



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Submission to DoJ Consultation on Proposals to
Amend the Legislation Governing the Retention
of DNA and Fingerprints in NI**

September 2020

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Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

- 2.14 recommends that the introduction and implementation of proposals relating to the retention of DNA and fingerprints in Northern Ireland fully and effectively addresses the specific issues raised in the *Gaughran v UK* judgment. Otherwise, the provisions are unlikely to strike the fair balance between public and private interests required under Article 8 of the ECHR.**
- 3.8 believes 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.**
- 3.18 recommends that the Department of Justice considers revising the model proposed so that the retention of biometric material for offences is more tailored and proportionate to the offence and the circumstances.**
- 3.19 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 approach to retain biometric data is adopted after death.**
- 3.22 recommends that the proposed amendment to retain biometric material on the basis of a conviction for a recordable offence committed extra-territorially is guided by the principles of necessity and proportionality in pursuit of a legitimate aim taking account of whether the data can be retained in the first place. The actual basis on which biometric material is retained should be set out transparently and fully comply with the principles contained in the *Gaughran* judgment.**
- 4.7 recommends that the Department of Justice considers making provision for further protections and safeguards for the retention of biometric data to ensure it is in line with Article 8 ECHR, for**

example having specific processes in place for dealing with different types of data including special categories of personal data or sensitive data.

- 5.3 recommends that the details of the review process is developed and published as soon as possible to ensure that a full analysis of the human rights implications of the measures can be comprehensively considered.**
- 5.6 recommends that the role of the Northern Ireland Commissioner for the Retention of Biometric Material is extended to review existing, emerging and future biometrics for the use by the Police Service NI and other public bodies for law enforcement. This 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.**
- 6.2 recommends that Police Service NI should set out what use it is considering making or currently utilising of algorithms, Automated Facial Technology and other digital approaches to prevent and detect crime within Northern Ireland.**

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with these functions, the following response is submitted to the Department of Justice's consultation on amending the legislation governing the retention of DNA and fingerprints in Northern Ireland.
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:
- CoE European Convention on Human Rights 1950 (ECHR);¹
 - CoE Charter of Fundamental Rights for the EU 2000;²
 - UN International Covenant on Civil and Political Rights 1966;³
 - UN International Covenant on Economic, Social and Cultural Rights 1966;⁴
 - UN Convention on the Elimination of All Forms of Racial Discrimination 1965;⁵
 - UN Convention against Torture 1984;⁶
 - UN Convention on the Rights of the Child 1989.⁷
- 1.3 The NIHRC understands that DNA and fingerprints play a valuable role in the detection and investigation of crime. Under the Police and Criminal Evidence (NI) Order 1989 (PACE NI), the Police Service NI have a range of powers available to them to obtain DNA samples and fingerprints in connection with the investigation of a recordable offence. PACE NI also provides the statutory basis for the retention of DNA and biometric data, which can currently be retained indefinitely, regardless of whether it

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

² Ratified by the UK in 2009.

³ Ratified by the UK in 1966.

⁴ Ratified by the UK in 1966.

⁵ Ratified by the UK in 1969.

⁶ Ratified by the UK in 1988.

⁷ Ratified by the UK in 1989.

results in a conviction. The current statutory provision was held to be incompatible with Article 8 ECHR (the right to private and family life) as far back as December 2008 when the ECtHR issued its judgment in *S and Marper v UK* (2008).⁸

- 1.4 The NIHRC welcomes the purpose of this consultation, to amend the provisions within PACE NI relating to the retention of DNA and fingerprints in Northern Ireland. However, the NIHRC would like to highlight a number of concerns with the existing proposals and provide recommendations to ensure the policy is compliant with human rights law.

2.0 Legal Proceedings

- 2.1 The retention of DNA and fingerprints in Northern Ireland has been subject to continuous legal action.
- 2.2 In 2008, the European Court of Human Rights (ECtHR) found that the provisions relating to DNA retention in the Police and Criminal Evidence (NI) Order were in violation of the Article 8 ECHR.⁹
- 2.3 The Criminal Justice Act (NI) 2013 was enacted in order to rectify this violation, however the sections in relation to DNA and fingerprint retention were not commenced pending political agreement on how these sections would affect legacy investigations.¹⁰

NI Human Rights Commission Judicial Review

- 2.4 In December 2017, the NIHRC issued judicial review proceedings against the Police Service NI on behalf of an individual.¹¹ The individual first approached the NIHRC in early 2017 regarding the refusal of the Police Service NI to erase fingerprints and DNA, which were retained following an arrest in 2009. The person was arrested for assault occasioning actual bodily harm after intervening to keep the peace in a neighbourhood dispute. The police accepted that the individual had been seeking to keep

⁸ *S and Marper v UK* (2008) ECHR 880.

⁹ *Ibid.*

¹⁰ Department of Justice, 'A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI' (DoJ, 2020), at para 2.5.

¹¹ NI Human Rights Commission, 'Press Release: Human Rights Commission secures settlement in DNA fingerprint retention case', 9 January 2019.

the peace. No charges or prosecution were brought against the person. However, as the individual had been fined for an offence 17 years previously for which no Biometric material had been retained the Police Service NI decided to retain the individual's DNA.

- 2.5 The NIHRC argued that the Police Service NI is entitled to retain DNA, fingerprints and other material provided that their approach is governed by law and proportionate, balancing the legitimate aim of solving crime and a person's right to privacy. The NIHRC's challenge was based on the current law being incompatible with Article 8 ECHR, the lack of a clear and accessible policy on finding out whether such material is held and the absence of a meaningful and accessible review process with a reasonable prospect of changing a decision to retain biometric material.¹²
- 2.6 The NIHRC entered into correspondence with the Police Service NI to have the individual's data destroyed. The Police Service NI informed the NIHRC that they were retaining the data due to the conviction from 1992 and consequently refused to destroy it.
- 2.7 In January 2019, the case was settled without the Police Service NI admitting liability on the human rights compliance of existing provisions.¹³ As part of the settlement of the case, the Police Service NI agreed to destroy the applicant's biometric material, produce a formal public policy on the retention of biometric data and review process based on the provisions in the Criminal Justice Act (NI) 2013 which were never commenced.¹⁴ The policy was to expressly take into account Article 8 ECHR and provide guidance to the public on how they can find out if their DNA or fingerprints have been retained, why this is so, and how to challenge the decision if necessary. Part of the settlement was also to provide members of the public with guidance as to how they can seek to have their biometric data destroyed. This policy was never published due to being overtaken by the ECtHR's judgment in *Gaughran v UK* (2020).¹⁵

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

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ *Gaughran v UK* (2020) ECHR 144.

- 2.8 In *Gaughran*, the applicant had a spent conviction for driving with excess alcohol in Northern Ireland. He was banned from driving for 12 months and fined £50 as a result. He made a complaint about the indefinite retention of personal data of his DNA profile, fingerprints and photograph.
- 2.9 In 2012, the NI High Court ruled on the indefinite retention of Mr Gaughran's DNA profile finding that the retention of the biometric data was an interference with Article 8 of the ECHR but, that the interference was justified and not disproportionate. As a result, there was no breach of Article 8.¹⁶
- 2.10 In 2015, the UK Supreme Court agreed with the NI Divisional Court and dismissed the applicant's appeal. The UK Supreme Court's judgment was then appealed to the ECtHR.¹⁷
- 2.11 On 13 February 2020, the ECtHR ruled that the current policy and practice of the indefinite retention of DNA profiles, fingerprints and photographs, of individuals convicted of a criminal offence was a violation of Article 8 ECHR.
- 2.12 The ECtHR held that there had been a violation of Article 8 ECHR, finding that the indiscriminate nature of the powers of retention of the DNA profile, fingerprints and photograph of the applicant as a person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention and in the absence of any real possibility of review, failed to strike the a fair balance between the competing public and private interests. Consequently, the United Kingdom had overstepped the acceptable margin of appreciation and the retention at issue constituted a disproportionate interference with the applicant's right to respect for private life, which could not be regarded as necessary in a democratic society.¹⁸
- 2.13 The ECtHR underlined in particular that it was not the duration of the retention of data that had been decisive, but the absence of certain safeguards.¹⁹ While a widened margin of appreciation exists to retain

¹⁶ *Gaughran v Chief Constable of the Police Service NI* [2012] NIQB 88.

¹⁷ *Gaughran v Chief Constable of the Police Service NI* [2015] UKSC 29.

¹⁸ *Gaughran v UK* (2020) ECHR 144, at para 97.

¹⁹ *Ibid*, at para 88.

fingerprints and photographs, this is not sufficient to be proportionate in the circumstances again due to the lack of relevant safeguards, including the absence of any real review. Noting also that the technology being used had been shown to be more sophisticated than that considered by the domestic courts in this case, particularly regarding storage and analysis of photographs.²⁰

2.14 The NIHRC recommends that the introduction and implementation of proposals relating to the retention of DNA and fingerprints in Northern Ireland fully and effectively addresses the specific issues raised in the *Gaughran v UK* judgment. Otherwise, the provisions are unlikely to strike the fair balance between public and private interests required under Article 8 of the ECHR.

3.0 Retention of DNA and fingerprints of convicted persons

Retention model

3.1 The Department of Justice proposes to amend Criminal Justice Act (NI) 2013 to replace the indefinite retention to that of '75/50/25' year retention model to biometrics of convicted individuals.²¹

3.2 Article 8 ECHR, which provides for the right to respect for private and family life, states that:

- 1) everyone has the right to respect for his private and family life, his home and his correspondence.
- 2) shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the

²⁰ Ibid.

²¹ Department of Justice, 'A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI' (DoJ, 2020), at para 3.3.

protection of health or morals, or for the protection of the rights and freedoms of others.

- 3.3 The primary purpose of Article 8 ECHR is to protect against arbitrary interferences with private and family life, home, and correspondence by a public authority.²² The ECtHR has consistently held that the concept of a private life extends to aspects relating to personal identity, such as a person's name, photo, or physical and moral integrity.
- 3.4 Conditions upon which a State may interfere with the enjoyment of a protected right are set out in Article 8(2) ECHR. Limitations are allowed if they are "in accordance with the law" or "prescribed by law" and are "necessary in a democratic society" for the protection of one of the objectives set out in Article 8(2) ECHR.
- 3.5 In order to determine whether a particular infringement of Article 8 ECHR is necessary in a democratic society, the ECtHR balances the interests of the State against the right of the applicant. The ECtHR has clarified that 'necessary' in this context does not have the flexibility of such expressions as "useful", "reasonable", or "desirable", but implies the existence of a "pressing social need" for the interference in question.
- 3.6 The '75/50/25' model consists of the following maximum periods of retention:
- 1) 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);
 - 2) 50 years' retention period for adult convictions for recordable offences that do not fall within the serious category; and
 - 3) 25 years' retention for two 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

²² *Libert v France* (2018) ECHR 185.

involving a custodial sentence of more than 5 years will attract a 50 years retention period).²³

3.7 The Department of Justice has created this model on the basis of the *Gaughran v UK* (2020) judgment, which referenced the lack of a framework and consideration of the offence. However, the provisions within the model itself must be compliant with human rights law concerning the right to a private and family life (Article 8 ECHR).

3.8 The NIHRC believes 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.

Maximum periods of retention

3.9 The ECtHR provides a 'margin of appreciation' to States in proceedings that concern qualified rights, such as Article 8 ECHR.²⁴ The State has a certain amount of discretion in how it chooses to limit such rights through considering the pressing social need to do so. However, any interference must be necessary and proportionate in pursuit of a legitimate aim, as set out in Article 8(2) ECHR.

3.10 A number of factors must be taken into account when determining the breadth of a State's margin of appreciation. For example, in previous cases where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted.²⁵

3.11 For example, in the case *Brunet v France* (2014),²⁶ the applicant complained of an interference with his private life as a result of being added to a French police database, which contained information from investigation reports and listed the individuals and victims implicated, after the discontinuance of criminal proceedings against him.

²³ Department of Justice, 'A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI' (DoJ, 2020), at para 3.4.

²⁴ *Dudgeon v UK* (1981) ECHR 5, at para 51-53.

²⁵ *X and Y v the Netherlands* (1985) ECHR 4; *Christine Goodwin v UK* (2002) ECHR 588; *Pretty v UK* (2002) ECHR 427.

²⁶ *Brunet v France* (2014) ECHR 263.

- 3.12 The ECtHR held that there had been a violation of Article 8 ECHR, finding that the French Government had overstepped its discretion to decide the 'margin of appreciation' on such matters.²⁷ The retention was regarded as a disproportionate breach of the applicant's right to respect for his private life and was not necessary in a democratic society.²⁸ The ECtHR considered whether the applicant had a real possibility of seeking to delete his data from the French police's database. Furthermore, the ability for the French police to retain his data for 20 years could be equated to indefinite retention.²⁹
- 3.13 The case of *MK v France* (2013) offers guidance in terms of applying the principle of proportionately to the retention of DNA and the type of offence committed.³⁰
- 3.14 In *MK v France* (2013), the applicant had been the subject of two investigations concerning book theft. One investigation ended in the applicant's acquittal and the other concluded with a decision not to prosecute. The applicant's case was based on the fact that his fingerprints had been retained on a database by the French authorities. The ECtHR held that there had been a violation of Article 8 ECHR as the French courts had overstepped their margin of appreciation and had failed to strike a fair balance between the public and private interests at stake. The retention of MK's fingerprints had amounted to a disproportionate interference with his right to respect for his private life and could therefore not be regarded as necessary in a democratic society.³¹
- 3.15 The NIHRC is concerned that the current model would allow for the retention of biometrics for less serious offences for an overly excessive length of time. For example, under the proposed model, retention of biometrics for less serious offences can be retained for up to 50 years. For example, a drunk driving offence could result in that individual's biometrics being retained for up to 50 years. This would appear to be a disproportionate length of time for that offence. As Lord Kerr outlined in

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ *MK v France* (2013) ECHR 120.

³¹ Ibid, at para 46.

his dissenting judgment in *Gaughran v Chief Constable of the Police Service NI* [2015]:

one must return, to the question whether a more tailored approach than that of the current Police Service NI policy in relation to the retention of the biometric materials, sufficient to satisfy the aim of detecting crime and assisting in the identification of future offenders, is possible. To that question only one answer can be given, in my opinion. Clearly, a far more nuanced, more sensibly targeted policy can be devised. At a minimum, the removal of some of the less serious offences from its ambit is warranted. But also, a system of review, whereby those affected by the policy could apply, for instance on the grounds of exemplary behaviour since conviction, for removal of their data from the database would be entirely feasible. Similarly, the gradation of periods of retention to reflect the seriousness of the offence involved would contribute to the goal of ensuring the interference was no more intrusive than it required to be.³²

3.16 There may, for example, 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 approach should be tightly focussed and carefully crafted and not unnecessarily broadly constructed.

3.17 Moreover, the consultation document is silent on whether biometric material will be retained after the death of an individual. There is clearly potential to utilise the retained biometric material for checking on other close family members who are not on the biometric database. 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.

3.18 The NIHRC recommends that the Department of Justice considers revising the model proposed so that the retention of biometric material for offences is more tailored and proportionate to the offence and the circumstances.

³² *Gaughran v Chief Constable of the Police Service NI* [2015] UKSC 29, at para 83.

3.19 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.

Extra-territoriality

3.20 The Department of Justice is proposing to amend the Criminal Justice Act (NI) 2013 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.³³

3.21 Article 1 ECHR provides that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of [the ECHR]”. This arguably permits retaining data related to a conviction outside of the UK to protect the rights and freedoms of others within Northern Ireland. However, consideration must be given to ensuring that this is not to an unjustified detriment in relation to protecting the Article 8 ECHR rights of the individual’s whose data is being retained. This will require a consideration of the principles of necessity, proportionality and the legitimate aim of retaining the data in the first place and for how long, balanced against the guiding principles of the rights of others that the Department of Justice is seeking to protect. For example, if it was protecting an individual’s right to life (Article 2 ECHR), there is a requirement on the Department of Justice to take reasonable steps to address any known real and immediate risks to life.³⁴

3.22 The NIHRC recommends that the proposed amendment to retain biometric material on the basis of a conviction for a recordable offence committed extra-territorially is guided by the principles of necessity and proportionality in pursuit of a legitimate aim taking account of whether the data can be retained in the first place. The actual basis on which biometric material is retained should be set

³³ Department of Justice, ‘A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI’ (DoJ, 2020), at para 5.1.

³⁴ *Osman v UK* (1998) ECHR 101, at para 116.

out transparently and fully comply with the principles contained in the Gaughran judgment.

4.0 Biometrics

- 4.1 The consultation document does not define the specific types of biometric identifiers that would be retained under the model. Biometric data is defined as personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic (fingerprint) data.³⁵ EU data protection law recognises two categories of information as biometric data: 1) 'physical/physiological characteristics', which pertain to bodily characteristics such as facial features, fingerprints, retina and iris characteristics; and 2) 'behavioural characteristics', like deeply ingrained habits, actions, personality traits, addictions, etc.³⁶ The NIHRC understands some countries have created immense centralized databases storing such information for a diverse range of purposes, from national security and criminal investigation to the identification of individuals for purposes of the provision of essential services, such as social and financial services and education.³⁷
- 4.2 However, while useful in preventing, detecting and prosecuting crime, capturing, storing and searching biometric identifiers can have significant impact on an individual's privacy.³⁸
- 4.3 The *Gaughran v UK* (2020) case focused on the retention of an individual's DNA profile, fingerprints and photographs. However, biometric retention can extend to a wide range of personal identifiers beyond those dealt within the verdict of *Gaughran v UK*. The judgment recognised the EU Charter for Fundamental Rights, which adopts a broad approach to protection of data. Article 8(1) of the EU Charter provides that "everyone has the right to the protection of personal data concerning him or her". Article 8(2) of the EU Charter continues that:

³⁵ EU Fundamental Rights Agency, 'Facial recognition technology: fundamental rights considerations in the context of law enforcement', 21 November 2019 at 5.

³⁶ Ibid.

³⁷ A/HRC/39/29, 'The Right to Privacy in the Digital Age: Report of the United Nations High Commissioner for Human Rights', 3 August 2018, at para 14.

³⁸ Ibid.

such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

4.4 The NIHRC is concerned that the impact of retaining certain types of biometric identifiers has not been thoroughly considered and that there is a need to further consider safeguards and protections. There is a need to ensure that the use of biometrics identifiers occurs within a governance framework that strikes a balance between public security and the fundamental rights to privacy and data protection.

4.5 The former UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, published a report on the right to privacy in a digital age. The UN High Commissioner specifically commented on biometric data stating that:

the creation of mass databases of biometric data raises significant human rights concerns. Such data is particularly sensitive, as it is by definition inseparably linked to a particular person and that person's life, and has the potential to be gravely abused. For example, identity theft on the basis of biometrics is extremely difficult to remedy and may seriously affect an individual's rights. Moreover, biometric data may be used for different purposes from those for which it was collected, including the unlawful tracking and monitoring of individuals. Given those risks, particular attention should be paid to questions of necessity and proportionality in the collection of biometric data. Against that background, it is worrisome that some States are embarking on vast biometric data-based projects without having adequate legal and procedural safeguards in place.³⁹

4.6 The EU Fundamental Rights Agency discusses how different data may require different approaches or special considerations, stating that:

recital (51) of the General Data Protection Regulation makes a distinction between the legal nature of simple 'photographs' and

³⁹ Ibid.

biometric 'facial images'. The definition of biometric data applies to photographs only when these are processed through specific technical means allowing the unique identification or authentication of a natural person. Due to their sensitive nature, facial images fall into the 'special categories of personal data' or sensitive data. As such, EU data protection law provides for enhanced protection, and additional safeguards, compared to other personal data.⁴⁰

- 4.7 The NIHRC recommends that the Department of Justice considers making provision for further protections and safeguards for the retention of biometric data to ensure it is in line with Article 8 ECHR, for example having specific processes in place for dealing with different types of data including special categories of personal data or sensitive data.**

5.0 Review Process

Regulation making power

- 5.1 The Department is proposing to make provision within the Criminal Justice Act (NI) 2013 for a regulation-making power that will enable the Department of Justice 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.⁴¹
- 5.2 The Department of Justice envisages 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.⁴²
- 5.3 The legality of proposals to amend the rules for retaining biometric material is strongly linked to having an accessible and meaningful review process as illustrated in Gaughran. As a result, there is a need to develop

⁴⁰ EU Fundamental Rights Agency, 'Facial recognition technology: fundamental rights considerations in the context of law enforcement', 21 November 2019 at 5.

⁴¹ Department of Justice, 'A Consultation on Proposals to Amend the Legislation Governing the Retention of DNA and Fingerprints in NI' (DoJ, 2020), at para 4.1.

⁴² Ibid.

and publish the details of the review process in tandem with these proposals. A comprehensive assessment of the human rights implications can then be made. The review process would need to set out whether it is automatically and periodically triggered or relies on an individual to apply, the degree of discretion given to look at the facts and the circumstances of each case is provided for, who conducts the review, the availability of written reasons for decisions among other essential requirements.

5.3 The NIHRC recommends that the details of the review process is developed and published as soon as possible to ensure that a full analysis of the human rights implications of the measures can be comprehensively considered.

Northern Ireland Biometric Commissioner

5.4 Article 8(3) of the EU Charter for Fundamental Rights requires that compliance with personal data safeguards is “subject to control by an independent authority”.

5.5 The Department is proposing to make provision within the Criminal Justice Act (NI) 2013 to widen the scope of the Northern Ireland Commissioner for the Retention of Biometric Material to provide independent statutory oversight of the acquisition, retention, use and disposal of biometric material, in accordance with Articles 63B-63R of PACE NI.⁴³ The Department of Justice also wishes to broaden the scope to include keeping under review existing, emerging and future biometrics for use by the Police Service NI and other public bodies for law enforcement purposes.⁴⁴

5.6 The NIHRC recommends that the role of the Northern Ireland Commissioner for the Retention of Biometric Material is extended to review existing, emerging and future biometrics for the use by the Police Service NI and other public bodies for law enforcement. This 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.

⁴³ Ibid, at para 7.1.

⁴⁴ Ibid.

Other Considerations

6.1 The proposals do not deal with the retention of photographs, an issue considered in Gaughran. Furthermore, there are wider issues at play in this field of law enforcement. On 11 August 2020 the Court of Appeal in England and Wales overturned a High Court decision holding that the South Wales police's use of Automated Facial Recognition technology was unlawful and violated human rights. In addition, a number of police forces in the UK use algorithms to predict crime hot spots among other uses. The efficacy of such techniques remains disputed. Moreover, there has been limited openness around the use of such technological approaches. It is unclear whether, for example, Police Service NI is considering, trialling or deploying these approaches in Northern Ireland. The Commission believes any such approaches should be part of a wider public discourse around the purpose, value and implications of any deployment alongside the human rights considerations.

6.2 The NIHRC recommends that Police Service NI should set out what use it is considering making or currently utilising of algorithms, Automated Facial Technology and other digital approaches to preventing and tackling crime within Northern Ireland.

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