



Department of
Justice

An Roinn Dlí agus Cirt

Männystrie O tha Laa

www.justice-ni.gov.uk

**A CONSULTATION ON PROPOSALS TO AMEND THE LEGISLATION
GOVERNING THE RETENTION OF DNA AND FINGERPRINTS IN NORTHERN
IRELAND.**

SUMMARY OF RESPONSES

OCTOBER 2020

CONTENTS

1. Introduction and policy background
2. Summary of consultation responses
3. Way forward

1. INTRODUCTION

1.1. This paper provides a summary of responses to the public consultation carried out between 3 July and 28 August 2020 on 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. This introduction sets out a high level indication of some of the key issues identified in the consultation responses. Fuller detail on responses to each of the five policy proposals (19 questions) can be accessed in Section 2 of the report.

1.2. This was a public consultation and in excess of 500 emails issued to individuals and stakeholder organisations. An easy read version of the consultation was produced and published on the DOJ website and emailed to one respondent. The Department issued a press release and promoted the launch of the consultation via Twitter.

1.3. The proposals were subject to an initial Equality Screening exercise which concluded that a full Equality Impact Assessment was not required. It was recognised that there is a minor opportunity for bias in favour of juveniles i.e. depending on the nature of the offence and the sentence imposed, biometric material in relation to juveniles may be subject to a shorter retention period than adults. This is considered desirable. A number of groups were identified as being minimally impacted by the proposals and mitigating actions were included as part of the proposals.

1.4. The Department also undertook a legal aid impact screening exercise which, following feedback from the Criminal Legal Aid and Remuneration Strategy team, concluded that the proposals would cause minimal or no impact in this area.

1.5. The Department received responses from 34 individuals or organisations. The following organisations provided a response (in alphabetical order):

Attorney General for Northern Ireland (AGNI)
Children's Law Centre (CLC)
GeneWatch UK
Her Majesty's Revenue and Customs (HMRC).
Information Commissioners Office (IFO)
Nexus NI
NIACRO
Northern Ireland Human Rights Commission (NIHRC)
Northern Ireland Policing Board (NIPB)
Northern Ireland Retired Police Officers Association
Northumbria University
Operation Kenova
Police Service of Northern Ireland (PSNI)
Sinn Féin
Superintendents Association of Northern Ireland (SANI)
Ulster Human Rights Watch (UHRW)
Ulster Unionist Party (UUP)
Wave Trauma Centre

Policy Background

1.6. [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 offence irrespective of whether it results in a conviction.

1.7. In May 2013, the Northern Ireland Assembly passed the Criminal Justice Act (NI) 2013 (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.

1.8. 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.

1.9. 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

1.10. 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](#). The proposals have not yet secured political agreement and it is unclear when the Department might be in a position to move ahead with commencement of CJA.

1.11. 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 (ECHR) 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 photographs 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’.

1.12. 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 policy proposals that the Department consulted on are 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.

1.13. The United Kingdom’s obligations in respect of the ECHR flow from the Human Rights Act 1998 (the HRA). The HRA extends to Northern Ireland. The HRA incorporates the rights set out in the ECHR into domestic law in the UK. The provisions of the HRA and the rights that it protects will continue to apply in Northern Ireland after the end of the Implementation period on 31 December. This situation would only change if the UK government made a decision to repeal or replace the HRA in the future.

1.14. The consultation asked respondents to consider proposals in respect of the following:

- retention of DNA and fingerprints of convicted persons;
- periodic review of biometric data of convicted persons;
- retention of material by virtue of a conviction outside of the UK;
- retention of material ‘Left on Books’; and
- extension of the scope of the Northern Ireland Commissioner for the Retention of Biometric Material.

1.15. The consultation paper contained a number of questions at the end of each section. Some respondents chose to submit their responses via email and choose not to answer the quantitative questions contained within the consultation paper. Where possible, these responses have been reflected in the following response tables.

1.16. The Department received 34 responses, 33 of which substantively answered some or all of the questions. The statistical analysis contained within this document is based on the 33 substantive responses.

2. SUMMARY OF CONSULTATION RESPONSES

RETENTION OF DNA AND FINGERPRINTS OF CONVICTED PERSONS

2.1 The Department is under a legal obligation to comply with the findings of the European Court of Human Rights (ECHR) judgment in *Gaughran v UK*. It is important that the Department's proposals not only comply with the judgment but continue to optimize the valuable opportunities that biometric material provides in the prevention and detection of crime.

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

2.3 The Department set out proposals within the consultation paper to amend CJA to replace indefinite retention elements and 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);
- 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 non-serious convictions which do not involve a custodial sentence of more than 5 years (an under 18 conviction for a non-serious offence involving a custodial sentence of more than 5 years will attract a 50 years retention period).

2.4 It is important to emphasise that the proposals are maximum periods of retention of biometric data, and that the development of an effective periodic review process also forms an integral part of this policy proposal.

Summary of Views

Q1: Do you agree/disagree with the aim of this policy proposal?		
Option	Total	Percent
Strongly Agree	14	42.42%
Agree	7	21.21%
Neither Agree nor Disagree	0	0%
Disagree	0	0%
Strongly Disagree	12	36.37%
Not Answered	0	0%

Q2: To what extent do you agree/disagree with the proposed maximum periods of retention for DNA and fingerprints of convicted persons?		
Option	Total	Percent
Strongly Agree	4	12.12%
Agree	8	24.24%
Neither Agree nor Disagree	2	6.06%
Disagree	7	21.21%
Strongly Disagree	12	36.37%
Not Answered	0	0%

Q3: To what extent do you agree/disagree that the proposal is balanced and proportionate		
Option	Total	Percent
Strongly Agree	0	0%
Agree	11	33.33%
Neither Agree nor Disagree	2	6.06%
Disagree	6	18.18%
Strongly Disagree	11	33.33%
Not Answered	3	9.09%

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?		
Option	Total	Percent
Strongly Agree	2	6.06%
Agree	6	18.18%
Neither Agree nor Disagree	11	33.33%
Disagree	2	6.06%
Strongly Disagree	7	21.21%
Not Answered	5	15.15%

2.5 The statistics indicate that the majority of respondents either strongly agree or agree with the overall policy proposal, with one respondent suggesting that there should be an increased use of biometrics to help the PSNI to succeed in solving crimes.

2.6 It is important to note that the majority of those who strongly disagreed with the proposals also disagreed with any changes to the current indefinite retention policy for those convicted of an offence. Eight respondents explicitly said that indefinite retention should be retained, and one respondent suggested introducing a blanket retention of 100 years. This would be in contravention of the ECtHR judgment. Some of the respondents believed that the policy related to the destruction of crime scene evidence, which does not fall within the scope of this consultation. Other respondents voiced concerns regarding the deletion of any material and were concerned how this would impact on legacy investigations. Here are some examples of those responses:

“Either we keep all data indefinitely or we need to stop investigating all historical crime”

“It is the Human Right of every victim to expect justice for the most heinous crimes that have been inflicted upon them”

“we wish to ensure that the victims and survivors are in no way disadvantaged by the improper or untimely destruction of any materials which may be crucial to a legacy investigation process, or any subsequent criminal justice process”

“I would ask the Department to keep at the forefront of their approach the interests of justice, and the interests of families and surviving victims, by means of maximising retention periods for biometric material – due to the continuing need of legacy investigations – within the confines of compliance with ECHR”

2.7 A number of respondents stated that the investigation of crime is a vital part of any democratic society that will always result in competing rights of all those involved but that the proposals generally struck an appropriate balance between Article 2 and Article 8 rights.

2.8 There appeared to be a general consensus that the proposed review mechanism would be a key factor in ensuring that the process was sufficiently robust and ECHR compliant.

2.9 A number of respondents queried the origins and robustness of the proposed 75/50/25 year retention periods, stating that it appeared arbitrary and lacked justification. A number of respondents suggested that the consultation paper should have provided more evidence to support the assertion that these are acceptable retention periods, particularly with respect to the proportionality and necessity of retaining the records for such lengths of time.

2.10 The Northern Ireland Human Rights Commission (NIHRC) stated that “the maximum years of retention across the proposed ‘75/50/25’ model is too broadly constituted, disproportionate and is incompatible with Article 8 ECHR”. They did concede that there may be circumstances for retaining biometric material for a prolonged and substantial period in the most serious circumstances including among those illustrated in the consultation but that the approach should be tightly focussed and carefully crafted and not unnecessarily broadly constructed. They recommended that the Department should consider revising the model proposed so that the retention of biometric material for offences is more tailored and proportionate to the offence and the circumstances.

2.11 The retention period that appeared to attract the most concern was the 50 year period for the recordable offences that don’t appear within the most serious category. The general feedback was that the proposal didn’t take sufficient account of the range and levels of seriousness of offences within this category, nor did it appear to show any consideration for the possibility of rehabilitation of offenders.

2.12 GeneWatch UK recommended using the 50/25 year model suggested for overseas convictions as a more defensible model than the longer upper limits of 75/50 years. They further recommended that for all offences where a rehabilitation period is specified, the biometric information is deleted at the same time at which the offence becomes spent.

2.13 The Children’s Law Centre (CLC) sought clarification on whether proposals included scenarios where young people accept a caution or a diversionary disposal. They advised that, in their experience, many young people accept cautions or diversionary disposal in the absence of a solicitor. They raised a concern that if a young person accepts a caution or diversionary disposal more than once, then their DNA and fingerprints can be potentially retained for 25 years. They recommend that in the case of diversionary disposals received by a child there should be a caveat in place to ensure the non-retention of biometric data.

Retention after Death

2.14 A few respondents mentioned that the consultation paper was silent regarding the retention of biometric material after the death of an individual. They advised that there is potential to utilise the retained biometric material for checking on other close family members who are not on the biometric database. They cautioned that this gives rise to further human rights considerations and the Department should set out whether such material is retained and in what circumstances it will be utilised. The NIHRC recommends that the Department makes clear whether biometric material is retained after death and if so, when and in what circumstances it will be utilised including in respect of other family members and that human rights considerations are fully taken into account before any such approach is adopted.

Photographs

2.15 The Northumbria University response noted in their response that they were assuming that custody photographs were being considered as part of the policy proposals.

2.16 The NIHRC also commented that the proposals do not cover the retention of photographs, an issue considered in the Gaughran judgment. They also expressed some concerns about the use of facial recognition which fall outside the remit of this consultation.

Departmental Response

2.17 Generally speaking, around half of the respondents were broadly supportive of the proposals, although some raised concerns on points of detail. Those respondents who disagreed with the proposals fitted mostly into one of two groups. The first group maintained that material should be retained for as long as possible (most in favour of indefinite retention) for public safety and crime prevention. Additionally, there is a strong lobby for the preservation of material to assist with historic and legacy crimes. The second group felt that the retention periods proposed were excessive.

2.18 The Department does not believe that the maximum 75 year period should be changed for convictions associated with serious violent, sexual and terrorism offences (so-called qualifying offences). Consideration was given to how the 50 year band could be split to ensure that it reflects more proportionately the wide range of offences for which material may be retained under this band. The Department is proposing that the original policy proposal be amended in order that material relating to adult convictions for non-qualifying offences that do not involve a custodial sentence should fall within the 25 year band rather than 50 years as originally proposed. Material for adult convictions that attract a custodial sentence will remain within the 50 years band.

2.19 The Department is of the view that this change will provide a greater balance of proportionality within the middle band that will ensure that the material of persons convicted of a relatively minor offence that did not attract a custodial sentence will be subject to a lower maximum retention period, and be subject to review at an earlier stage. Should a subject go on to be convicted of a further offence that involves a custodial sentence or an offence within the qualifying offences list, then the maximum retention periods will be adjusted accordingly.

2.20 The Department considers that the revised 75/50/25 retention model strikes a reasonable balance and is confident that the introduction of a robust review mechanism will go some way to alleviate a number of the concerns surrounding the length of retention periods proposed.

2.21 The 75/50/25 model was developed following consideration of the Sunita Mason review of criminal records in Northern Ireland which recommended that criminal record information should be kept until the subject reaches the age of 100. The Department has also considered the wide variety of retention regimes that are in operation across Europe. Estonia, Finland, Greece and Luxembourg hold material until the offender has passed away, and they also factor in various timelines for retention after death. Slovakia and Latvia hold material for at least 75 years and Denmark holds material until the offender reaches the age of 80. The Department believes that the revised 75/50/25 retention periods for DNA and fingerprints together with a robust review process provides a mix of the elements from the various regimes across Europe. The introduction of maximum retention periods removes indefinite retention, and it differentiates between recordable offences and the more serious qualifying offences. The proposals represent a reduction in retention periods particularly for those convicted of less serious crimes and juveniles. The Department believes that the proposals strike an appropriate balance between the Article 2 and Article 8 rights engaged in the question of biometric retention.

2.22 The Department acknowledges that there is a gap in the proposals regarding what happens to an individual's biometric material after death. A number of respondents commented on the need to make provision for this eventuality, in order to comply fully with the Gaughran judgment. It is important to acknowledge that, in order to serve the course of justice relating to historical cases (so-called cold cases) there is merit in retaining material after the death of a subject, but it is accepted that it is only reasonable to do so for a time-limited period. The Department has considered retention of material after death regimes across other European countries and proposes that all biometric material should be deleted 10 years after the date of death of a subject (or the maximum retention period, whichever is shorter). Currently, there is no formal link between the police custody system and the deaths registration system that would facilitate the automated deletion on the death of a subject. It will be important to build capacity in this regard, through the development of a service level agreement between the PSNI and the General Register Office.

2.23 The Department would also wish to provide a statutory role for the Biometric Commissioner to consider the further retention of such material in exceptional circumstances on application by the Chief Constable.

2.24 The Department further acknowledges that custody images have not been considered as part of this consultation. From 2014 the PSNI policy on the retention / deletion of custody images has been to include them in the regime governing the lawful retention / deletion of biometrics which ensures that they are and will be reviewed / deleted in line with CJA. The Department considers this approach is proportionate and doesn't believe that any additional legislation is required at this time.

2.25 The CLC have requested clarification on the issue of young people accepting cautions and being dealt with by means of diversionary disposals. The Department

notes their concerns regarding the possibility of young people accepting these sentences without seeking legal advice. CJA currently includes retention periods of 5 years for material retained as a result of cautions and diversionary disposals. The Department remains of the view that that is a reasonable retention period and has no plans at this stage to amend those retention periods.

PERIODIC REVIEW OF BIOMETRIC DATA OF CONVICTED PERSONS

2.26 The consultation paper set out proposals 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. We anticipate that the regulations will include details on the scheduled 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.

Summary of Views

Q7: Do you agree/disagree with the aim of this policy proposal?		
Option	Total	Percent
Strongly Agree	5	15.15%
Agree	12	36.37%
Neither Agree nor Disagree	0	0%
Disagree	2	6.06%
Strongly Disagree	10	30.30%
Not Answered	4	12.12%

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?		
Option	Total	Percent
Strongly Agree	5	15.15%
Agree	10	30.30%
Neither Agree nor Disagree	0	0%
Disagree	3	9.09%
Strongly Disagree	8	24.24%
Not Answered	7	21.21%

2.27 The statistics indicate, of those who responded, a majority agreed or strongly agreed with the proposal to introduce a regulation making power. The majority of those who either disagreed or strongly disagreed with the proposal also expressed the view that indefinite retention should be kept, which could perhaps indicate that they believed that a review policy was not necessary.

2.28 One respondent advised that it was important that any proposals that are introduced should be “effective in maintaining public confidence and in assisting the PSNI to catch offenders, this should be the priority rather than a tick box, and process obsessed exercise”.

2.29 A number of respondents agreed that the review mechanism not only needed to ensure that there were sufficient levels of transparency and accountability to fulfil human rights obligations but cautioned that any associated “bureaucracy” should be no more than absolutely necessary. The PSNI suggested considering building in as much automation as was practical to the process. A number of respondents also mentioned that there needed to be sufficient resources and funding to complete the function effectively.

2.30 The NIHRC recommended that the review process should set out whether it is automatically and periodically triggered or would rely on an individual to apply, the degree of discretion given to look at the facts and the circumstances of each case, who conducts the review and the availability of written reasons for decisions.

2.31 A few respondents suggested that individuals should be given the right to apply to the PSNI if retaining the data no longer appears necessary in light of the offence, age of the person concerned, and length of time that has elapsed and the current personality of the individual. They suggested that an appeal mechanism before an independent panel should also be made available to the applicant.

2.32 The response from Northumbria University suggested that the review mechanism should comprise of two forms:

- an operational (micro or subject-level) review, considering factors pertaining to the specific circumstances of the subject, nature and seriousness of the offence, rehabilitation and risk of reoffending; involvement in previous criminal activity and the intended purpose of the biometric retention; and
- systematic research (macro level) review should systematically investigate the relevant biometric retention for different categories of crime and different categories of individuals for specific time intervals. This research should be combined with criminal career research and public / stakeholder surveys on the public acceptability of retention to determine appropriate maximum retention periods.

2.33 They also suggested that a Biometrics Retention Unit (BRU) should be established within the PSNI. The BRU would assess cases and identify those that may benefit from extended biometric data retention. This may also help to identify shortcomings in some cases.

2.34 The Information Commissioner’s Office (ICO) cautioned that if biometric data is to be retained for set maximum periods of time, this brings along with it a responsibility to ensure that the processing of the data is compliant with the data protection

principles for its lifetime. To ensure full transparency it should be made clear to individuals what the maximum retention timeframes of their biometric data are and the review process that will be followed to determine whether the biometric data can be retained or destroyed.

2.35 The ICO advised the Department must consult with them directly during the drafting of the review process Regulations as required under Article 36(4) of GDPR.

2.36 Sinn Féin were supportive of these proposals but strongly recommended close co-operation with human rights and equality experts in the development of the review process Regulations which would be subject to Assembly scrutiny prior to becoming operational.

2.37 One respondent disagreed with there being any reduction for juvenile offenders, based on the assumption that if an individual starts a life of crime at an early age then they are more likely to escalate their criminal activity throughout their life.

2.38 The Northumbria University response suggested that the 25 year period for juveniles for 2 or more non-serious convictions (under 5 years custodial sentence) or 50 years if over 5 years custodial sentence, appeared contrary to the notion of treating juveniles differently in the criminal justice system. They reasoned that if offending continued beyond the age of 18, they would then more than likely fall into the 50/75 year retention categories, meaning that the proposal intends to keep DNA from young people under 18 whose offending is not 'serious' and ceases before the age of 18. They concluded that if the rationale was that juveniles should be able to move on from youthful offending behaviour, then retaining their DNA for 25, potentially 50 years, even when they have ceased offending upon reaching adulthood (or before), runs counter to that aim.

2.39 The respondents representing young people opposed the proposal to retain data for unspecified offences and recordable offences in respect of juveniles. They contended that data held for under 18's who are convicted of unspecified offences is not in line with the United Nations Convention on the Rights of the Child (UNCRC), and the Youth Justice Review recommendations. They felt that the proposal to retain biometric data of children for 50/25 years after an offence has been committed was a breach of privacy, family life and home life. They contended that offences committed by children under the age of 18 would remain linked to that young person, in some cases, for the remainder of their natural lives.

2.40 The CLC recommend that when the Department is developing proposals for the review mechanism there should be an assumption that all children have their biometric data deleted upon reaching their 18th birthday. They advised that this is echoed in the Youth Justice Review that recommended that young offenders should be allowed to apply for a clean slate at age 18.

2.41 A number of respondents suggested that the review process should include reference to the Rehabilitation of Offenders (Northern Ireland) Order 1978 which includes rehabilitation periods ranging from less than six months to ten years, depending on the sentence and whether the offender was under 18. They cited that rehabilitation periods are based on the likelihood of reoffending and the likely impact on society of such reoffending, which should be the basis of any review process. They further mentioned that individuals sentenced to more than 30 months in prison do not have a rehabilitation period.

2.42 One respondent suggested that the review process should be developed in consultation with the Biometric Commissioner's office. Another suggested that crime levels should be used as part of the review process.

Departmental Response

2.43 The Department has taken on board feedback from the consultation responses and looks forward to a further round of consultation in developing a robust review mechanism. A number of respondents emphasised that the review process should not be overly bureaucratic and resource intensive.

2.44 The Department acknowledges that there are a wide range of offences that fall under the recordable but not qualifying category and that, in developing a review mechanism it will be important to consider how best to differentiate between these offences.

2.45 The Department is considering appropriate mechanisms for automatically triggering individual reviews, and two options are currently being explored. The first is based on scheduled review periods for each retention band, and the other is linked to the length of custodial sentences received by the subject.

2.46 It is anticipated that there may also be an opportunity for an individual to submit a request to the PSNI for a review of their information if they believe that retention of their data is no longer necessary. We anticipate that an individual would not be able to submit a request until at least three years after the first automatic review.

2.47 Once an individual's material has been flagged for review, depending on the information held on the police database the material may be:

- automatically deleted – subject to appropriate safeguards e.g. no further reoffending, not currently on bail, not wanted for interview, not a registered sex offender etc..
- manually reviewed. It is anticipated that material that is not automatically deleted will be considered for an operational (micro or subject-level) review, considering factors pertaining to the specific circumstances of the subject including age, nature and seriousness of the offence, rehabilitation and risk of reoffending,

involvement in previous criminal activity and the intended purpose of the biometric retention. The National Retention Assessment Criteria (NRAC) may be included as part of the review process which include:

- Is there evidence that the individual has a capacity to inflict serious harm on either themselves or others?
- Are there concerns in relation to children and vulnerable adults?
- Did the conviction involve a breach of trust?
- Is there evidence that the individual has links or associations which may increase the risk of harm or reoffending?
- Are there concerns in relation to substance misuse?
- Are there concerns in relation to the individual's mental health that may exacerbate the risk of reoffending?

2.48 The Department will continue to develop its thinking on the review mechanism provisions, in advance of the introduction of the Bill. We will liaise with key stakeholders in advance of consulting on the content of future draft regulations, subject to securing the regulation making power in the Bill.

2.49 The Department will explore how consideration of the Rehabilitation of Offenders (Northern Ireland) Order 1978, can be utilised to assist with the review process particularly in relation to young people and those who have convictions for some of the more minor offences.

RETENTION OF MATERIAL BY VIRTUE OF A CONVICTION OUTSIDE OF THE UK

2.50 The consultation paper set out proposals to make an amendment to 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.

2.51 The policy intention is 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.

2.52 It was proposed that the relevant material would be retained under a simplified version of the retention model for persons convicted in Northern Ireland 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. It was proposed not 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.

Summary of Views

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		
Option	Total	Percent
Strongly Agree	12	36.37%
Agree	8	24.24%
Neither Agree nor Disagree	2	6.06%
Disagree	0	0%
Strongly Disagree	7	21.21%
Not Answered	4	12.12%

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?		
Option	Total	Percent
Strongly Agree	3	9.09%
Agree	7	21.21%
Neither Agree nor Disagree	3	9.09%
Disagree	3	9.09%
Strongly Disagree	12	36.37%
Not Answered	5	15.15%

Q12: To what extent do you agree/disagree that retention on the basis of a conviction for a recordable offence is the appropriate level?		
Option	Total	Percent
Strongly Agree	4	12.12%
Agree	6	18.18%
Neither Agree nor Disagree	1	3.03%
Disagree	2	6.06%
Strongly Disagree	14	42.42%
Not Answered	6	18.18%

Q13: Do you agree/disagree that the retention of biometric data under this proposal should be subject to periodic review?		
Option	Total	Percent
Strongly Agree	6	18.18%
Agree	7	21.21%
Neither Agree nor Disagree	0	0%
Disagree	3	9.09%
Strongly Disagree	10	30.30%
Not Answered	7	21.21%

2.53 The statistics indicate, of those who responded, a significant majority of respondents agreed or strongly agreed with the overall policy proposal. Several respondents advised that they thought the most serious of crimes (murder, sexual offences, people smuggling) should be easily identified across jurisdictions and should be subject to the 75 year retention period i.e. the same retention period applied if the offence took place in Northern Ireland.

2.54 The 21% of respondents who disagreed with the proposals tended to disagree with all of the policy proposals on the basis that there should be indefinite retention of material with no review provision.

2.55 One respondent suggested that there should be a minimum period of 50 years for all offenders, and that age should not be taken into consideration. The same respondent advised that they would prefer that a 75 year period be used for murder, sexual offences and people smuggling offences.

2.56 Several respondents queried the robustness of the 50/25 years model, advising that there appeared to be insufficient attention to the seriousness of the offence and a limited consideration of the principle of necessity. One respondent submitted that the simplified approach was inconsistent with the longer retention period for offences committed within the UK. They acknowledged the mapping difficulties but they recommended giving consideration to setting retention periods in these circumstances on a case by case basis guided by rigorous procedures.

2.57 One respondent suggested that the proposal could be considered as an additional unnecessary “punishment” for a completed sentence or judicial outcome in another country.

2.58 The PSNI indicated that they would welcome the ability to retain biometric material in Northern Ireland as a result of a conviction outside the UK. They advised that this would bring tangible benefits for policing and the protection of the public specifically in relation to contemporary local crimes against the person. The PSNI advised that this proposal will be of particular value in offences connected to public protection, sexual offences and exploitation, organised crime and domestic abuse.

The PSNI expressed a preference for the retention periods to mirror those governing UK convictions but highlighted the issues in relation to mapping convictions across jurisdictions. They suggested the Department should consider retention as a result of a foreign conviction for any offence.

2.59 One respondent queried whether this policy was part of a UK wide approach to biometric data handling. They also enquired whether the reference to recordable offences referred to offences considered as recordable in Northern Ireland or would it be determined by the overseas jurisdiction. They raised a concern in relation to the possibility of acts constituting a criminal offence in various overseas jurisdictions would be protected under ECHR. They cautioned that if the policy intent was to use offences determined as recordable by the overseas jurisdiction that a full Equality Impact Assessment should be undertaken.

Departmental Response

2.60 The Department notes the feedback provided in relation to the most serious offences and that these should be easily identified across jurisdictions. The main categories referenced were murder, sexual offences and human trafficking. The caution regarding the inconsistencies with the longer retention periods for individuals committing similar offences in Northern Ireland has been noted.

2.61 The Department has had further discussions with the PSNI and after taking on board the feedback from the consultation they have agreed to revise their policy and will aim to map offences committed abroad with those committed in Northern Ireland. This would allow the Department to apply the 75/50/25 model to overseas convictions and maintain consistency with the proposed retention periods for Northern Ireland convictions. The Department is proposing that the original policy proposal be changed from 50/25 to the 75/50/25 year's maximum retention model.

2.62 The Department does not accept that the proposal could be considered an additional "punishment". The policy proposal, if introduced, will only impact on individuals who have been arrested by the PSNI and had their DNA and fingerprints taken under PACE NI for a crime committed in Northern Ireland. Only at that stage can the material be legally retained on the basis of the existence of a conviction for a recordable offence in a country or territory outside of the UK.

2.63 The Department can confirm that the policy proposal is consistent with a similar legislative amendment that was made in England and Wales in 2017. However, there is one important element of the England and Wales legislation in which the Department diverged, which relates to the retention periods. The England and Wales legislation states that material may be retained indefinitely. In light of the *Gaughran* judgment the Department cannot introduce legislation that is not considered ECHR

compliant. Therefore, the Department has included the 75/50/25 year maximum retention periods which will be subject to a review mechanism.

2.64 The Department can further confirm that the references to recordable offences overseas do refer to offences that would be considered a recordable offence if the offence was committed in Northern Ireland.

RETENTION OF MATERIAL – ‘LEFT ON BOOKS’

2.65 The consultation paper outlined a proposal 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’.

2.66 There is currently no 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.

Summary of Views

Q15: To what extent do you agree/disagree with this policy proposal?		
Option	Total	Percent
Strongly Agree	3	9.09%
Agree	15	45.45%
Neither Agree nor Disagree	3	9.09%
Disagree	1	3.03%
Strongly Disagree	6	18.18%
Not Answered	5	15.15%

2.67 The statistics indicate, of those who responded, a significant majority of respondents agreed or strongly agreed with the ‘left on books’ policy proposal. Those who expressed disagreement, disagreed with all the proposals on the basis that there should be no change to the current indefinite retention policy.

2.68 A few respondents queried why this provision would be necessary as there was an assumption that the defendant would be convicted of another crime and that the biometric material would be retained by virtue of that conviction. Another respondent suggested that because it is a judicial decision to leave a charge on the books then a judge should decide if the biometric material should be retained.

2.69 A number of respondents queried whether the suggested 12 month retention period was adequate. The ICO advised that the Department should be able to demonstrate why the 12 month proposed retention period is deemed acceptable, necessary and proportionate. They suggested that consideration should be given to a variable retention period according to the nature of the allegation, reflecting the approach being taken for cases where a prosecution has been successful.

2.70 The PSNI welcomed clarity on the issue to resolve the current discrepancy around retention when a charge has been 'left on books'.

Departmental Response

2.71 The biometrics retention regime is based on a conviction / no conviction regime. The outcome of a court case will determine the retention periods for an individual's biometric material. When a judge directs that a charge is "to be left on books" it means that there is no immediate outcome and biometric material could potentially be held in relation to this charge indefinitely. The proposal contained within the consultation paper is intended to provide a legal basis to retain biometric material that has been taken in relation to a charge that has been 'left on books'.

2.72 The Department acknowledges that in the majority of cases when a charge is 'left on books' the defendant will have been convicted of other offences. However, the other offences may not always be offences that provide a legislative basis to retain the biometric material.

2.73 The Public Prosecution Service have advised that it is very rare for charges that have been 'left on books' to be re-instituted. The Department received legal advice that stated that for charges that are 'left on books' biometric material should only be retained for a reasonable time in case the proceedings are revived. Our initial policy proposal was a blanket 12 months retention period for all such cases. The Department has noted the feedback from the consultation and concedes that there may be cases when the charges 'left on books' involve relatively serious offences so in cognizance of that the Department is planning to amend the original proposal to include that there should be a three year retention period for cases involving qualifying offences (serious violent, sexual and terrorism) and a 12 month retention period for all other cases. This will introduce an element of differentiation between cases based on seriousness.

EXTENSION OF THE SCOPE OF THE NORTHERN IRELAND COMMISSIONER FOR THE RETENTION OF BIOMETRIC MATERIAL

2.74 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.

2.75 The consultation paper set out proposals 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 and to keep under review existing, emerging and future biometrics for use by the PSNI and other public bodies for law enforcement purposes. There was a further proposal 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.

Summary of Views

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?		
Option	Total	Percent
Strongly Agree	8	24.24%
Agree	9	27.27%
Neither Agree nor Disagree	3	9.09%
Disagree	1	3.03%
Strongly Disagree	7	21.21%
Not Answered	5	15.15%

Q18: To what extent do you agree/disagree that this proposed oversight will complement existing arrangements for the oversight of policing in Northern Ireland?		
Option	Total	Percent
Strongly Agree	5	15.15%
Agree	11	33.33%
Neither Agree nor Disagree	3	9.09%
Disagree	1	3.03%
Strongly Disagree	7	21.21%
Not Answered	6	18.18%

2.76 The statistics indicate, of those who responded, a majority of respondents agreed or strongly agreed with the policy proposals to extend the remit of the commissioner and agreed that this would complement the existing arrangements for the oversight of policing. Of those disagreeing with the proposals one respondent mentioned that national security was an excepted matter and remains within the control of central government and that the appointment of a commissioner should fall to central government. Another respondent suggested that if the police store evidence securely there should be no need for oversight.

2.77 The PSNI were supportive of the opportunity for external, independent oversight of the legislation relating to biometrics in Northern Ireland and were supportive of the proposals to expand the role of the Commissioner. The Policing Board considered that the extended remit proposed for the Commissioner would provide them with invaluable assurance that the policy and practices are being monitored, human rights compliant and appropriately governed. The Board have offered to work with officials together with the Chief Constable regarding the creation of the role.

2.78 A number of respondents agreed that the proposals would strengthen the overall biometric retention mechanisms and help to maintain public confidence in this field. NIHRC noted that the policy proposal would fulfil the need to have an independent specialist authority to oversee the protection of personal data such as biometrics in compliance with Article 8 of the EU Charter for Fundamental Rights.

2.79 The ICO highlighted that biometric data is regarded as a special category and sensitive personal data under GDPR and DPA 2018 and as such warrants special protection as well as stringent safeguards. They offered to meet with officials to discuss the proposed remit of the Biometrics Commissioner further, in particular, to consider any potential overlap with the functions of the Information Commissioner. It was suggested that this could form part of the formal consultation required under Article 36(4) of GDPR.

2.80 Some respondents cautioned that the Commissioner role should be clearly defined and comprehensive, to ensure that it enhances the work of the organisations already tasked with monitoring biometrics such as the National DNA Strategy Board (NDNAD) and the Biometrics and Forensics Ethics Group.

2.81 It was also recommended that the Commissioner's role should be adequately supported and resourced to carry out their function effectively. It was suggested that a multidisciplinary advisory group should be established by statute or secondary legislation to support the Commissioner, to provide the level of expertise required to understand and regulate the capabilities, limitations and ethical costs of the use of traditional and next generation biometrics.

Departmental Response

2.82 The Department is encouraged by the positive feedback that was received in relation to these policy proposals. The consultation responses showed strong support for a Commissioner and the transparency and independence this would bring to the biometrics oversight role. Following feedback the Department proposes that an additional statutory provision is made within CJA to include scope for the Commissioner to keep under review the operation of the scheduled review process; and to consider applications made by the Chief Constable to retain material beyond the death + 10 years period but only in exceptional circumstances.

2.83 The consultation showed strong support for a Commissioner and the transparency and independence this would bring to the biometrics oversight role.

2.84 The Department is grateful to the ICO for their offer of meeting to discuss the proposed remit of the Biometrics Commissioner and how it would dovetail with the role of the Information Commissioner. The Department has noted the feedback regarding the importance of the role and in providing adequate resources.

2.85 The Department is content that there is sufficient support to proceed with the legislative amendments to extend the role of the Commissioner.

EQUALITY SCREENING

2.86 The CLC disagreed with the Department's decision that the impact on grounds of age is 'minor' and would assert that the proposals to mitigate adverse impact for those under 18 are wholly inadequate to address adverse impact. They state that the DoJ have therefore breached their Equality Scheme in this respect.

Departmental Response

2.87 The Department thanks the Children's Law Centre for its detailed submission in relation to the screening exercise. In terms of the outcome of the equality assessment the Department is content with the screening that it has undertaken. As mentioned in the consultation paper we will be consulting separately on the proposed review regulations and another equality screening exercise will be completed as part of that exercise.

GENERAL

2.88 The Attorney General has advised that they would be happy to review any draft legislation which the Department brings forward in due course as a product of this policy consultation.

3 WAY FORWARD

- a. The Department now proposes to prepare draft legislation for the proposals set out in this document.
- b. It is hoped that the new legislation will be included as part of the Justice (Miscellaneous Provisions) Bill that is currently being prepared by the Department.
- c. The Department will start work on drafting an outline review mechanism. The Department will consult with the ICO and work with other agencies such as the NIHRC and NIPB. Equality screening and a consultation with all key stakeholders will be included as part of the process.
- d. We have shared this consultation summary with the Justice Committee and the Minister of Justice and will seek Executive approval for the new legislation in due course.
- e. If you require any further information in relation to the consultation or this summary of responses please contact:

E-mail: PPHR.Consultations@justice-ni.x.gsi.gov.uk