

## Collection of Biometric Data and Northern Ireland Legacy Cases: Amending clause 31 of the Northern Ireland Troubles (Legacy and Reconciliation) Bill

### Summary

- The Northern Ireland Troubles (Legacy and Reconciliation) Bill is the UK government's most recent attempt to address the legacy of the conflict known as 'the Troubles' in Northern Ireland. To facilitate this effort, the government plans to legislate for the retention and use of personal data from people who are, or have been, in Northern Ireland, as part of the Independent Commission for Reconciliation and Information Recovery's (ICRIR) functions.
- We are concerned by clause 31 of the Bill, entitled 'biometric material'. The clause does very little to regulate the collection, retention or use of such data, including DNA and fingerprint samples.
- Instead, clause 31 would grant the Secretary of State for Northern Ireland sweeping powers to create secondary legislation on this topic, with the only two restrictions being to ensure that there are 'periodic reviews' of the necessity of the data retention, and that material is destroyed a 'reasonable period' after the termination of ICRIR's functions. 'Reasonable period' is not defined.
- Any regulations passed pursuant to clause 31 would only be scrutinized under the 'negative procedure', which means that regulations become law unless rejected by Parliament.<sup>1</sup> We believe that this is inadequate due to the highly sensitive nature of people's biometric information, the broad powers granted by clause 31 and the potential for resulting human rights violations.

### Human rights laws on the use of biometric data

1. The Human Rights Act 1998 (HRA) and the European Convention on Human Rights (ECHR) protect the right to private and family life, under Article 8. Any processing of a person's biometric data (such as collecting, storing, sharing, accessing or interpreting it) amounts to an interference with this right.<sup>2</sup> To be lawful, any interference must be made in accordance with a clear and specific law, have a legitimate aim, and be necessary to pursuing that aim.
2. For an interference with private life to be 'in accordance with the law', there must be a law authorizing the interference – but this alone is not enough. The law must also be of sufficient quality, meaning that the clauses and their and its effects must be publicly accessible, clear, and ensure that any applications are foreseeable. The law must also comply with rule-of-law principles.<sup>3</sup>

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<sup>1</sup> See [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#), clause 31(3).

<sup>2</sup> Application nos. 30562/04 and 30566/04, [S and Marper v. the United Kingdom](#), Judgment, 4 December 2008; Application no. 45325/15, [Gaughran v. the United Kingdom](#), Judgment, 13 February 2020.

<sup>3</sup> Applications nos. 58170/13, 62322/14 and 24960/15, [Big Brother Watch and Others v. the United Kingdom](#), Judgment, 25 May 2021, para. 33; Application no. 61838/10, [Vukota-Bojić v. Switzerland](#), Judgment, 18 October 2016, paras. 66 and 77; Application no. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, [Silver and Others v. the United Kingdom](#), Judgment, 25 March 1983, para. 87.



3. The interference must also pursue one of the ‘legitimate aims’ listed under Article 8(2), which – of most relevance to the Bill – include the prevention of disorder or crime, and protection of the rights of others. It is for the government to prove that the interference pursues a legitimate aim.<sup>4</sup>
4. Finally, the interference with the right to private life must be necessary to achieving that legitimate aim.<sup>5</sup>

### Recommendations to peers

5. We believe clause 31 should clearly and concisely set out the limits of ICRIR’s powers in the statute itself, rather than allowing the Secretary of State to introduce regulations later date. We also make other recommendations on human rights compliance below.

#### Clause 31(1) – powers to regulate

6. Clause 31(1) authorises the Secretary of State to create regulations for the processing of biometric data in relation to almost any ICRIR function, except in the establishment of the historical record. This sweeping delegation of substantive rule-making power lacks clarity and foreseeability.
7. For example, the law leaves open important questions such as whether the ICRIR will have the power to collect and retain people’s biometric information when considering an application for immunity, and whether a person’s biometric data could be retained regardless of the outcome of the immunity request. It is also unclear whether, upon an inconclusive final report into a ‘Troubles-related’ death,<sup>6</sup> the biometric data could still be retained. There appears to be a strong possibility that biometric data – including DNA – could be retained until the conclusion of the ICRIR’s mandate (which is likely to take years) and potentially even more years afterwards.
8. Clause 31 also places no limits who will have access to biometric data. Instead, the clause alludes to the ICRIR’s data retention powers, however it places no limits on who the ICRIR may share biometric data with. Instead, clause 31 should set out in clear terms who is responsible for data collection and retention, while also placing clear limits on data sharing.
9. **We recommend that the UK government set out, clearly and foreseeably, what powers will be granted under clause 31 and what the limits on those powers are. This is an important issue for democracy and human rights in Northern Ireland, and not appropriate for a broad delegation of power to the Secretary of State to determine the specifics later.**

#### Clause 31(2)(a) – ‘periodic reviews’ of ‘necessity’ of data retention

10. Under clause 31(2) as drafted, the Secretary of State is only required to create regulations that require a periodic review the necessity of continued retention of people’s biometric information. The review regime should be significantly strengthened to generate greater respect for the Article 8 right, by ensuring frequent, ongoing and individualised assessments of whether retention of the data is truly necessary to achieving a legitimate aim. Peers should also act to ensure that reviews must happen frequently enough to be meaningful for the purposes of the Article 8 obligation.

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<sup>4</sup> Application no. 11138/10, [Mozer v. Moldova and Russia](#), Judgment, 23 February 2016, para. 194.

<sup>5</sup> Application no. 22009/93, [Z v Finland](#), Judgment, 25 February 1997.

<sup>6</sup> [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#), clause 9.

**11. We recommend that the UK government amend clause 31 to require an ongoing, individualised assessment of the necessity of ongoing retention, considering the individual's Article 8 rights.**

Clause 31(2)(b) – destruction of data

12. The unspecified time limit of 'a reasonable period' for the destruction of the data following the conclusion of the ICIR – which may take years to complete its functions – is also an area of concern. The vague definition of 'a reasonable period' raises the possibility that highly sensitive personal information will be retained for arbitrary lengths of time. Unless civil or criminal litigation is ongoing – which appears unlikely as the Bill's primary aim is to foreclose all such mechanisms – there appears to be no justification for retaining people's biometric information following the closure of the ICIR process in a given case.

**13. We recommend that the UK government amend clause 31(2)(b) to place a clear, firm upper limit on the 'reasonable period'.**

Clause 31(3) – negative procedure

14. The negative procedure for passing regulations on biometric data is insufficient. Under this procedure, the Secretary of State for Northern Ireland can pass regulations with minimal scrutiny. Once they lay the regulations before Parliament, they will be adopted as law unless rejected within a set time period.

15. Due to the broad discretion given to the Secretary of State, and the potential for disproportionate and rights-violating secondary legislation, we believe the negative procedure is inadequate to protect individual rights where this biometric data is concerned. If using the negative procedure, the Secretary of State could create regulations which clearly violate rights, but still be acting within the scope of the powers conferred by clause 31.

**16. We recommend that the UK government amend clause 31(3) to use the affirmative procedure for passing any secondary legislation.<sup>7</sup>**

**Rights & Security International** is a London-based NGO that has spent over 30 years advocating for compliance with human rights laws in response to the conflict in Northern Ireland. RSI has compiled a range of briefings on the government's 'legacy' proposals, which are available [online](#).

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<sup>7</sup> For more information, see: Joe Marshall, '[Secondary legislation: how is it scrutinized?](#)' (*Institute for Government*, 19 May 2020).