteria and the considerations used to determine the length of the retention periods provided by the Justice Bill.
- 3.28 In its consultation report, the Department of Justice set out how the proposed retention periods have been developed, referring to research into comparative retention regimes throughout Europe.⁶¹ The NIHRC has highlighted the importance of a solid evidence base to demonstrate the contribution which the retention of biometrics makes to the detection and prevention of crime. In addition, further detail on how the proposed retention regime compares with retention regimes throughout Europe is required. It would strengthen the existing body of evidence if the Department of Justice set out further how current understanding of re-offending patterns have informed the proposed retention periods.
- 3.29 **The NIHRC recommends that the Committee for Justice scrutinises the proportionality of the proposed retention regime in respect of**

⁵⁸ *Peruzzo and Martens v Germany* (2013) ECHR 743, at para 46.

⁵⁹ *Gaughran v UK* (2020) ECHR 144, at para 88.

⁶⁰ *Direktor na Glavna Direktsia "Natsionalna Politsia" Pri MVR – Sofia* [2024], Case C-118/22, 30 January 2024, at para 69.

⁶¹ Department of Justice, ‘A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI. Summary of Responses’ (DoJ, 2020), at para 2.21.

each category of person. In particular, the NIHRC recommends that the Committee for Justice ascertains how the retention lengths reflect current re-offending patterns.

3.30 The Committee may wish to ask the Department of Justice to provide details on the criteria used to arrive at the specified periods for retention of biometric data in order to satisfy itself that the safeguards provided by the Article 5 of the EU Law Enforcement Directive have been satisfied.

3.31 The NIHRC notes that the Justice Bill makes a number of alterations for children convicted of an offence. Provisions relating to non-custodial disposals are welcomed (proposed Article 63O and Article 63P). Biometrics of a child convicted of a first minor offence will be retained for five years plus the length of the sentence only (proposed Article 63M). Where this provision does not apply the biometrics of a child convicted of a recordable offence who receives a custodial sentence of less than five years, will be retained for 25 years only (proposed Article 63L). In contrast, the biometrics of an adult who has received a custodial sentence for a recordable offence will be retained for 50 years (proposed 63K). However, it is noted that retention periods for the biometrics of a child convicted of a qualifying offence is the same as that for an adult (proposed Article 63J). Biometrics of a child convicted of a non-qualifying offence, in receipt of a five year custodial sentence, will be retained for 50 years (proposed Article 63L). The same period of retention as that for an adult convicted of a recordable offence who receives a custodial sentence (proposed Article 63K).

3.32 The NIHRC recalls that Article 40(1) of the UN CRC provides that:

States Parties recognise the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

- 3.33 The NIHRC notes that the ECtHR referred to this provision in its deliberations in the case of *S and Marper v UK* (2008).⁶²
- 3.34 **The NIHRC recommends that the Committee for Justice closely scrutinises the proposed periods for the retention of a child’s biometric material. In particular, the Committee for Justice should assure itself that every effort has been taken to ensure that children are not unnecessarily stigmatised.**

Proposed periods of retention for DNA and fingerprints of non-convicted persons

- 3.35 The Justice Bill provides that the biometrics of a person charged with a qualifying offence will be retained for three years (proposed Article 63G). The NIHRC notes that an evidential threshold must be met before a person is charged with an offence.
- 3.36 The Justice Bill proposes that the biometrics of a person arrested but not charged with a qualifying offence may be retained for three years (proposed Article 63G(4)). However, this is dependent on the consent of the Biometrics Commissioner and will only be permissible in certain circumstances. It is proposed that the Department of Justice will prescribe these circumstances in regulations. It is unclear why this could not be provided within the Justice Bill. It is noted that the proposed article 63G contained in clause 1 of the Justice Bill does not make a distinction between individuals who are over 18 and individuals who are under 18 years of age. It is unclear if the proposed regulations will specifically consider the circumstances of children.
- 3.37 In the case of *S and Marper v UK*, the ECtHR highlighted the risk of stigmatisation for people whose biometrics have been retained “who have not been convicted of any offence and are entitled to the presumption of innocence”.⁶³ The ECtHR has further highlighted that it:

considers that the retention of the unconvicted persons’ data may be especially harmful in the case of minors such as the

⁶² *S and Marper v UK* (2008) ECHR 880, at para 55.

⁶³ *Ibid*, at para 122.

first applicant, given their special situation and the importance of their development and integration in society.⁶⁴

- 3.38 The NIHRC considers that the retention of biometrics of children requires specific consideration and justification.
- 3.39 Article 10 of the EU Law Enforcement Directive specifies that biometric data is 'special category data' and therefore only to be collected "where strictly necessary" provided for by law "to protect the vital interests of the data subject or of another natural person." In *Direktor na Glavna*, the CJEU said this constituted "a strengthened condition for the lawful processing of such data and entails, inter alia, a particularly strict review of compliance with the principle of 'data minimisation', as derived from Article 4(1)(c)." The court also made reference to the need for particular consideration of the strict necessity test in respect of persons accused but not convicted of an offence.
- 3.40 **The NIHRC recommends that the Committee for Justice assures itself that the proposed retention periods for the biometrics of adults and children who have not been convicted of an offence are proportionate to the aim of detecting and preventing crime.**

Right to review

- 3.41 As set out above, the ECtHR in *Gaughran v UK* (2020) highlighted the importance of a review mechanism as an essential safeguard within a biometric retention regime. As clarified by the CJEU in *Direktor na Glavna*, the data protection safeguards provided by the EU Law Enforcement Directive also hinge upon having review mechanisms to ensure periodic review of whether the biometric data stored is still necessary, or whether it should be erased.⁶⁵
- 3.42 The proposed Article 63U contained in clause 1 of the Justice Bill seeks to provide an enabling power to allow for the Department of Justice to issue regulations requiring the Chief Constable to review the retention of an individual's biometric material, where this material is retained for a long

⁶⁴ Ibid, at para 124.

⁶⁵ *Direktor na Glavna Direktsia "Natsionalna Politsia" Pri MVR – Sofia* [2024], Case C-118/22, 30 January 2024, at paras 70 and 73.

period of time. It is proposed that the regulations, “may, in particular, make provision— a) about when, and in what circumstances, the reviews must be conducted”. In order to satisfy the requirements of the EU Law Enforcement Directive periodic reviews are required.

- 3.43 **The NIHRC advises that to ensure compliance with the Law Enforcement Directive the proposed Article 63U should set out the time frame for periodic reviews of biometric material.**
- 3.44 The proposed Article 63U contained in clause 1 of the Justice Bill provides that a regulation may enable an individual to request a review. However, it does not set out clearly the grounds on which an individual may apply to the Chief Constable to seek the destruction of their material. The proposed Article 63U(5) contained in clause 1 of the Justice Bill indicates that the regulations may set out factors that the Chief Constable must, may or must not consider in conducting a review. Consistent with the ECtHR judgment the NIHRC considers an express reference to the principle of proportionality would strengthen this important safeguard.
- 3.45 **The NIHRC advises the Committee for Justice to explore whether to include in the proposed Article 63U(3) a duty on the Chief Constable to consider the proportionality of the retention of a person’s material.**
- 3.46 It is understood that the proposed Article 63U contained in clause 1 of the Justice Bill would provide a right for an individual to present their individual circumstances to the Chief Constable. The proposed Article 63U provides that the regulations “may set out factors that the Chief Constable must, may or must not consider in conducting a review”. The NIHRC considers that to ensure the review is sufficiently robust it is important that the enabling power makes clear that the Chief Constable must consider the particular circumstances of an individual.
- 3.47 **The NIHRC advises that the Committee for Justice explore the potential to include a duty on the Chief Constable to consider the individual circumstances of an applicant in the proposed Article 63(U)(4) contained in clause 1 of the Justice Bill.**
- 3.48 The proposed Article 63U(3)(d) contained in clause 1 of the Justice Bill suggests that an individual who has applied to the Chief Constable for their

material to be deleted who is not content with the outcome will have a right to appeal. It would be helpful if the proposed Article 63U(3)(d) provided further detail on the right to appeal, including the grounds on which an appeal may be sought and to whom an appeal will be made to.

- 3.49 **The NIHRC advises the Committee for Justice explore whether further provision for the right to appeal a determination by the Chief Constable can be included within the proposed Article 63U(3)(d) contained in clause 1 of the Justice Bill.**
- 3.50 The Commission notes that the right to review extends to material retained long term only. For individuals, including individuals under 18 years old convicted of their first minor offence, there will be no provision for a review. The NIHRC appreciates that this may be acceptable as part of a graduated approach. However, it would be helpful if the Department of Justice set out how they have concluded that a right to review should not extend to individuals convicted of minor offences.
- 3.51 **The Committee may wish to ask the Department of Justice for more detail on how the current clauses of the Justice Bill concerning the review of biometric data respect the data protection safeguards laid down by the EU Law Enforcement Directive.**
- 3.52 It is noted that all individuals whose biometrics are retained may have a right under section 47 of the Data Protection Act 2018 to apply to the police for the deletion of their personal data. If this is refused an individual can lodge a complaint with the Information Commissioners Office and potentially apply to a court under section 167 of the 2018 Act. As discussed, the UK Government has made several submissions to the CoE Committee of Ministers in relation to compliance with *Gaughran*. In the UK Government's latest submission, it is suggested that the law governing DNA and biometric retention in England and Wales, which continues to provide for the indefinite retention of biometrics, is compatible with *Gaughran* by virtue of the safeguards contained within the 2018 Act. This view has not been fully reviewed by the Committee of Ministers. However, the Committee of Ministers has highlighted concerns that:

reviews of biometric data are not available in practice to adults convicted of recordable offences whose DNA profiles and/or fingerprints continue to be kept indefinitely; urged the authorities

therefore to amend the framework to establish effective safeguards to enable applications for review and deletion of that data if conserving it is no longer necessary in view of the seriousness of the offence and other factors.⁶⁶

- 3.53 The NIHRC notes that adults and children whose biometrics are retained for shorter periods of time in NI will have to rely solely on their rights to review, contained within the Data Protection Act 2018. In addition, the NIHRC understands that individuals whose biometrics have been retained for longer periods of time, who have exhausted their review and appeal rights to be provided by the proposed Article 6U(3) contained in clause 1 of the Justice Bill, will have the option to make a complaint to the Information Commissioner.
- 3.54 **The NIHRC advises that the Committee for Justice explores the interplay between the Data Protection Act 2018 and the proposed reforms in the Justice Bill, in particular the right to review. The Committee for Justice should ascertain how individuals whose biometrics are retained will be made aware of their rights under the Data Protection Act 2018.**
- 3.55 Article 16 of the EU Law Enforcement Directive requires the controller to erase personal data without undue delay and provide for the right of the data subject to obtain from the controller the erasure of personal data concerning him or her without undue delay. Furthermore, Article 13 of the EU Law Enforcement Directive guarantees the data subject the right to access information about the collection, processing and storage of their personal data.
- 3.56 The Justice Bill currently does not provide sufficient detail on the procedural mechanisms put in place to ensure that the safeguards provided by Article 16 of the Law Enforcement Directive are respected and that the data subject will have their biometric data erased, as well as be able to obtain a written confirmation from the data controller that their biometric data has been erased. Detail on how data subjects will have their right to information protected by the Justice Bill is also insufficient. Therefore, it is difficult to assess the extent to which the Justice Bill

⁶⁶ DH-DD(2021)202, 'Communication from the UK Concerning the Case of Gaughran v UK Application No 45245/15', 15 February 2021.

complies with the “right to erasure” and the “right to information” provisions laid down by the EU Law Enforcement Directive.

3.57 The Committee may wish to ask the Department of Justice for more detail on how the Justice Bill satisfies the “right to erasure” and the “right to information” requirement to erase biometric data without undue delay when the storage of such data is no longer needed and enable the data subject to have access to information about their biometric data.

3.58 The proposed Article 63Z contained in Clause 1 of the Justice Bill will make provision for the establishment of the NI Commissioner for the Retention of Biometric Material. The NIHRC welcomes the inclusion of a duty on the Biometrics Commissioner to keep under review the use and development of existing and new biometric technologies. Technological advancements relating to biometrics are constant and it is important that safeguards and human rights protections develop in line with them. The role of the Biometrics Commissioner is not fully set out in the proposed Article 63Z of the Justice Bill, in particular the role which a Biometrics Commissioner may play in assessing individual applications for destruction is not fully referred to.

3.59 The NIHRC considers that the Biometrics Commissioner is well placed to perform a role in considering applications for destructions from individuals or appeals from initial decisions relating to applications for destruction. The NIHRC advises that the proposed Article 63Z contained in clause 1 of the Justice Bill should refer to the Biometric Commissioner performing a role in considering individual applications.

EU Law Enforcement Directive: Rights of the data subjects and obligations of the data controllers and data processors

3.60 Articles 12 to 18 of the EU Law Enforcement Directive provide for the rights of data subjects, including duties on data controllers to provide information; rights of access; rights to rectification and erasure of data; and the right to a judicial remedy. Articles 19 to 34 of the EU Directive

deal with the duties of data controllers and supervisory authorities and Articles 52 to 57 of the EU Directive address remedies for breach of rights.

- 3.61 The NIHRC notes that various provisions in Part 1 touch upon these issues, particularly in terms of the establishment of a Commissioner for the Retention of Biometric Data. It is noted also that the provisions will sit within the Police and Criminal Evidence (NI) Order 1989, and the broader suite of criminal justice legislation. The Committee may therefore wish to explore the interaction between these provisions and the degree to which rights of data subjects, safeguards and remedies are dealt with elsewhere.
- 3.62 **The NIHRC recommends that the Committee explore with the Department how the proposed biometric data retention framework will comply with the EU Law Enforcement Directive including in respect of the rights of data subjects, duties on data controllers and supervisory authorities and remedies for breach of rights.**

4.0 Part 2 - Children

Bail and remand of children

- 4.1 The Justice Bill proposes to strengthen the existing presumption of bail for children. The Bill introduces a presumption that a child charged with an offence must be released on bail unless certain conditions exist. In addition, the Bill proposes a requirement that any conditions applied to a grant of bail should be proportionate and necessary. The Justice Bill also proposes to introduce specific conditions which must be met before a child can be remanded in custody.

Principles of proportionality and necessity

- 4.2 Clause 5(5), supported by Schedule 4, of the Justice Bill proposes amending the Article 48ZA of the Police and Criminal Evidence (NI) Order 1989 to include the safeguard that “a condition of bail must be no more onerous than is necessary for the purpose for which it is imposed”.
- 4.3 Clause 5(6) of the Justice Bill proposes to add additional provisions to Article 10 of the Criminal Justice (Children) (NI) Order 1998. These include a requirement that a child who is arrested for or charged with an offence

“must be released on bail” except in certain circumstances, with the power to refuse bail where two conditions are met. In summary:

the first condition is that if the child is convicted of the offence it is very likely that a custodial sentence will be imposed.

The second condition is that there are substantial grounds for believing that it is necessary to remand the child in custody to prevent –

- a) the child failing to surrender to custody,
- b) the child committing an offence while on bail,
- c) the child interfering with witnesses or otherwise obstructing the course of justice, whether in relation to the child or any other person, or
- d) the child’s release causing a serious threat to public order.

4.4 Clause 5(6) of the Justice Bill proposes that the presumption of bail does not extend to situations where the child has been convicted of an offence, has been refused bail in respect of another offence or is subject to a sentence of a court or under the Armed Forces Act 2006. Yet it is proposed that a court will retain the power to release a child without bail or to grant bail on compassionate grounds.

4.5 Clause 5(6) of the Justice Bill also proposes that bail conditions are only imposed on juveniles where necessary and for as long as necessary. It is also proposed that a bail condition must not be imposed on a juvenile if it is more onerous than necessary for the purpose it was imposed. It is proposed that a:

court must not impose a condition of bail on a juvenile unless it is satisfied that it is necessary to do so to prevent –

- a) the child failing to surrender to custody,
- b) the child committing an offence while on bail, the child interfering with witnesses or otherwise obstructing the

course of justice, whether in relation to the child or any other person, or

c) the child's release causing a serious threat to public order.

- 4.6 Clause 5(7) of the Justice Bill proposes to amend Article 6 of the Criminal Justice (NI) Order 2003 to ensure that a decision on whether to arrest a child for absconding or breaking conditions of bail considers the "nature and seriousness of the likely breach or breach of the conditions of bail". If it is decided to not arrest the child, the constable must record the decision, including the reasons for the decision made. A copy of the record must also be provided to the court on the next occasion the child is brought before a court.
- 4.7 Right to liberty and security is protected by the ECHR and numerous international treaties.⁶⁷ The European Court on Human Rights (ECtHR) has clarified that deprivation of liberty is permissible provided certain safeguards are provided and that it is proportionate and necessary.⁶⁸
- 4.8 Concerning remand, the ECtHR has clarified that Article 5(1) of the ECHR allows for pre-trial detention, if it can be "justified on the grounds of a reasonable suspicion concerning an existing offence in relation to which criminal proceedings are pending". The ECtHR acknowledges that "prevention of further offences may... be a secondary effect of such detention", however "pre-trial detention can never be used as a purely preventative measure".⁶⁹
- 4.9 Specific to children, Article 5(1)(d) of the ECHR enables a child to be lawfully detained for the purpose of being brought before a competent authority. However, the ECtHR has clarified that all of Article 5(1) of the ECHR can apply to a child, where relevant, and that Article 5(1)(d) of the ECHR is not "the only provision which permits the detention of a minor".⁷⁰

⁶⁷ Article 5, European Convention on Human Rights 1950; Article 9(1), UN International Covenant on Civil and Political Rights 1966; Article 14, UN Convention on the Rights of Persons with Disabilities 2006; CCPR/C/GC/35, 'UN Human Rights Committee General Comment No 35: Liberty and Security of Person', 16 December 2014; CRC/C/GC/24, 'UN CRC Committee General Comment No 24: Children's Rights in the Child Justice System', 18 September 2019.

⁶⁸ *S, V and A v Denmark* (2018) ECHR 856, at para 161; *Ladent v Poland* (2008) ECHR 211, at para 55.

⁶⁹ *Kurt v Austria* (2021) ECHR 527, at paras 187 and 188.

⁷⁰ *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (2006) ECHR 1170, at para 100.

- 4.10 That said, the “key purpose” of the right to liberty and security “is to prevent arbitrary or unjustified deprivations of liberty”.⁷¹ Any deprivation of liberty must fall within the permissible grounds set out in Article 5(1) of the ECHR, which “must be interpreted strictly”, with an emphasis on the rule of law.⁷²
- 4.11 Article 37(b) of the UN Convention on the Rights of the Child provides that:
- no child shall be deprived of his or her [or their] liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.
- 4.12 Article 40(3)(b) of the UN CRC provides that there should be “whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected”. Article 40(4) of the UN CRC also requires that:
- a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.
- 4.13 The UN Committee on the Rights of the Child (UN CRC Committee) has clarified that the focus should be on “expanding the use of non-custodial measures to ensure that detention of children is a measure of last resort”.⁷³ Also that “for the few situations where deprivation of liberty is justified as a last resort, ensuring that its application is for older children only, is strictly time limited and is subject to regular review”.⁷⁴ This includes that laws “should contain a wide variety of non-custodial measures and should expressly prioritise the use of such measures to

⁷¹ *Selahattin Demirtas v Turkey (No 2)* (2020) ECHR 922, at para 311.

⁷² *IS v Switzerland* (2020) ECHR 663, at paras 46-60; *Buzadji v Republic of Moldova* (2016) ECHR 1398, at para 84.

⁷³ CRC/C/GC/24, ‘UN CRC Committee General Comment No 24: Children’s Rights in the Child Justice System’, 18 September 2019, at para 6(iii).

⁷⁴ *Ibid*, at para 6(iv).

ensure that deprivation of liberty is used only as a measure of last resort and for the shortest appropriate period of time”.⁷⁵

4.14 The UN CRC Committee has stated that:

the child justice system should provide ample opportunities to apply social and educational measures, and to strictly limit the use of deprivation of liberty, from the moment of arrest, throughout the proceedings and in sentencing. State Parties should have in place a probation service or similar agency with well-trained staff to ensure the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day reporting centres, and the possibility of early release from detention.⁷⁶

4.15 Regarding pretrial detention, it has been confirmed that “children languish[ing] in pretrial detention for months or even years... constitutes a grave violation of Article 37(b) of the [UN CRC]”.⁷⁷ Furthermore, “pretrial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered”.⁷⁸

4.16 Specifically:

the law should clearly state the criteria for the use of pretrial detention, which should be primarily for ensuring appearance at the court proceedings and if the child poses an immediate danger to others. If the child is considered a danger (to himself or herself or others) child protection measures should be applied. Pretrial detention should be subject to regular review and its duration limited by law. All actors in the child justice system should prioritise cases of children in pretrial detention.⁷⁹

⁷⁵ Ibid, at para 73.

⁷⁶ Ibid, at para 19.

⁷⁷ Ibid, at para 86.

⁷⁸ Ibid.

⁷⁹ Ibid, at para 87.

- 4.17 Furthermore, there should be “regular opportunities to permit early release from custody... into the care of parents or other appropriate adults”.⁸⁰ This requires “discretion to release with or without conditions”.⁸¹
- 4.18 Additionally, right to a fair trial may require consideration.⁸² The ECtHR is clear that any decision regarding bail or remand must not interfere with the right to be presumed innocent until proved guilty.⁸³ An accused must also have “adequate time and facilities for the preparation of” their defence.⁸⁴ However, this is to be balanced against the requirement that a fair trial takes place “within a reasonable time”.⁸⁵ This indicates that the trial of the accused must progress with reasonable expediency, including that bail conditions are reasonable and periods of remand are no longer than necessary. As the ECtHR has stated “the precise aim of [Article 6(1) of the ECHR]... in criminal matters is to ensure that accused persons do not have to lie under a charge for too long and that the charge is determined”.⁸⁶ Thus, “unwarranted adjournments or excessive delays on the part of trial courts are... to be feared”.⁸⁷ This requires an “overall assessment” of the “particular circumstances of the case” to determine what is reasonable regarding length of judicial proceedings.⁸⁸ It is likely that “lengthy periods of inactivity” will be deemed as unreasonable delays.⁸⁹
- 4.19 Furthermore, bail and remand conditions should not limit the right to respect for family life or correspondence without a legitimate aim, proportionate justification or in a discriminatory manner.⁹⁰ This requires particular consideration for children, as the right to respect for private life extends to protecting the right to personal development.⁹¹ However, it is noted that this right can be limited where it is reasonable to do so.⁹²

⁸⁰ Ibid, at para 88.

⁸¹ Ibid.

⁸² Article 6, European Convention on Human Rights 1950; Article 14(1), UN International Covenant on Civil and Political Rights 1966; Article 40(2)(b)(iii), UN Convention on the Rights of the Child 1989.

⁸³ *Nestak v Slovakia* (2007) ECHR 185, at para 90. See also, CCPR/C/GC/32, ‘UN Human Rights Committee General Comment No 32: Right to Equality Before Courts and Tribunals and to a Fair Trial’, 23 August 2007, at para 30.

⁸⁴ Article 6(3)(b), European Convention on Human Rights 1950.

⁸⁵ Article 6(1), European Convention on Human Rights 1950; Article 14(3)(c), UN International Covenant on Civil and Political Rights 1966.

⁸⁶ *Wemhoff v Germany* (1968) ECHR 2, at para 18.

⁸⁷ Ibid.

⁸⁸ *Adiletta and Others v Italy* (1991) ECHR 4, at para 17.

⁸⁹ Ibid.

⁹⁰ Article 8, European Convention on Human Rights 1950; *Resin v Russia* (2018), ECHR 1024, at paras 29-41; *Chaldayev v Russia* (2019) ECHR 387, at paras 69-83.

⁹¹ *Evers v Germany* (2020) ECHR 356, at para 53.

⁹² Ibid, at para 54.

4.20 In 2023, the UN CRC Committee recommended that the UK Government and NI Executive:

repeal the practice of remanding children into police custody, ensure that no child is held in police custody overnight, and avoid the use, and reduce the maximum duration, of pretrial detention; and address the overrepresentation of children belonging to minority groups in detention and develop measures, in consultation with affected children and their families, to prevent racial profiling by law enforcement authorities.⁹³

4.21 In 2023, the Criminal Justice Inspection NI reported that bail laws and processes in NI were often inadequate, and that limited progress has been made in developing viable alternatives to remand.⁹⁴ The Criminal Justice Inspection highlighted the proposed legislative provisions for children and recommended the introduction of a broader Bail Act that would provide necessary reforms to bail for all defendants.⁹⁵

4.22 The NIHRC welcomes the Department of Justice’s proposal to include provisions within the Justice Bill that ensure that a child is only held in pre-trial detention as a measure of last resort, guided by the express mention of the principle of necessity within the legislation.

4.23 The NIHRC recommends that the Department of Justice includes provisions within the Justice Bill that impose a statutory duty that suitable accommodation is provided within a reasonable time if a child is released on bail.

4.24 The NIHRC continues to recommend that the Department of Justice and Department of Health ensure that a range of non-custodial accommodation arrangements are available for children awaiting trial who cannot return to their homes.

⁹³ CRC/C/GBR/CO/6-7, 'UN CRC Committee Concluding Observations on the Sixth and Seventh Periodic Reports of the UK of Great Britain and NI', 2 June 2023, at paras 54(e) and 54(g).

⁹⁴ Criminal Justice Inspection NI, 'The Operation of Bail and Remand in NI' (CJINI, 2023), at 18.

⁹⁵ Ibid.

Best interests of the child

4.25 Clause 4 of the Justice Bill proposes to amend Article 39 of the Police and Criminal Evidence (NI) Order 1989 to include a requirement that a custody officer after charge is required to consider “in the case of an arrested juvenile – i) the juvenile’s age, maturity and needs; and ii) the juvenile’s capacity to understand and comply with any condition of bail”.

4.26 Clause 5(2) of the Justice Bill proposes to extend Article 48(3D) of the Police and Criminal Evidence (NI) Order 1989 to read that a person released on bail after arrest:

may be required to comply, before release on bail... with such requirements as appear to the custody officer to be necessary that

–

- a) He surrenders to custody;
- b) He does not commit an offence while on bail;
- c) He does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person; and
- d) He does not cause a serious threat to public order.

4.27 Clause 5(3) of the Justice Bill further proposes that Article 48(3F) of the Police and Criminal Evidence (NI) Order 1989 is amended to read:

where a custody officer grants bail to a person no conditions shall be imposed... unless it appears to the custody officer that it is necessary to so for the purpose of –

- a) preventing that person from failing to surrender to custody;
- b) preventing that person from failing to committing an offence while on bail;
- c) preventing that person from interfering with witnesses or otherwise obstructing the course of justice, whether in relation to himself or any other person; or

- d) preventing that person's release from causing a serious threat to public order.

4.28 Clause 5(5) of the Justice Bill proposes that Article 48ZA of the Police and Criminal Evidence (NI) Order 1989 is amended to include the requirements that in deciding whether to impose conditions on bail of a juvenile, consideration is given to:

- a) the nature and seriousness of the offence,
- b) the character, antecedents, associations and community ties of the juvenile,
- c) the juvenile's record as respects the fulfilment of the juvenile's obligations under previous grants of bail,
- d) the strength of the evidence of the juvenile's having committed the offence,
- e) the juvenile's age, maturity and needs, and
- f) the juvenile's capacity to understand and comply with any condition of bail.

4.29 In deciding whether to refuse bail or impose, vary or remove bail conditions regarding a juvenile, clause 5(6) of the Justice Bill proposes that consideration must be given to:

insofar as they are relevant –

- a) The nature and seriousness of the offence;
- b) The strength of evidence against the child;
- c) The child's character and history, including –
 - i) The nature of any previous convictions,
 - ii) The conduct of the child during any previous grants of bail;

- d) The child's community ties and associations;
- e) The child's age, maturity and needs;
- f) The child's capacity to understand and comply with any condition of bail.

4.30 Clause 5(8) of the Justice Bill proposes to clarify in Article 39 of the Police and Criminal Evidence (NI) Order 1989 and the Criminal Justice (Children) (NI) Order 1998 that a juvenile's accommodation needs "may" be considered when deciding whether to grant bail or not. However, a refusal to release a juvenile on bail "must not... solely [be] because the juvenile does not have any or adequate accommodation".

4.31 Article 37(c) of the UN CRC provides that "every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her [or their] age".

4.32 Furthermore, Article 40(1) of the UN CRC requires that:

every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming constructive role in society.

4.33 More broadly, Article 3(1) of the UN CRC Committee requires that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

4.34 Best interests of the child is a "dynamic", "flexible" and "adaptable" concept that requires an assessment "appropriate to the specific context" and on an "individual basis" to the specific circumstances of the child

concerned.⁹⁶ This includes consideration of the child's "age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves".⁹⁷ Also "consideration of the child's views; the child's identity; preservation of the family environment and maintaining relations; care, protection and safety of the child; situation of vulnerability; the child's right to health; and the child's right to education".⁹⁸ However, it is acknowledged that "not all the elements will be relevant to every case, and different elements can be used in different ways in different cases".⁹⁹

4.35 The best interests principle is a substantive right of the child to have their best interests assessed, which is open to interpretation that "most effectively serves the child's best interests" and includes a process by which the decision taken is "evaluated of the possible impact (positive and negative) of the decision on the child concerned".¹⁰⁰ It includes "the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her [or their] human dignity".¹⁰¹ It should be "at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets, legislative and budgetary initiatives and guidelines... concerning children in general or as a specific group".¹⁰² This includes demonstrating "that the child's best interests have been a primary consideration" through "describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision".¹⁰³

4.36 The best interests principle "applies to children in conflict (i.e. alleged, accused or recognised as having infringed)... with the law".¹⁰⁴ It is also underlined "that protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders".¹⁰⁵

⁹⁶ CRC/C/GC/14, 'UN CRC Committee General Comment No 14: Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration', 29 May 2013, at paras 3, 32 and 48.

⁹⁷ Ibid, at para 48.

⁹⁸ Ibid, at paras 52-79.

⁹⁹ Ibid, at para 80.

¹⁰⁰ Ibid, at para 6.

¹⁰¹ Ibid, at para 5.

¹⁰² Ibid, at paras 10 and 14(a).

¹⁰³ Ibid, at para 14(b).

¹⁰⁴ Ibid, at para 28.

¹⁰⁵ Ibid.

4.37 Section 53 of the Justice (NI) Act 2002 requires that all persons and bodies exercising functions in relation to the youth justice system in NI “must... have the best interests of children as a primary consideration”.¹⁰⁶ However, it can be beneficial for an express reminder of this to be listed in legislation that guides important decisions regarding children and the criminal justice system, particularly considering the stigmatisation of children that can arise.¹⁰⁷ Mention of the best interests of the child is currently absent from the clauses regarding bail and remand of children within the Justice Bill.

4.38 The NIHRC recommends that the Department of Justice ensures that the Justice Bill includes express mention of the best interests of the child principle, as appropriate, within the clauses regarding bail and remand of children in NI. This is particularly relevant regarding clauses 5(3), 5(5) and 5(6) of the Justice Bill.

Training, guidance and resources

4.39 Clauses 4, 5(2), 5(3), 5(5), 5(6) and 5(8) of the Justice Bill propose several criteria on which decisions related to bail and remand regarding children are to be made. Beyond the detail of the Justice Bill, but relevant to its implementation, it is unclear how it will be ensured that the decision-maker regarding the bail and remand of a child is appropriately trained and that there is comprehensive guidance in place to ensure the provisions of the Justice Bill are fully understood and applied appropriately, including that the best interests of the child are taken into account regarding any decision.

4.40 The UN CRC Committee has stressed that “children who commit offences are often subjected to negative publicity in the media, which contributes to discriminatory and negative stereotyping of those children”.¹⁰⁸ Thus:

it is essential for the quality of the administration of child justice that all professionals involved receive appropriate multidisciplinary training on the content and meaning of the [UN CRC]... The

¹⁰⁶ As amended by section 98 of the Justice (NI) Act 2015.

¹⁰⁷ CRC/C/GC/24, ‘UN CRC Committee General Comment No 24: Children’s Rights in the Child Justice System’, 18 September 2019, at para 112.

¹⁰⁸ Ibid.

training should be systematic and continuous and should not be limited to the information on the relevant national and international legal provisions. It should include established and emerging information from a variety of fields on, inter alia, the social and other causes of crime, the social and psychological development of children, including current neuroscience findings, disparities that may amount to discrimination against certain marginalised groups such as children belonging to minorities or indigenous peoples, the culture and trends in the world of young people, the dynamics of group activities and the available diversion measures and non-custodial sentences, in particular measures that avoid resorting to judicial proceedings... There should be a constant appraisal of what works.¹⁰⁹

4.41 It is also considered:

useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests. The non-exhaustive nature of the elements in the list implies that it is possible to go beyond those and consider other factors relevant in the specific circumstances of the individual child or group of children. All the elements of the list must be taken into consideration and balanced in light of each situation. The list should provide concrete guidance, yet flexibility.

4.42 The Barnahus model on a child-centred approach to justice also refers to capacity building, access to education (including guidance), and a clear system of evaluating and reviewing services.¹¹⁰

4.43 **The NIHRC recommends that the Department of Justice considers and sets out a clear plan for specialised training, guidance and long-term funding to ensure that implementation of the provisions of the Justice Bill related to the bail and remand of children adheres to international human rights standards, particularly the UN CRC.**

¹⁰⁹ Ibid.

¹¹⁰ Promise Project Series, 'Barnahus Quality Standards: Guidance for Multidisciplinary and Interagency Response to Child Victims and Witnesses of Violence' (PPS, 2017).

Imprisonment of children with adults

4.44 The Justice Bill proposes to underpin the current administrative arrangements which exist around the separation of children and adults in custodial settings. For example, clauses 9, 10, 11 and 16 of the Justice Bill propose to amend existing laws to impose a statutory duty where a court remands or commits a child to custody, that the child must be detained in a child-appropriate location, i.e. a juvenile justice centre.¹¹¹ Clause 17 of the Justice Bill also increases the age at which an individual can be detained in a young offenders centre to 18 years old. A young offenders centre can detain adults up to 21 years old.

4.45 Clause 12 and Schedule 4 of the Justice Bill also propose amending Article 38 of the Criminal Justice (Children) (NI) Order 1998 and a range of other linked legislation to replace existing youth-specific custodial orders with a new youth custody and supervision order. This would enable the court to make “an order that the child is to be subject to a period of detention followed by a period of supervision”, with clear parameters for the length of each, depending on the circumstances. It is also clear the detention period must be served in a juvenile justice centre, that the child must be under the supervision of a probation officer during the supervision period and that there are restrictions on making two or more youth custody and supervision orders which must be communicated in plain language. This applies:

where a child is found guilty by or before any court of an offence and –

- a) it appears to the court that the child was aged 14 or over when the offence was committed, and
- b) the offence is one which is punishable, in the case of an adult, with imprisonment, and for which the sentence is, in the case of an adult, not fixed by law as imprisonment for life.

¹¹¹ This includes amendments to Articles 45 and 46B of the Criminal Justice (Children) (NI) Order 1998, Articles 13, 14, 39 and 44 of the Criminal Justice (NI) Order 2008, and section 5(1)(a) of the Treatment of Offenders Act (NI) 1968.

4.46 It is also proposed in clause 12 of the Justice Bill that a youth custody and supervision order must be revoked if a custodial sentence is imposed on the child.

4.47 Clause 13 of the Justice Bill proposes that Article 101 of the Criminal Justice (Children) (NI) Order 1998 is amended to require “where a court remands in or commits to custody a child arrested for, charged with or convicted of an offence, the child must be detained in a juvenile justice centre”. However, there is an exception “where a court considers it appropriate to remand a child to customs detention” regarding a suspected drugs offence.¹¹²

4.48 Clause 14 of the Justice Bill proposes that the Criminal Justice (Children) (NI) Order 1998 is amended to include a requirement for specific consideration to be given where “the total period for which the child is remanded in custody will exceed three months”. It proposes that “the court must give reasons for doing so in open court”. It proposes that:

the court must have regard to –

- a) the likely period of any custodial sentence which a court would have the power to impose if the child is convicted of the offence in question, and
- b) the extent (if any) to which the total period for which the child is remanded in custody will exceed the likely period of any custodial sentence.

4.49 Clause 15 of the Justice Bill proposes to amend Article 32 of the Criminal Justice (Children) (NI) Order 1998 to ensure that there is specific consideration given to the time a child is spent on remand in custody.

4.50 Article 37(c) of the UN CRC specifically states that:

in particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or

¹¹² Section 152, Criminal Justice Act 1988.

her [or their] family through correspondence and visits, save in exceptional circumstances.

4.51 The UN CRC Committee is clear that:

every child deprived of liberty is to be separated from adults, including in police cells. A child deprived of liberty is not to be placed in a centre or prison for adults, as there is abundant evidence that this compromises their health and basic safety and their future ability to remain free of crime and to reintegrate.¹¹³

4.52 Thus:

the permitted exception to the separation of children from adults stated in Article 37(c) of the [UN CRC]... - 'unless it is considered in the child's best interests to do so' – should be interpreted narrowly and the convenience of the States Parties should not override best interests. States Parties should establish separate facilities for children deprived of liberty that are staffed by appropriately trained personnel and that operate according to child-friendly policies and practices.¹¹⁴

4.53 Furthermore, this:

does not mean that a child placed in a facility for children should be moved to a facility for adults immediately after he or she [or they] reaches the age of 18. The continuation of his or her [or their] stay in the facility for children should be possible if that is in his or her [or their] best interests and not contrary to the best interests of the children in the facility.¹¹⁵

4.54 Additionally, the UN CRC Committee has emphasised that:

children should be provided with a physical environment and accommodation conducive to the reintegrative aims of residential placement. Due regard should be given to their needs for privacy,

¹¹³ CRC/C/GC/24, 'UN CRC Committee General Comment No 24: Children's Rights in the Child Justice System', 18 September 2019, at para 92.

¹¹⁴ Ibid.

¹¹⁵ Ibid, at para 93.

for sensory stimuli and for opportunities to associate with their peers and to participate in sports, physical exercise, arts and leisure-time activities.¹¹⁶

4.55 In 2023, the UN CRC Committee recommended that the UK Government and NI Executive:

for the few situations where deprivation of liberty is used as a measure of last resort, continue to strive for full compliance with the international requirement to detain children separately from adults and ensure that detention conditions are compliant with international standards, including with regard to access to education and health services, including mental health services.¹¹⁷

4.56 **The NIHRC welcomes the Department of Justice’s proposals to include clauses within the Justice Bill that ensure there is a statutory duty to prevent children from being imprisoned with adults in NI.**

Child-centred approach

4.57 It is proposed in clause 6 of the Justice Bill that the court must record and provide reasons for any decisions it makes regarding the bail of a child. This includes providing a child with a copy of the record, if requested. It is also proposed that the court “must use language that is appropriate to the age, maturity and understanding of the child”.

4.58 Clause 12 of the Justice Bill also proposes to require that “the court must state in open court and in ordinary language how it discharged the duty” in relation to a restriction on making two or more youth custody and supervision orders.

4.59 The proposed clauses in the Justice Bill regarding understandable language are reflective of the Barnahus model, which promotes a child-centred

¹¹⁶ Ibid, at para 94.

¹¹⁷ CRC/C/GBR/CO/6-7, 'UN CRC Committee Concluding Observations on the Sixth and Seventh Periodic Reports of the UK of Great Britain and NI', 2 June 2023, at para 54.

approach to justice.¹¹⁸ However, use of understandable language is only one aspect, with the need to consider how to ensure a child's journey through the criminal justice system from start to finish adopts a child-centred and trauma informed approach. The proposed express inclusion of a requirement to use understandable language within the Justice Bill is welcomed, however it is in very specific circumstances.

4.60 Similar to the Barnahus model,¹¹⁹ the UN CRC Committee has stated that:

to effectively participate, a child needs to be supported by all practitioners to comprehend the charges and possible consequences and options in order to direct the legal representative, challenge witnesses, provide an account of events and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Proceedings should be conducted in a language the child fully understands or an interpreter is to be provided free of charge. Proceedings should be conducted in an atmosphere of understanding to allow children to fully participate. Developments in child-friendly justice provide an impetus towards child-friendly language at all stages, child-friendly layouts of interviewing spaces and courts, support by appropriate adults, removal of intimidating legal attire and adaption of proceedings, including accommodation for children with disabilities.¹²⁰

4.61 Furthermore:

children are a diverse group, with each having his or her own characteristics and needs that can only be adequately assessed by professionals who have expertise in matters related to child and adolescent development. This is why the formal assessment process should be carried out in a friendly and safe atmosphere by professionals trained in, inter alia, child psychology, child development and other relevant human and social development fields, who have experience working with children and who will

¹¹⁸ The Barnahus model has its origins in ensuring the rights of child victims and witnesses. However, many of the principles can be applied in situations where the child is the alleged offender, to ensure a child-centred approach is adopted to their journey through the criminal justice system. See Promise Project Series, 'Barnahus Quality Standards: Guidance for Multidisciplinary and Interagency Response to Child Victims and Witnesses of Violence' (PPS, 2017).

¹¹⁹ Promise Project Series, 'Barnahus Quality Standards: Guidance for Multidisciplinary and Interagency Response to Child Victims and Witnesses of Violence' (PPS, 2017).

¹²⁰ CRC/C/GC/24, 'UN CRC Committee General Comment No 24: Children's Rights in the Child Justice System', 18 September 2019, at para 46.

consider the information received in an objective manner. As far as possible, a multidisciplinary team of professionals should be involved in assessing the child's best interests.¹²¹

- 4.62 **The NIHRC recommends that the Department of Justice considers how it can expand express reference to a child-centred and trauma informed approach within the Justice Bill, as appropriate, for the purposes of ensuring such an approach expands across a child's journey through the criminal justice system in NI.**

No punishment without law

- 4.63 Clause 19 of the Justice Bill clarifies when and how clauses 9 to 18 and Schedule 4 of the Bill apply, with a particular emphasis on non-retrospectivity.

- 4.64 This is in line with the right to no punishment without law, which requires that:

no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that applicable at the time the criminal offence was committed.¹²²

- 4.65 The ECtHR has clarified that "States are free to determine their own criminal policy, for example by increasing the penalties applicable to criminal offences... [but] they must comply with the requirements of Article 7 [of the ECHR] in doing so".¹²³ This provision "unconditionally prohibits the retrospective application of the criminal law where it is to an accused's disadvantage".¹²⁴

- 4.66 There can be an exception regarding a continuous offence. A continuous offence is "defined as consisting of individual acts driven by the same purpose, which constituted the same offence and were linked by virtue of

¹²¹ CRC/C/GC/14, 'UN CRC Committee General Comment No 14: Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration', 29 May 2013, at para 94.

¹²² Article 7, European Convention on Human Rights 1950; Article 15(1), UN International Covenant on Civil and Political Rights 1966.

¹²³ *Del Río Prada v Spain* (2013) ECHR 1899, at para 116.

¹²⁴ *Ibid.*

being carried out in an identical or similar manner, occurring close together in time and pursuing the same object”.¹²⁵ It is “considered to constitute a single act” which has to be “assessed under the rules in force at the time of completion of the last occurrence of the offence, provided that the acts committed under any previous law would have been punishable also under the older law”.¹²⁶

- 4.67 **The NIHRC welcomes the Department of Justice’s proposals to include clauses within the Justice Bill that ensure clarity regarding the application of provisions related to the bail and remand of children, and to ensure that children are not imprisoned with adults.**

5.0 Part 3 - Use of Live links

Warrants for further detention: Use of live links

- 5.1 Part 3 of the Justice Bill introduces provisions enabling “live links” technology to be used by police for a number of custody functions. Clause 20 proposes amendments to Article 40 of the Police and Criminal Evidence (Northern Ireland) Order 1989 to enable remote interviewing using a live link so that a police officer can interview a suspect from a different location and requires that a detained person would have exercised their right to legal advice as a precondition for the use of the live link.
- 5.2 Clause 21 proposes an amendment to Article 46ZB(1) of the Police and Criminal Evidence (NI) Order 1989 to enable a Magistrates’ Court to issue a live link direction for the purposes of the hearing of a complaint under Article 45 of the 1989 Order for an extension of a warrant for further detention.
- 5.3 The Minister has indicated that further provision will be brought forward through this Bill for the use of live links in NI courts. In the intervening period, the regulatory powers under the Coronavirus Act will continue to provide for the operation of live links in NI Courts and tribunals.

¹²⁵ *Rohlena v Czech Republic* (2015) ECHR 210, at para 61.

¹²⁶ *Ibid.*

- 5.4 The NIHRC appreciates that the use of live links in the criminal justice system presents several advantages in terms of efficiency and resources. However, it is important to consider the important role which an appearance before a judge plays in guaranteeing the rights of an individual who has been deprived of their liberty.
- 5.5 The right to liberty and security of the person is protected by Article 5 of the ECHR. Articles 5(3) and 5(4) of the ECHR provide that:
- (3) everyone arrested or detained in accordance with the provisions of paragraph 1(c) of... [Article 5 of the ECHR] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
- (4) everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- 5.6 Article 5(3) of the ECHR is referred to as the habeas corpus provision of the ECHR. In addition to providing a mechanism for the lawfulness of an individual's detention to be assessed, this provision provides an important safeguard which allows an individual to raise concerns relating to their detention. The NIHRC notes that the consent of the person detained must be obtained before a live link is authorised, which is an important safeguard. However, the NIHRC considers it is important that use of a live link does not become the presumed method for court appearance. Furthermore, in circumstances in which an individual chooses to appear via live link it is important that pre-existing safeguards which ensure the safety and well-being of a suspect held in custody operate to their full potential.
- 5.7 The NIHRC has previously highlighted that the adoption of new technologies and ways of working should not inadvertently hinder access to justice for individuals with specific needs, including children, persons with disabilities and unrepresented litigants and/or individuals for whom English is not their first language. The NIHRC has also expressed concerns about the extension of live links technology without undertaking specific

research to determine whether the use of live links had any adverse consequences for court users with disabilities and/or those for whom English is not their first language.

- 5.8 The NIHRC highlights the relevance of Windsor Framework Article 2, the EU Victims' Directive and the EU Interpretation Directive in respect of persons suspected or accused, victims with disabilities and people who do not speak English as a first language.
- 5.9 The EU Victims' Directive reinforces existing national laws and establishes minimum standards on victims' rights. Its purpose is to ensure victims of crime receive appropriate information, support and protection, and are able to participate in criminal proceedings.
- 5.10 The EU Directive on Interpretation and Translation in Criminal Proceedings establishes minimum protections for suspected or accused persons who do not speak or understand the language of the criminal proceedings and makes specific provision for the right to interpretation. Underlining the risk of the possible negative impact of live links for people for whom English is not a first language, Article 2(6) of the Directive states that communication technology may be used, "unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings".
- 5.11 Windsor Framework Article 2 requires consideration of the suitability of live links technology for victims, especially those victims who are vulnerable, for those who do not speak English as a first language and disabled victims.
- 5.12 In response to concerns raised by the NIHRC in relation to use of live links to date, the Minister responded that the courts are able to conduct case-by-case consideration of the individual needs of people with disabilities or for whom English is not their first language when determining whether it is in the interests of justice to use live links.
- 5.13 The Department has indicated that legislation will provide that the 'interests of justice' test will be accompanied by a requirement that any court/tribunal in determining the 'interests of justice' must have regard to any guidance issued by the Lady Chief Justice/President of that tribunal. Where a court or tribunal refuses an application from a party for the use of

live links it will state its reasons for concluding why the use of live links was not 'in the interests of justice'.

5.14 In November 2023, the Lady Chief Justice issued guidance which indicated that there is a presumption for in-person attendance unless "a judge has decided they can attend remotely applying the interests of justice test in that individual case". In addition, the guidance clarifies that "where a litigant has a vulnerability, learning disability or requires special measures counsel and solicitor should always attend in person". This guidance does not apply to tribunals.

5.15 The NIHRC remains concerned about the extension of live links technology without undertaking specific research to determine whether the use of live links had any adverse consequences for court users with disabilities and/or those for whom English is not their first language as previously relayed to the Minister of Justice.

5.16 The Committee may wish to ask the Department of Justice to outline its plans to ensure guidance and training is provided to all relevant personnel on the circumstances in which live links can be used and the safeguards that should be in place to ensure such technology is accessible and used appropriately.

5.17 The NIHRC recommends that the Committee ask the Department of Justice what research and monitoring has been or will be commissioned, to identify individuals for whom "live links" technology is not suitable, particularly in the context of reviews, hearings or police interviews.

5.18 The NIHRC recommends that the Committee for Justice continues to keep the use of live links in the criminal justice system in NI under their consideration, in particular in relation to individuals held in custody.

6.0 Part 4 - Administration of Justice

Automatic review of certain criminal records certificates

6.1 Clause 29 of the Justice Bill includes reform to the Police Act 1997 relating to criminal records. The proposed reforms are brought forward to ensure

compliance with the UK Supreme Court judgment in the case of *R (On the Application of P, G and W) v Secretary of State for the Home Department and Others* (2019).¹²⁷ In this case the UK Supreme Court held that the automatic disclosure of out of court disposals, youth reprimands and warnings administered to young offenders to be in breach of the ECHR. The UK Supreme Court held that:

a warning or reprimand given to a young offender whose moral bearings are still in the course of formation, requires no consent and does not involve the determination of a criminal charge. Its purpose is wholly instructive, and its use as an alternative to prosecution is designed to avoid any deleterious effect on his subsequent life.¹²⁸

- 6.2 It is noted that following this judgment, the UK Government brought forward in England and Wales a statutory instrument to remove the requirement for automatic disclosure of youth cautions, reprimands and warnings.¹²⁹ The proposed amendment to the Police Act 1997 contained in the Justice Bill, rather than ending the disclosure of out of court disposals occurring when a person was aged under 18 years old, will introduce a system of automatic review, conducted by the independent reviewer. In line with Schedule 8A of the Police Act 1997 paragraph 8, the Independent Reviewer:

must not determine that details of a spent conviction or other disposal should be removed from a certificate unless the independent reviewer is satisfied that the removal of those details would not undermine the safeguarding or protection of children and vulnerable adults or pose a risk of harm to the public.

- 6.3 It appears that the proposed reforms will provide a legal basis for an administrative practice which has been in place since 2020/2021 business year.¹³⁰ The UK Supreme Court in its judgment highlighted that retention and disclosure of criminal records interferes with the right to private and family life. As discussed above, the right to private and family life is a

¹²⁷ *R (On the Application of P, G and W) v Secretary of State for the Home Department and Others* [2019] UKSC 3.

¹²⁸ *Ibid*, at para 64.

¹²⁹ Home Office and Ministry of Justice, 'Press Release: Government plan new changes to criminal records disclosure regime', 9 July 2020.

¹³⁰ Department of Justice, 'Independent Reviewer of Criminal Record Information: Annual Report 2020-2021' (DoJ, 2021).

qualified right and interferences are permissible provided that they are “in accordance with the law”, and “necessary in a democratic society in the interests of ... public safety ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights ... of others”.¹³¹ In his lead judgment, Lord Sumption, considered what was necessary for an interference to be considered ‘in accordance with the law’. He stated:

for a measure to have the quality of law, it must be possible to discover, if necessary with the aid of professional advice, what its provisions are. In other words, it must be published and comprehensible. The requirement of foreseeability, so far as it adds to the requirement of accessibility, is essentially concerned with the principle summed up in the adage of the American founding father John Adams, “a government of laws and not of men”. A measure is not “in accordance with the law” if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made. But a legal rule imposing a duty to take some action in every case to which the rule applies does not necessarily give rise to the same problem.¹³²

6.4 The NIHRC notes that in addition to the legal test set out in Schedule 8A of the Police Act 1997 paragraph 8, the Department of Justice has published statutory guidance for the Independent Reviewer.¹³³ To ensure compliance

¹³¹ Article 8(2), European Convention on Human Rights 1950.

¹³² *R (On the Application of P, G and W) v Secretary of State for the Home Department and Others* [2019] UKSC 3, at para 94.

¹³³ Department of Justice, ‘Statutory Guidance for the Independent Reviewer of Criminal Record Certificates in NI’ (DoJ, 2022).

it is important that the discretionary power of the Independent Reviewer to authorise the disclosure of non-court disposals is sufficiently constrained.

- 6.5 **The NIHRC recommends that the Committee for Justice consider if the test applied by the independent reviewer is clearly defined and accessible. Furthermore, the Committee for Justice should consider how an individual will be informed of their ability to make representations.**

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