



Department of  
**Justice**

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# A consultation on proposals to amend the legislation governing the retention of DNA and fingerprints in Northern Ireland

Department of Justice  
Police Powers & Human Resources Policy Branch  
Safer Communities Directorate  
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## **Purpose of this consultation**

### **Why are we consulting?**

1.1 The purpose of this consultation is to seek the views of key stakeholders and other interested parties regarding proposals to amend the provisions within the [Police and Criminal Evidence \(Northern Ireland\) Order 1989 \(PACE NI\)](#) relating to the retention of DNA and fingerprints in Northern Ireland.

1.2 All of the proposals will involve changes to the yet to be commenced biometric provisions set out in [Schedule 2 of the Criminal Justice Act \(Northern Ireland\) 2013](#) (CJA).

### **Responding to this consultation**

1.3 The consultation will run from 3 July 2020 for a period of eight weeks and all responses should be submitted by 12 midnight on 28 August 2020. The Department of Justice (the Department) encourages you to respond using the online survey via [this link](#) (the questions are included at the end of each proposal). Alternatively, you can send comments by email to [PPHR.Consultations@justice-ni.x.gsi.gov.uk](mailto:PPHR.Consultations@justice-ni.x.gsi.gov.uk).

### **Enquiries and Responses**

Please submit any enquiries to: [PPHR.Consultations@justice-ni.x.gsi.gov.uk](mailto:PPHR.Consultations@justice-ni.x.gsi.gov.uk)

### **Alternative Formats**

1.4 Copies of the document in alternative formats (including Braille, large print etc.) can be made available on request. If it would assist you to access the document in an alternative format or language other than English, please let us know and we will do our best to assist you.

If you have any comments about the way this consultation process has been handled, you should send them to: [standardsunit@justice-ni.x.gsi.gov.uk](mailto:standardsunit@justice-ni.x.gsi.gov.uk)

## Policy background

2.1 [Article 64 of PACE NI](#) is the current legislation governing the retention of DNA and fingerprints in Northern Ireland. It states that the Police Service of Northern Ireland (PSNI) may retain indefinitely the DNA and fingerprints taken by them in connection with a recordable<sup>1</sup> offence irrespective of whether it results in a conviction.

2.2 In May 2013, the Northern Ireland Assembly passed the CJA. Schedule 2 of the Act makes provision for a new regime covering the retention and destruction of DNA samples, DNA profiles and fingerprints taken under PACE NI. These provisions were made created primarily in response to a judgment by the European Court of Human Rights (ECHR) in the case of [S and Marper v UK](#) which found that the blanket and indefinite nature of the retention of DNA and fingerprints in England, Wales and Northern Ireland was in violation of [Article 8 of the European Convention on Human Rights](#) (Right to respect for your private and family life).

2.3 Schedule 2 of CJA sets out a series of rules under new Articles 63B to 63P of PACE NI for the retention of DNA and fingerprints taken by police based on the seriousness of the offence, the age of the person from which the material was obtained, whether the person was convicted or not convicted and the person's criminal history. The basic premise is that DNA and fingerprints must be destroyed unless the material can be retained under any power conferred by Articles 63C to 63M.

2.4 To date, it has not been possible for the Department to bring these provisions into operation. This is because under the current provisions of CJA, a large volume of DNA and fingerprints related to non-convicted persons would fall for deletion from the PSNI databases. Prior to the planned commencement of the legislation in 2015, the Department was made aware by the then Chief Constable of a potential risk that the deletion of this material may undermine the investigation of unsolved Troubles related deaths in Northern Ireland. The Justice Minister at the time took the decision to suspend commencement of CJA until a solution could be developed to mitigate the risk.

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<sup>1</sup> A recordable offence is an offence that may be punishable with a custodial sentence

2.5 The proposed solution was to create a lawful basis to retain and use a copy, or ‘snapshot’, of the material that would be eligible for destruction under CJA, which could be strictly accessed and used for the sole purpose of the investigations into Troubles related deaths. The snapshot provision formed part of the [draft Stormont House Agreement Bill](#) which was drawn up by the Northern Ireland Office (NIO) aimed at giving effect to commitments made in the [Stormont House Agreement](#) to establish several new institutions to deal with the legacy of the Troubles in Northern Ireland. However, following a consultation on the draft Bill, fresh proposals were published by the NIO on 18 March 2020 on the way forward to address [the legacy of the past in Northern Ireland](#). This is likely to delay further the introduction of legislation by the NIO.

2.6 Commencement of the provisions of Schedule 2 of the 2013 Act has been further complicated by the recent judgment by the European Court of Human Rights in the case of [Gaughran v UK](#). On 13 February 2020, the Court 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. The Court found that ‘the indiscriminate nature of the powers of retention of DNA profiles, 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’.

2.7 An integral part of the yet to be commenced CJA framework contains provisions that allow for the indefinite retention of material relating to convicted persons which has now been found to be non-ECHR compliant. Consequently, it is not possible for the Department to commence CJA if these elements were to remain in their current form. The Department’s proposed approach is outlined in more detail in the following pages, alongside other biometric policy proposals aimed at making sure that Schedule 2 of the Act is fit for purpose when the time comes for it to be brought into operation.

## Policy Proposals

### Retention of DNA and fingerprints of convicted persons

3.1 As previously mentioned, the Department is under a legal obligation to comply with the findings of the judgment in *Gaughran v UK*. It is therefore important that the Department sets out proposals that will not only comply with the judgment but that will continue to optimize the valuable opportunities that biometric material provides in the prevention and detection of crime. The Department will continue to liaise and consult with colleagues in the other UK administrations who are also faced with aligning their statutory frameworks with the findings of the judgment.

3.2 The Department considers that Schedule 2 of CJA still provides the basis for the retention of DNA and fingerprints in Northern Ireland. However, it will need to be amended to ensure that it is ECHR compliant.

3.3 The Department is keen that this does not involve another prolonged period of delay so has explored a range of legislative options as to how this might be achieved and the proposed solution is a two-part approach involving legislative amendments to CJA within the current mandate of this Assembly. In effect, we are proposing legislative amendments to replace the indefinite retention elements of CJA with maximum periods of retention for convictions based on the seriousness of the offence and the age of the offender. Once enacted, this would enable the Department to proceed with the commencement of CJA.

3.4 The Department is proposing to amend CJA to apply the following maximum periods of retention to biometric material taken from individuals who have been convicted of an offence:

- 75 years retention period for DNA and fingerprints for all convictions associated with serious violent, sexual and terrorism offences (otherwise known as a qualifying offence, as set out in Section 53A of PACE NI<sup>2</sup>);
- 50 years retention period for adult convictions for recordable offences that do not fall within the serious category; and
- 25 years retention for 2 or more juvenile<sup>3</sup> non-serious convictions which do not involve a custodial sentence of more than 5 years (an under 18 conviction for a non-serious

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<sup>2</sup> <http://www.legislation.gov.uk/nisi/1989/1341/article/53A>

<sup>3</sup> Under the age of 18 at the time of the offence

offence involving a custodial sentence of more than 5 years will attract a 50 years retention period).

3.5 These periods of retention take into account the conclusions reached in the judgment of *Gaughran v UK* which found that the majority of EU Member States had regimes which put a time-limit on the retention of biometric data belonging to convicted individuals. The UK was one of very few to permit indefinite retention of data. The court found that the applicant's biometric data and photographs had been retained without reference to the seriousness of the offence and without regard to any continuing need to retain that data indefinitely. Moreover, the PSNI were only empowered to delete biometric data and photographs in exceptional circumstances.

3.6 The Department also considered the recommendations from the review of the criminal records regime in Northern Ireland completed by the UK Government's Independent Advisor on Criminality Information Management, Sunita Mason, in 2012. One of the recommendations was that there was no reason for Northern Ireland not to follow the decision of the Association of Chief Police Officers (ACPO) in England and Wales to retain criminal record data on the Police National Computer for 100 years from the subject's date of birth. That does not mean that a person's biometric data and their criminal record should be treated similarly. It is entirely reasonable that subsets of police information may have different time-limits appropriate to their use and purpose within the criminal justice system.

3.7 The Department believes that the 75/50/25 years model set out within this proposal is a balanced and proportionate response to the judgment in *Gaughran v UK*. It is also important to emphasise that what is being proposed are maximum periods of retention of biometric data, and that an effective periodic review process must also form an integral part of the policy proposal.

### **Questions**

**Q1. Do you agree/disagree with the aim of this policy proposal?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q2. To what extent do you agree/disagree with the proposed maximum periods of retention for DNA and fingerprints of convicted persons?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q3. To what extent do you agree/disagree that the proposal is balanced and proportionate?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q4. To what extent do you agree/disagree that the policy proposal complies with the judgment of the European Court of Human Rights pertaining to the retention of biometric data of convicted persons?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q5. To what extent do you agree/disagree that the retention of biometric data should be subject to periodic review?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q6. Do you have any other comments? (250 words)**

### **Periodic review of biometric data of convicted persons**

4.1. The Department is proposing to make provision within CJA for a regulation-making power that will enable the Department to set out clearly in secondary legislation a detailed review mechanism that will apply to all material falling within the 75/50/25 maximum retention periods set out in section 3. We envisage that the regulations will include detail on the review periods; the criteria to be applied; who will conduct the review; how it will be conducted; and how individuals can request a review of their retained data. Regulations made under this power would be subject to separate consultation.



**Questions**

**Q7. Do you agree/disagree with the aim of this policy proposal?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q8. To what extent do you agree/disagree with the proposal to introduce a regulation making power within CJA to allow the Department to set out a detailed review mechanism?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q9. Do you have views on the form the review mechanism might take which may assist the Department in shaping any future Regulations? (250 words).**

**Retention of material by virtue of a conviction outside the UK**

5.1 The Department is proposing to amend CJA to enable DNA and fingerprints that are taken under PACE NI in connection with an offence in Northern Ireland to be retained on the basis of a conviction for a recordable offence committed in a country or territory outside the United Kingdom.

5.2 Under CJA (as amended), DNA and fingerprints taken under PACE NI may be retained by virtue of the existence of a previous conviction in England, Wales or Scotland. This would only be engaged if there was no other lawful means for the material to be retained in Northern Ireland, for example, by virtue of a previous conviction in NI.

5.3 Crime is not confined to national borders. There is an increasing international dimension to criminal activity, including human trafficking, illegal importation/exportation of drugs, sexual exploitation, money laundering and fraud, to name a few. This means that more UK citizens are the subject of convictions overseas which now form part of their overall criminal history.

5.4 The Department wishes to ensure that convictions not only in other UK jurisdictions but also in countries and territories outside the UK may be used for the purposes of retaining biometric data obtained by the PSNI under PACE NI. It is important from a public protection and public safety perspective that biometric data may be retained on the basis of a person's criminal history no matter where that criminal history originates from.

5.5 It is proposed that the relevant material would be retained under a simplified version of the retention model for convicted persons that is set out in the first policy proposal. This would involve a maximum retention period of 50 years for adult convictions and 25 years for under 18 convictions for offences committed outside the UK. We do not propose to use the concept of qualifying offences as they are unique to the UK biometrics legislation and it would be a complex exercise to attempt to map serious offences committed in other countries to the list set out in Northern Ireland legislation.

### ***Questions***

**Q10. To what extent do you agree/disagree that a conviction overseas should be taken into account for the purposes of retaining DNA and fingerprints in Northern Ireland?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q11. To what extent do you agree/disagree with the proposed maximum periods of retention for biometric data on the basis of convictions outside the UK?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q12. To what extent do you agree/disagree that retention on the basis of a conviction for a recordable offence is the appropriate level?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q13. Do you agree/disagree that the retention of biometric data under this proposal should be subject to periodic review?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q14. Do you have any other comments? (250 words)**

### **Retention of material – Left on Books**

6.1 The Department is proposing to amend CJA to enable the DNA and fingerprints taken in connection with an offence that has been ‘left on books’ by the court to be retained for a period of **12 months** from the date in which the judge consents for the charge to be ‘left on books’.

6.2 In some criminal cases, a scenario exists for the Public Prosecution Service (PPS) to make a case to the court not to proceed with a particular charge but for it to be ‘left on books’. The judge will normally consent provided that the defence agrees. What this means is that a judge may decide at a later date, possibly as a result of a further criminal action, to resurrect the charge and continue with criminal proceedings in relation to this offence.

6.3 There is no current provision within Schedule 2 of CJA to enable DNA and fingerprints taken in connection with an offence where there is no definitive prosecutorial outcome to be retained. In effect, if DNA and fingerprints are taken in connection with an offence which is subject to an order by a judge to be ‘left on books’ and there is no other basis under CJA for the material to be retained (for example, a previous conviction) then the biometric material must be destroyed. This proposal will ensure that material is not destroyed until a sufficient time period has lapsed to indicate that the charge is unlikely to be resurrected by the court.

**Questions**

**Q15. To what extent do you agree/disagree with this policy proposal?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q16. Do you have any other comments? (250 words)**

**Extension of the scope of the Northern Ireland Commissioner for the Retention of Biometric Material**

7.1 The Department is proposing to make provision within CJA to widen the scope of the Northern Ireland Commissioner for the Retention of Biometric Material (the Commissioner) to provide independent statutory oversight of the acquisition, retention, use and disposal of biometric material in accordance with Article 63B to 63R of PACE NI. The Department also wishes to broaden that scope to include keeping under review existing, emerging and future biometrics for use by the PSNI and other public bodies for law enforcement purposes.

7.2 Under the current provisions of Schedule 2 of CJA, the Commissioner's sole function is to consider applications from the PSNI for the retention of DNA and fingerprints from persons arrested but not charged with a serious offence and where so called 'prescribed circumstances' apply.

7.3 [Section 20 of the Protection of Freedoms Act 2012 \(POFA\)](#) makes provision for the appointment and functions of the Commissioner for the retention and use of biometric material in England and Wales (EW). These provisions were commenced on 1 October 2012. Unlike the NI Commissioner, the EW Commissioner has a wider statutory role under section 20. In particular, section 20(2) of POFA provides the EW Commissioner with the function of keeping under review the retention and use of material under a range of different statutes. There is no definition within POFA as to what keeping under review actually means but from the Commissioner's annual reports it would indicate that the review function is relatively wide.

7.4 [Section 21 of POFA](#) makes provision for reports by the EW Commissioner to be made to the Secretary of State about the carrying out of the Commissioner's functions and the publication and laying of the reports before Parliament. The Department is proposing to amend CJA to require the NI Commissioner to report annually, and also as necessary, to the Department of Justice, and for the Department to publish and lay reports in the Assembly.

### **Questions**

**Q17. To what extent do you agree/disagree that the NI Commissioner for the Retention of Biometric Material should have a wider role in keeping under review the operation of the legislation relating to biometric data?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q18. To what extent do you agree/disagree that this proposed oversight will complement existing arrangements for the oversight of policing in Northern Ireland?**

Strongly agree / Agree / Neither agree nor disagree / Disagree / Strongly disagree

**Q19. Do you have any other comments? (250 words)**



## Equality Considerations

8.1 As a public authority under Section 75 of the Northern Ireland Act 1998, the Department is required to have due regard to the need to promote equality of opportunity. This legislation also requires public authorities to identify whether a policy has a differential impact upon relevant groups; the nature and extent of that impact; and whether such impact is justifiable. These obligations are designed to ensure that equality and good relations considerations are made central to policy development.

8.2 The retention of personal biometric data engages significant human rights and privacy considerations. The proposed changes would apply to anyone who has had their DNA and fingerprints lawfully by the PSNI in connection with a recordable offence. However, when considering the profile of suspects in the criminal justice system there is evidence that any change is most likely to impact upon male suspects. Males accounted for 83% of arrests made under PACE NI during 2018/19<sup>4</sup>.

8.3 The proposals we have outlined will not change the individual's rights that are already set out in legislation such as PACE NI but are in fact designed to enhance an individual's right to privacy and personal life.

8.4 The Department, therefore, believes that the introduction of the proposed amendments to the legislation would be beneficial in equality terms with no adverse effect to Section 75 groups.

8.5 The policy has been subjected to Equality Screening (which can be made available upon request) and, at this point, we do not consider that a full Equality Impact Assessment (EQIA) is required. The Department will take account of the evidence gathered through this consultation in developing final policy proposals and revisit the equality screening if required.

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<sup>4</sup> <https://www.psni.police.uk/globalassets/inside-the-psni/our-statistics/police-and-criminal-evidence/2018/pace-statistics-report-2018.19.pdf>

## **Privacy, Confidentiality and Access to Consultation Responses**

9.1 For this consultation, we may publish all responses except for those where the respondent indicates that they are an individual acting in a private capacity. All responses from organisations and individuals responding in a professional capacity may be published. We will remove email addresses and telephone numbers from these responses; but apart from this, we will publish them in full. For more information about what we do with personal data please see our consultation privacy notice<sup>[1]</sup>.

9.2 Your response, and all other responses to this consultation, may also be disclosed on request in accordance with the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (EIR); however, all disclosures will be in line with the requirements of the Data Protection Act 2018 (DPA) and the General Data Protection Regulation (GDPR) (EU) 2016/679.

9.3 If you want the information that you provide to be treated as confidential it would be helpful if you could explain to us why you regard the information you have provided as confidential, so that this may be considered if the Department should receive a request for the information under the FOIA or EIR.



## Privacy Notice – Consultations (DoJ)

Data Controller Name: Department of Justice (DoJ)

Email: [PPHR.Consultations@justice-ni.x.gsi.gov.uk](mailto:PPHR.Consultations@justice-ni.x.gsi.gov.uk)

Data Protection Officer Name: DoJ Data Protection Officer

Email: [DataProtectionOfficer@justice-ni.x.gsi.gov.uk](mailto:DataProtectionOfficer@justice-ni.x.gsi.gov.uk)

Being transparent and providing accessible information to individuals about how we may use personal data is a key element of the [Data Protection Act \(DPA\)](#) and the [EU General Data Protection Regulation](#) (GDPR). The Department of Justice (DoJ) is committed to building trust and confidence in our ability to process your personal information and protect your privacy.

### Purpose for processing

We will process personal data provided in response to consultations for the purpose of informing the development of our policy, guidance, or other regulatory work in the subject area of the request for views. We may publish a summary of the consultation responses and, in some cases, the responses themselves but these will not contain any personal data. We will not publish the names or contact details of respondents, but will include the names of organisations responding.

If you have indicated that you would be interested in contributing to further Department work on the subject matter covered by the consultation, then we might process your contact details to get in touch with you.

### Lawful basis for processing

The lawful basis we are relying on to process your personal data is Article 6(1) (e) of the GDPR, which allows us to process personal data when this is necessary for the performance of our public tasks in our capacity as a Government Department.

We will only process any special category personal data you provide, which reveals racial or ethnic origin, political opinions, religious belief, health or sexual life/orientation when it is necessary for reasons of substantial public interest under Article 9(2) (g) of the GDPR, in the exercise of the function of the Department, and to monitor equality.

### How will your information be used and shared

We process the information internally for the above stated purpose. We don't intend to share your personal data with any third party. Any specific requests from a third party for us to share

your personal data with them will be dealt with in accordance the provisions of the data protection laws.

### **How long will we keep your information?**

We will retain consultation response information until our work on the subject matter of the consultation is complete, and in line with the Department's approved Retention and Disposal Schedule [DoJ Retention & Disposal Schedule](#).

### **What are your rights?**

- You have the right to obtain confirmation that your data is being [processed, and access to your personal data](#)
- You are entitled to have personal data [rectified if it is inaccurate or incomplete](#)
- You have a right to have personal data [erased and to prevent processing](#), in specific circumstances
- You have the right [to 'block' or suppress processing](#) of personal data, in specific circumstances
- You have the right to [data portability](#), in specific circumstances
- **You have the right to** [object to the processing](#), in specific circumstances
- **You have rights in relation to** [automated decision making and profiling](#).

### **How to complain if you are not happy with how we process your personal information**

If you wish to request access, object or raise a complaint about how we have handled your data, you can contact our Data Protection Officer using the details above.

If you are not satisfied with our response or believe we are not processing your personal data in accordance with the law, you can complain to the Information Commissioner at:

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire SK9 5AF

[casework@ico.org.uk](mailto:casework@ico.org.uk)