



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Proposals to Amend Legislation Governing
the Retention of DNA and Fingerprints:
Department of Justice

15 October 2020

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Ms Linda Dillon (Deputy Chairperson)
Mr Doug Beattie
Ms Sinéad Bradley
Ms Jemma Dolan
Mr Gordon Dunne
Mr Paul Frew
Miss Rachel Woods

Witnesses:

Ms Maura Campbell	Department of Justice
Mr Gary Dodds	Department of Justice
Mr William Dukelow	Department of Justice

The Chairperson (Mr Givan): We should have from the Department: Maura Campbell, head of policing policy and strategy division; William Dukelow, head of police powers and human resources branch; and Gary Dodds, police powers and custody. Maura, I am not sure whether you have your team ready to go.

Ms Maura Campbell (Department of Justice): If you like, Chair, I can start with opening comments, and hopefully colleagues will have joined me by the time that I have completed those.

The Chairperson (Mr Givan): I have every faith that you can manage without them if they do not, but, yes, thank you for volunteering to take on the role. Please provide an overview, and we will take it from there.

Ms Campbell: OK, Chair. I will do that rather than detain you. Thanks very much. We are grateful for the opportunity to brief the Committee today on the outcome of the public consultation on proposed changes to the law on the retention of DNA and fingerprints. It might be useful to start by explaining briefly the current state of play on biometric retention. As things stand, DNA and fingerprints taken under Police and Criminal Evidence Act (PACE) legislation may be held indefinitely, and that will be the position until we are able to commence a new retention framework that was set out in schedule 2 to the Criminal Justice Act (Northern Ireland) 2013 (CJA). That legislation was the Department's response to a judgement by the European Court of Human Rights in the case of S and Marper versus UK, which found that the indefinite retention of DNA and fingerprints of persons arrested but not convicted of a recordable offence was in violation of article 8 of the European Convention on Human Rights (ECHR). Schedule 2 to the 2013 Act introduces rules that determine how long the DNA and

fingerprints of someone may be retained, depending on the seriousness of the offence, the age of the offender and their criminal history.

To date, it has not been possible for us to bring these provisions into operation, because, if we did so, a large volume of material relating to non-convicted persons would fall for deletion from the police databases, which may be needed in the future for legacy investigations. The Northern Ireland (Stormont House Agreement) Bill, which was out for consultation some time ago, as you may be aware, would have allowed this material to be retained for the sole use of the proposed historical investigations unit (HIU), but, as you know, the Secretary of State has since published fresh proposals, so we still await a legislative solution for the retention of material that may need to be retained for legacy investigations.

In February this year, the European Court of Human Rights found, in the case of Gaughran versus UK, that retaining indefinitely the DNA, fingerprints and custody images of convicted persons was also in violation of article 8 of the ECHR. That meant that key elements of what we had in the 2013 legislation have now been rendered non-ECHR-compliant. That is why we now propose changes to the retention framework in the 2013 Act, and we hope to make those changes in the forthcoming Justice (Miscellaneous Provisions) Bill. That is just by way of context and background.

I will outline the main changes that we are proposing. We propose to replace indefinite retention with maximum periods of retention; to provide a regulation-making power that would allow us to create a new review mechanism; to provide for DNA and fingerprints to be retained where a recordable offence was committed outside the UK; to allow DNA and fingerprints taken from events that were "left on books" by the court to be retained for 12 months; and to widen the scope of the post of the Northern Ireland commissioner for the retention of biometric material.

We carried out an eight-week consultation on those proposals, which ended on 28 August. A total of 34 responses were received, and, overall, around half of the responses were broadly supportive of the proposals, although some raised concerns on points of detail. The majority of those who were opposed to the proposals were in favour of continuing to retain biometric material indefinitely but, since that would not comply with the European Court's judgement, to do so would be unlawful.

We have considered carefully how we might respond to the concerns raised during the consultation, and I will set out briefly what we propose to do in response to some of the issues raised. The first is in relation to the maximum retention periods. Some people felt that those periods, which are 75, 50 and 25 years, were too broad and disproportionate. Some made the point that the two higher bands could effectively amount to lifetime retention. The band that appeared to attract most concern was the 50-year period, because we were proposing that quite a wide range of offences would fall within that band. We now propose to amend the model, so that material relating to adult convictions for non-qualifying offences that do not involve a custodial sentence should be moved to the 25-year band rather than remaining in that 50-year band. That would mean that material for adult convictions that attract a custodial sentence would remain within the 50-year band.

There was broad support for the review mechanism, although some people would have liked more detail on what this might look like. We are looking at a couple of potential options for that, and we will be happy to give a bit more detail on our current thinking on that today. We will bring the proposed review mechanism back to you in due course in the form of draft regulations, which would also be subject to public consultation.

Another issue that was raised in the consultation was the absence of any provision in our current retention framework relating to the material of deceased persons. We have taken the view that there is merit in retaining material after the death of a subject but that it would be reasonable to do so only for a time-limited period. We looked at practice across other European countries and now intend that all biometric material should be deleted 10 years after the death of a subject or the maximum retention period, whichever is shorter.

We also looked again at the issue of cases that have been left on books as it was brought to our attention that some of those cases could involve relatively serious charges. We are now proposing that there should be a three-year retention period for cases involving qualifying offences that are more serious, and 12 months for all other cases.

Another change that we are minded to make to the original policy proposals relates to the retention of material for overseas convictions. Our initial proposal was to retain that material for 50 or 25 years, based on whether the conviction related to an adult or someone under 18. That was primarily due to

difficulties with mapping offences committed abroad to equivalent Northern Ireland offences. Following further discussions with the PSNI, it has undertaken to revise its operational policy and is now aiming to map those offences against relevant maximum retention bands. In effect, that would allow us to apply the same model — the 75/50/25 model — to overseas convictions and maintain consistency with the proposed maximum retention periods for UK convictions.

One final policy change that I would like to highlight relates to the scope of the role of the Northern Ireland commissioner for the retention of biometric material. The consultation showed strong support for a commissioner given that the role would add transparency and independence to the oversight of biometrics. Our initial proposal was to extend the commissioner's role to include keeping the operation of the retention framework under review once it was commenced. We now plan to add two further things to the commissioner's remit: first, to keep under review the operation of the scheduled review process and, secondly, to consider applications by the Chief Constable to retain material associated with deceased persons beyond the 10 years that we have proposed, but only in exceptional circumstances.

In conclusion, the use of biometric data by law enforcement bodies is a valuable investigative tool in the prevention and detection of crime, but we acknowledge that retaining such data engages significant civil liberty and privacy concerns. We have sought to strike a fair and proportionate balance between those competing demands. Subject to the views of the Committee, we intend to seek their inclusion in the forthcoming Justice (Miscellaneous Provisions) Bill.

Thank you. As ever, we are happy to take any questions.

The Chairperson (Mr Givan): OK. Thank you, Maura. Is the 75/50/25 model the same in other jurisdictions across the United Kingdom?

Ms Campbell: We looked at a number of jurisdictions, including other parts of the UK. Our starting point was the Sunita Mason review of criminal records, which concluded that criminal record information should be kept until the subject reaches the age of 100. We started from there and mapped to other areas.

In England, they are still considering the outcome of the Gaughran judgement.

Mr Gary Dodds (Department of Justice): They are focusing more on Brexit than on any policy. They have not defined that policy yet.

Ms Campbell: They have not, so I think that it is fair to say that we are slightly further ahead with our thinking. We thought that it was better to move ahead than to wait to see what they put in place, although I think that they were looking at a review mechanism that is akin to ours. As I said, we looked at the UK and some other European countries. Estonia, Finland, Greece and Luxembourg hold all material until the offender has passed away, and they 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. While 75 years sounds like quite a long time, I do not think that it is significantly out of kilter with what we have seen in the other jurisdictions that we looked at. I emphasise that it is a maximum period, so, when you overlay it with the review mechanism, it does not necessarily mean that all material will be held for that length of time.

The Chairperson (Mr Givan): Yes. The review mechanism could shorten the period in which people have their material held. For what it is worth, I prefer the indefinite ruling. That is my preference for all categories. Nevertheless, the European Court has decided otherwise. Is there a mechanism whereby it would be reasonable to have it until somebody dies? You take the 25-year model, for example. I understand the argument about proportionality, but would it be proportionate to say that it is there for the period in which you are alive?

Mr William Dukelow (Department of Justice): On proportionality, Maura outlined some of the longer periods in other European countries. Some European countries have much lower retention periods of 50 years or below. We looked at a number of options and considered the possibility of retaining material until the subject dies. I think that there are only four countries out of 27 that currently have a policy of retention until death, so it would be slightly out of kilter.

The Chairperson (Mr Givan): I appreciate that you are trying to get something that will comply with the court ruling, so I will not revisit the arguments around this because it is what it is, and you are

trying to get something that complies with the law. Is your time frame for implementation through the Justice (Miscellaneous Provisions) Bill?

Mr Dukelow: Yes, we are hopeful at this point that the proposals could be included in the Justice (Miscellaneous Provisions) Bill. There is no absolute guarantee, but we are hopeful that that will be the case. I understand that the Bill is likely to be introduced to the Assembly early next year, so there would be a considerable time frame involved before these provisions would be commenced. Commencement orders would be required for all these provisions, so you would be looking at, potentially, late 2022.

The Chairperson (Mr Givan): Are you confident that this time it will stand up to any court challenge? I can recall the previous Committee supporting the changes, which have subsequently been overruled again.

Mr Dukelow: The Gaughran judgement set out three main principles. The first was to do away with completely indefinite retention; the second was to take into consideration the seriousness of the offence; and the third was to have a meaningful review process. We believe that these proposals, as revised, include those three elements.

Ms Campbell: I think that there is always a risk of challenge. Whether or not that would be a successful challenge would be mitigated by us having evidence that we are moving towards ensuring compliance. If we had a process in place that should lead to a proportionate package of measures, we would draw on that to defend any challenge that was taken.

Mr Dunne: Thanks for the presentation. How are fingerprints recorded?

Mr Dodds: They are on a national fingerprints database. It is called IDENT1. The Northern Ireland collection is contained in that national database along with the rest of the UK fingerprints. In the olden days, fingerprints were taken by ink and pad, but now, obviously, they are taken electronically and migrated to the national systems.

Mr Dunne: How are they managed? How do you see the review taking place? Obviously, the frequency of review will be important. How is that processed and who will do that?

Mr Dukelow: We are at the developmental stage of our proposals for the review mechanism. The details are not part of the provisions that need to be in the Justice (Miscellaneous Provisions) Bill. Nevertheless, it is important to understand the Department's direction of travel on these issues. We are looking at two possible options for the review mechanism. The first option is review periods that reflect the maximum retention periods that we have set out: 75, 50 and 25 years. Another option might be to align it with the length of the sentence set by the judge in court, and to set out review periods that relate to the length of the sentence. We have had some initial thoughts about what review periods should look like. We are thinking about a 20- to 30-year review period for the most serious crimes in the qualifying offences bracket, and shorter periods of review, perhaps 10-year reviews, for those in the minor offences bracket. It is envisaged that it will be an automatic review. It will be for the PSNI to carry out the review in the first instance, although we also envisage the biometrics commissioner having a role in reviewing the review process.

Mr Dunne: OK. It will be an ongoing process. Will there be a policy for the retention process?

Mr Dukelow: For the review?

Mr Dunne: Yes. Recently, we looked at a PSNI retention policy. It was very clear and laid out the specific years. Where will this fit into the overall policy?

Ms Campbell: At the moment, we have indefinite retention. Once we create the maximum retention period, we might use an automated system as that would minimise the resource requirement for the police. Once the material reaches that point, there would be an automatic deletion. Overlaid with that, as we said, there would be the new review process. We are still looking at what exactly the trigger would be to initiate that review. William touched on a couple of options. We may identify other options as we work through this process. However, at that point, a review would be undertaken and a decision taken based on a range of factors that will be similar to the factors considered in the court. I imagine that it would look at the seriousness of the offence, the age of the offender when the offence occurred,

whether there have been further offences and whether there is anything to suggest that there is a public protection risk, particularly to children or vulnerable adults. Once all the factors have been taken into account, a decision would be made on whether to retain that record or to have it deleted at that point. That would be a more manual process, but we are trying to strike a balance between manual processing and automation where that is possible. We could not go straight to an automated process because that would be a bit too much of a one-size-fits-all approach, and we could not demonstrate proportionality on that basis. Have we answered your question?

Mr Dunne: Yes, that is fine. Thanks.

Mr Beattie: It is fascinating stuff. If the legislation were to come in tomorrow, what is the starting point? Is the starting point tomorrow or will it be 75 years ago? In other words, would there be a complete cull of records?

Mr Dukelow: Obviously, this is not coming in any time very soon. Yes, if 2022-23 is a starting point, it would relate to all data. As Maura outlined, commencing the Criminal Justice Act would mean that 30,000 DNA sample records and 80,000 fingerprint records relating to non-conviction would be deleted. Yes, a significant number of records would be deleted. That represents less than 10% of the total number of records on the database but, nevertheless, it is a significant number.

Mr Beattie: I think that I know what you mean; maybe I did not explain myself properly. If I am looking at the 75/50/25, when it is brought in, the point that I am making is this: do you then go back 25 years and cut them from there, or is that the starting point, so we will hold them for the next 50 years or the next 25 years or the next 70 years?

Mr Dodds: It will be the date on which the material was taken in the first instance. You will work your 75/50/25 from that point. If some material was taken 10 years ago and it fell within the 25-year band, it would come up for destruction in 15 years' time.

Mr Beattie: OK. Here is another one: what about non-convictions? How long are we allowed to hold DNA if there is no conviction?

Mr Dukelow: It is basically until we change the legislation. The current legislation allows for material relating to non-convictions to be retained, but that is in breach of the European Court judgement. When we commence the CJA, that will be the point at which non-convicted material can be deleted.

Mr Beattie: OK, sorry. I am looking at this as if the legislation is going through. I am imagining that the legislation has just passed. When it is passed, for how long will we be allowed to hold DNA where there has not been a conviction?

Mr Dodds: If the legislation comes into play and the CJA is commenced, in the majority of cases, non-convicted material would be destroyed if there were no other legal basis on which to retain it. If, for example, there were a previous conviction on that individual, that would obviously allow the material to be retained for a period. In the case of a person who has had their material taken but has had no previous convictions and has not been convicted for the offence for which the material was taken, that material would be destroyed.

Mr Beattie: All right. Let us imagine a hypothetical case — well, it is not hypothetical; it is a real case. The police have not got anyone for the murder of Lisa Dorrian. Does that mean that, when the legislation comes in, any DNA that they may have taken that has not been evidentially secured for a conviction would have to be destroyed?

Mr Dukelow: I believe that, under the provisions that have yet to be commenced, it would be possible for the Chief Constable to apply to the biometrics commissioner in circumstances in which the police believed that material needed to be kept. They would set that out in an order before the Assembly, and there would be a very specific protocol for that and the prescribed circumstances that the Chief Constable believes exist for that material. There is the possibility of exceptional cases where material could be kept, but they would be exceptional and subject to strict protocols.

Mr Beattie: I get that; thank you. The more that I dig into this, the more questions I have. We responded to this and were very supportive of it. I am not trying to dig into this for no reason; there were a few things that popped into my mind. If we are destroying all DNA where there are no

convictions, what happens when there is an association further down the line if we have no DNA to cross-reference? The more you dig into it, the more we are losing in an intelligence biometric database that can help to get convictions. That leaves me slightly concerned, as do the rules around the deceased.

I have never heard of this post before: do we already have a biometrics commissioner?

Mr Dodds: No, we do not. We have a UK commissioner, who has a specific role in Northern Ireland for national security determinations. There is provision in the Criminal Justice Act (Northern Ireland) 2013 for the establishment or appointment of a Northern Ireland commissioner, but that appointment would have to take place once we are in a position to commence the legislation.

Mr Beattie: So, we will have a biometrics commissioner looking after the interests of the perpetrators and their DNA, and we still do not have a Victims' Commissioner. Thank you.

Ms Campbell: I would not categorise the role in quite that way. The role of the biometrics commissioner is to oversee the operation of the regime for the retention of material. As William outlined, in some cases, a commissioner might rule that material that would normally fall due for deletion could be retained. I would categorise it as more of a neutral role than maybe you had thought.

Mr Beattie: That is a fair point. Thank you, Chair.

Ms Dillon: I was going to make the point that Maura just made. If people have not been convicted, we cannot assume that they are perpetrators. We have to look at the balance, but you made a good point about Lisa Dorrian's case. I would not have thought of it, and it is good that we have had this conversation and got that out there.

I know that you have made extensive changes, and they appear to be positive changes. What is the Human Rights Commission's view of this now with the amendments and changes that you have made, Maura?

Ms Campbell: We have engaged with the commission. William, do you want to say something about that?

Mr Dukelow: The Human Rights Commission responded to the consultation. It had some concerns, particularly about compliance with the court judgement, the retention band that we had proposed and the volume of offences that would be contained within that 50-year period. I have engaged with the Human Rights Commission since the consultation, along with the PSNI and other key stakeholders. As Maura outlined in her opening remarks, there is a total of five significant revised proposals. One of them relates to the 50-year maximum retention band. Originally, we considered that all adult convictions outside of qualifying offences — in other words, outside of the most serious — should be contained within the 50-year band. We have now revised that proposal to take out adult convictions for recordable offences that do not result in a custodial sentence. That will remove about three quarters of the records from the 50-year band and put them into the 25-year band. When I explained that to the Human Rights Commission, it indicated that it felt that that was a very significant improvement on the original proposals. I cannot speak for the commission, obviously, but from the discussions that I have had with it and others, I believe that the revised proposals comply fully with the Gaughran judgement.

Ms Campbell: Since the consultation, we have also been briefing the commission on the options that we are looking at for our review mechanism. I understand why some people were nervous of signing off on this without knowing what that looked like, but for us to have set that out in detail now would have pre-empted the Committee and the Assembly's consideration of the proposals that we are currently developing. We did not feel that we could do that. The fact that we are now starting to engage with stakeholders on the detail and granularity has given them some assurance, as well, on the issue of proportionality. Further discussion that we have had with the likes of the Human Rights Commission has brought us to the view that we will be in a pretty good position to demonstrate and evidence that what we have done around the balance that we are trying to strike here will meet the requirements set down by the European Court. We will continue to engage with them. We also plan to engage further with the Information Commissioner's Office. It has been keen to talk to us further as well on matters such as how the role of the biometrics commissioner will sit alongside the Information Commissioner's role. That was a good point for it to have raised, and I am keen to engage with it further on that to ensure that those roles are complementary.

Ms Dillon: Thank you very much. I appreciate it. Could we write to the Human Rights Commission and ask for a view?

The Chairperson (Mr Givan): Yes, we could.

Miss Woods: Sorry, Linda; my question was also about the Human Rights Commission and these newer proposals. I fully support writing, as a Committee, to the Human Rights Commission to see what its updated opinion is.

You said that you have engaged with the PSNI, the Human Rights Commission and others on the newer proposals. Who are the others?

Mr Dukelow: Those are the main two, frankly, that we have engaged with.

Ms Campbell: Sorry, I may have —.

Mr Dukelow: No, no; I may have missed it. Those are the main two that we have engaged with, but we have given progress reports to, for example, the Policing Board and so on.

Miss Woods: Thank you.

Is the proposal to retain biometric material for 10 years after a person has died based on any empirical evidence from operational matters, or is that based on what other European countries do?

Mr Dukelow: To be fair, it is based mainly on what other European countries do. We have looked at the regimes right across Europe. As was outlined in the initial remarks, four countries delete at death. Other countries delete 20 years after, many delete 10 years after and some delete five years after. Ten years seems like a reasonable balance. We have also discussed that with the police; in principle, they are supportive.

The Chairperson (Mr Givan): Sinéad Bradley is joining us for this session.

Ms S Bradley: Thank you, Chair. I have a few points, and I got clarity on some of them, such as that the timeline runs from the acquisition date. I want to get absolute clarity on other points.

Two types of biometric information are held. One is where a person knowingly provides that information. That is very clear. As Doug referred to, the other type is where evidence is gathered at a crime scene; the person may not actually be identified. Are those sets of data treated the same? Do they both have the same weight of human-rights compliancy around them?

The paper states:

"The Department ... proposes a statutory role for the Biometric Commissioner to consider ... further retention ... of ... material in exceptional circumstances".

I imagine that legacy issues would rest heavily on that. Is there a possibility — I do not have any strong objection to this; please do not get me wrong — that that could be a back door to indefinite retention, and could that, therefore, be challenged?

Mr Dodds: I will cover your first point on crime-scene material. That will not fall within the destruction ruling; it will be purely material taken from a suspect in relation to an arrest for a recordable offence. Crime-scene material will remain on the database until such times as it is no longer required. It will be there for any subsequent matches that may occur. You can be reassured that crime-scene material will not be destroyed.

The intention is that the biometric commissioner's role will be engaged only in exceptional circumstances, such as in cases where the police may have a particular operational reason for wanting to retain that material. The Chief Constable would have to make an application to the commissioner to set out those exceptional circumstances. One member mentioned Lisa Dorrian. That might be a situation where somebody who, perhaps, has died and was a strong suspect in that case and that material would be retained under exceptional circumstances.

Ms S Bradley: Would legacy issues be able to come in under that?

Ms Campbell: Legacy is a slightly separate issue. We had hoped that, by now, there would be legislative provision in the form of schedule 8 to the Stormont House Agreement Bill, which would have put in place a mechanism for the retention of legacy material for the Historical Investigations Unit, but, as I mentioned, that has been overtaken by events.

Originally, we had the 2013 Act, and we were ready to commence that at the time. That looked at the deletion of material related to non-convicted persons. The then Chief Constable, George Hamilton, raised a concern that some of that material could be of interest to legacy investigations. That is why we did not commence that legislation at that time.

We did not think, in 2015, that, five years later, we would still be waiting for a legislative solution to allow for the retention of material that could be relevant to legacy investigations, with, obviously, strict controls so that you would not have the police dipping into that for modern-day investigations. Access would have been reserved for the Historical Investigations Unit.

On legacy, we still await developments. We will just have to see what comes from any political discussions around the Secretary of State's latest proposals. We do not have a time frame for that, but it is pretty much a political matter at this stage, and we are just waiting to see the developments.

The Chairperson (Mr Givan): Does the Department have the non-convicted material broken down into what is deemed to be legacy-related material versus other types of crimes?

Mr Dodds: No, not at that level of detail. In many respects, existing material would be classed as legacy material. When this legislation commences, material taken after the date of commencement will not be legacy material; it will be new material. In terms of retaining legacy material per se, it will be material taken before this legislation commences.

The Chairperson (Mr Givan): OK, so a protocol will be established for non-convicted material whereby the Chief Constable can make a case to say, "This needs to be retained for potential future use". How do you know what material you need to keep? Who will go through all the types of material to assess whether it needs to be kept?

Mr Dodds: Under this legislation, as William mentioned, there will be a volume of material — DNA and fingerprints. Quite a large amount of material would have to be destroyed under the new destruction regime that the legislation would introduce. The idea is that, before any destruction, the police would take what we would call a "snapshot" of the entire database at the point before deletion. That snapshot would be used by the Historical Investigations Unit for the purposes of legacy investigations. That would then allow the PSNI to hit the button on deletions. Effectively, the snapshot will contain material that exists on the database before the legislation is commenced.

Ms Campbell: The provision giving the Chief Constable the ability to make the case to the biometric commissioner on the exceptional basis is intended to deal with individual cases as opposed to an entire batch of information. As Gary says, a solution will need to be put in place to deal with material that could be potentially relevant to legacy cases in the future.

The Chairperson (Mr Givan): I want to come back to that issue, but to tease this out further: is there no way in which we can put a legal framework in place that stops the destruction of non-convicted material? The courts have ruled against that.

Ms Campbell: The original Marper judgement prompted the creation of the 2013 legislation.

Mr Dodds: That is correct. The 2013 Act introduced corrective measures in response to the Marper judgement that dealt with non-convicted persons. Now, we have the Gaughran judgement that deals with convicted persons. We are where we are on this; there is no way round it. Certainly, we have to proceed with this legislation.

The Chairperson (Mr Givan): I go back to how the PSNI will determine what material to retain. Why would the PSNI be able to retain Troubles-related material but not potential material that relates to things that are not associated with the Troubles?

Ms Campbell: The idea was that a snapshot will be taken prior to the deletion, but it will not be retained by the PSNI. The snapshot will be retained by whatever body is established to deal with the investigation of legacy matters. We do not have clarity on what the revised set of arrangements for dealing with the legacy of the past might be, and that makes it difficult for us to predict when we will be in a position to move ahead. Our position since 2013 has been that there will need to be provision for the retention of material before we can move ahead with the deletion of material.

Mr Dodds: To be clear, on the retention of non-convicted material, a snapshot would be taken before the new legislation commences, and the snapshot would be used purely for legacy purposes. The actual PSNI databases would be cleansed of the material that falls for destruction under the new legislation. There would be no speculative search of that material in the future, and that is the difference. That is why we need a legal basis to create a snapshot, so that material can be lawfully retained for the sole purpose of legacy investigations.

The Chairperson (Mr Givan): OK. I know that I am revisiting a court ruling from 2013 and we had this discussion then, and this is about how we manage convicted material as opposed to going back over the non-convicted issue that we dealt with a number of years ago. I am trying to get my head around the HIU and legacy issues. Linda Dillon and Rachel Woods want to follow up on that.

Ms Dillon: The conversation was getting confusing, but it has now been clarified. If the HIU is set up, it will be the legal basis under which the material can be retained; it cannot be retained on a PSNI database. You will be complying with the European judgement.

Ms Campbell: Provided that legislation is created, that would empower the HIU to hold that material, and that is what we are missing at the moment.

Ms Dillon: My understanding is that that was part of the mechanisms, so it would have been put in place under the HIU.

Miss Woods: To clarify: what is a "snapshot"? Is it a case of control+c/control+v of the entire database or is it a condensing of information? Do you know what that is? We are saying it a lot, but I do not know what it is that we are talking about.

Ms Campbell: It is really a copy.

Mr Dodds: Sorry, maybe that was misleading. We have been referring to it as a "snapshot" in our working papers, but it is effectively a copy of the material that is currently held on the database — an electronic copy that will be passed to the HIU once there is a legal basis for that to be created and then passed.

Miss Woods: So it is a direct copy of what we have at the moment to be used for the purposes of legacy, if and when HIU is set up, and it would mean that, in your understanding, it would not be open to legal challenge because that would be having information held indefinitely. Is that right?

Ms Campbell: It would be held for the duration of the HIU, the legacy commissioner or whichever body it is. It is to be a time-limited entity, so it would not be an indefinite retention. It would be for however long is needed for the investigation of the outstanding cases.

Mr Frew: I suppose that I am asking this question: when is retention not retention and when is destruction not destruction? Do you simply take a screenshot of things? That is what it sounds like.

Mr Dodds: It is a screenshot purely for the purposes of legacy. Going forward, that material will not exist on the national databases, so it would be used only for the purposes of the unsolved cases in relation to the Troubles. As Maura said, once those investigations are over, that copy of the material would be destroyed.

Mr Frew: Remind me again of the legislative basis for that retention. I am not taking a position one way or the other on the positives or negatives of that, but does that not clearly and surely create a two-tiered evidential base for unsolved crimes?

Ms Campbell: The legislative basis does not exist at the moment. It was due to be created through the Stormont House Agreement Bill, but, as you know, that has not been taken forward, and the revised proposals that the Secretary of State published are significantly different from the arrangements that the Stormont House Agreement Bill was to give effect to. If there was political agreement on the fresh set of proposals, the legislation would look quite different overall, but there would probably be a schedule that is similar to schedule 8 to the current draft Bill, and that would create a legal basis on which material could be held solely for legacy purposes. It would be a sort of parallel system, but, as Gary said, the material would be gone from police databases, as would the sharing of criminal record information that normally takes place between different systems, not just access to data within Northern Ireland.

Mr Frew: So it could well sit in an enforcement body or a police force that is not as accountable as the PSNI?

Ms Campbell: It would sit with whatever body it is agreed will take carriage of legacy investigations, and, for such an entity to exist, there would be a requirement for there to have been political agreement on the shape of that.

Mr Frew: If that political agreement does not come before your miscellaneous provisions Bill, where will we sit?

Ms Campbell: We would be in the position that we have been in since 2013 with the Criminal Justice (Northern Ireland) Act, the commencement of which we have had to pause, pending some mechanism that allows for legacy investigations. At the moment, the position is that we await further political developments on dealing with the legacy of the past. If a clear decision were ever taken that there would not be legislation to create that kind of framework, we may have to look again at what would need to be done to allow us to implement the legislation, because I do not think that the European Court would see us as being compliant if we just left that legislation needing to be commenced indefinitely — back to the "indefinitely" word. What that plan B might look like, I cannot say at this point. We would have to look for some other mechanism for retaining the material. We would also have to think about where that material should be held.

Mr Frew: Would that change the vehicle of legislative change here with regard to the miscellaneous provisions Bill? Would you not place it in a miscellaneous provisions Bill? Could you do that, irrespective of political agreement?

Mr Dukelow: Our plan is to place the revised provisions on biometrics in the miscellaneous provisions Bill but not to commence those provisions until other elements are in line.

Ms Campbell: Yes, but we do not intend to include in that Bill provision for taking a snapshot or copy of the existing database.

Mr Frew: Why not? How are you doing that?

Ms Campbell: The Northern Ireland Office (NIO) was to make provision for the retention of data for the purposes of legacy investigations, given that it has been leading on the policy on dealing with the past, and, obviously, *[Inaudible]* with the political parties.

Mr Frew: How will the NIO do that legally?

Mr Dodds: Sorry, I did not understand that question.

Mr Frew: How will the NIO take the snapshot legally?

Mr Dodds: As Maura said, the NIO would be responsible for any statutory provision that needs to be put in place to provide the legal basis for the creation and retention of the snapshot. It was intended that that provision would be in the Northern Ireland (Stormont House Agreement) Bill. We are reliant on that separate provision: it would allow for the snapshot to be taken, which would allow us to proceed with our legislation. If we do not have that provision, as Maura said, there will come a point when we will have to decide what plan B is or what the other options are.

Mr Frew: What timescale are you working to?

Mr Dodds: Obviously, those new proposals have to be legislated for. The idea is that we put them in the miscellaneous provisions Bill. The hope is to get the Bill through before the end of the current mandate. At that point, if a snapshot provision is not in place, we will have to look at other ways in which we can proceed: for example, a transitional provision, or some form of interim or holding position, may need to be put in place so that we can not only proceed with the legislation but try to preserve the material, which would otherwise fall to destruction, for legacy purposes.

Ms Campbell: At this time, for us to seek to do that would be seen as directly cutting across any political decisions that might be taken.

Mr Frew: I understand that. Who would retain that power? Would that power be given in the miscellaneous provisions Bill? Would the Justice Minister hold and retain it?

Ms Campbell: Sorry, are you talking about the retention of material for legacy investigations?

Mr Frew: Yes.

Ms Campbell: No, we are not proposing to make any provision in the miscellaneous provisions Bill for that.

Mr Frew: So, who then decides on the timing?

Mr Dodds: It is a bit of a chicken-and-egg thing. We are reliant on the NIO providing the legal basis for the snapshot, and we have to push ahead with the provisions for the CJA. It is a very difficult question to answer. We need political agreement on legacy to be able to move forward with the snapshot provision, and it is very difficult for us to give a timeline for when we will be in a position to commence the CJA legislation.

Mr Frew: OK.

Ms Dillon: May I suggest that we write to the NIO and ask that question? It is responsible for that; not the people sitting at that table, who are in an impossible situation, to be fair to them. How can they possibly answer questions that are for the NIO to answer? We should have had the legacy mechanisms in place, and that is through no fault of anybody sitting at that table. In fact, it is more likely to be between the NIO and the politicians around this table. I do not think that we should put people under pressure to answer questions that are not within their responsibility or capability to answer. We should write to the NIO and ask how it will address that issue.

The Chairperson (Mr Givan): I am happy to do that. The other point to make is that this will be taken forward through the Department of Justice's miscellaneous provisions Bill. There are aspects that I am not happy with, but I am happy to note them because that is what we are being asked to do. The next step will be to bring those in through the miscellaneous provisions Bill. I will want to look at the issue of 25 years. I do not think that that is enough, but that is by the way. At a future point, we will need to look at the legislation and try to determine our positions at that stage. On that basis, I do not suggest prolonging this session any longer. If members are content, we should note the consultation response and the ways forward, and we should follow up with correspondence to the Human Rights Commission to get an updated opinion from it. We should also raise the points about legacy, as well as the other points that members have raised, with the Northern Ireland Office.

Looking at the screen, I see that Sinéad has her hand up. I am not sure whether that is from earlier, but I will bring her in.

Ms S Bradley: Yes, Chair, my point has been pretty well covered, so I will not go over it. It was about the timeline, and Paul's discussion went into that in some depth. We need to be very careful about the timeline. We cannot allow any slippage through which valuable information could be lost.

The proposal to contact the NIO is the right one. However, going back to provision 2.24, I wonder whether there is room to amend it. It refers to the role of commissioner and retention. Is there still room to work in the possibility of including rights for the Secretary of State or the Northern Ireland

Office? Then, if it did go through the miscellaneous provisions Bill, that would be captured in some form, regardless of what the NIO continued to do, and would act as a safeguard.

The Chairperson (Mr Givan): Maura.

Ms Campbell: Will you clarify the question?

Ms S Bradley: You mentioned that 2.24 was for a specific case and that, under exceptional circumstances, the Chief Constable could ask for further retention. It was on the basis of that provision or recommendation that the conversation opened up about what could be considered. You said that that was an individual case. Is there still room and time to put in something broader that would allow the involvement of the NIO, or some level of involvement, to allow the miscellaneous provisions Bill to go forward and maybe give the NIO the scope to retain data? I am conscious of the two timelines and the need to run everything in parallel.

Ms Campbell: I understand your point and what you are trying to achieve: a safety net in case no solution to legacy comes over the hill. It would be difficult to put that within the purview of the biometrics commissioner. It would be quite a significant change to the role currently envisaged. Before even countenancing that, we would want to be satisfied that there would be broad political support for a change of that significance. I am not necessarily sure that there would be. There is also the appropriateness of our taking on a responsibility that sits currently with the UK Government. There are some quite significant issues that we would need to work through. Obviously, we would need to take the Minister's views.

I appreciate that what you suggest is an attempt to be pragmatic and find a way through for us, because, as recognised, we find ourselves in the difficult position of trying to achieve a result without necessarily having control of the levers that we need to achieve it. It would be difficult for us, today, to say that that would necessarily give us the way through in the way that you suggest. It would be quite a departure. It could be difficult to get political agreement that that was the way in which it should be done, given that it touches on the hugely sensitive and emotive issue of the legacy of the past. I do not need to tell the Committee how many differing views there are on what should be done there. However, I appreciate the suggestion and the spirit in which it was offered.

Ms S Bradley: Thank you.

The Chairperson (Mr Givan): Maura, thanks very much to you and your team for coming to the Committee. I am sure that we will talk about this in the future. Thank you, members. We will write to the Human Rights Commission and the NIO, and we will note the consultation response and the Department's proposed next steps.