

EXPLANATORY MEMORANDUM TO
THE PROTECTION OF FREEDOMS ACT 2012
(NORTHERN IRELAND) (BIOMETRIC DATA) ORDER 2015

2015 No. [xxxx]

1. This explanatory memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of Her Majesty.

2. **Purpose of the instrument**

2.1 The Order permits biometric data that is subject to the Police and Criminal Evidence (Northern Ireland) Order 1989 (“the 1989 Order”) as amended by the Criminal Justice Act (Northern Ireland) 2013 (“the 2013 (NI) Act”) to be used in the interests of national security and for the purposes of a terrorist investigation. The Order also makes a transitional provision which permits the Chief Constable of the Police Service of Northern Ireland (“PSNI”) additional time to consider whether such material held by the police under the 1989 Order should be retained for an extended period for the purposes of national security.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

4. **Legislative Context**

4.1 Part 1, Chapter 1 of the Protection of Freedoms Act 2012 (“the 2012 Act”) created a new regime for the retention, destruction and use of fingerprints, footwear impressions and DNA samples and profiles taken in the course of a criminal investigation in England and Wales.

4.2 The Northern Ireland Assembly has the legislative competence, within the meaning of section 6 of the Northern Ireland Act 1998, to make provision for the retention, destruction and use of biometric data for general policing purposes. Provisions that are broadly equivalent to those contained in sections 1 to 18 and 23 to 25 of the 2012 Act were made by the Northern Ireland Assembly in section 9 of and Schedules 2 and 3 to the 2013 (NI) Act. Section 9 of and Schedules 2 and 3 to that Act introduce into the 1989 Order a new framework for the destruction, retention and use of fingerprints and DNA profiles etc. The majority of the changes to the 1989 Order effected via section 9 of and Schedules 2 and 3 to the 2013 (NI) Act are expected to be commenced by the devolved administration in Northern Ireland by the end of October 2015.

4.3 The Northern Ireland Assembly does not have the legislative competence to make provision for the retention, destruction or use of biometric data in the

interests of national security or for the purposes of a terrorist investigation, since such provision would deal with excepted matters within the meaning of section 4(1) of the Northern Ireland Act 1998.

4.4 Accordingly, Part 7 of Schedule 1 to the 2012 Act confers an order-making power on the Secretary of State, which has not previously been exercised, to make provision for Northern Ireland in respect of the retention of fingerprints and DNA profiles etc. for excepted or reserved purposes. The power is exercisable by the Secretary of State where she considers that an Act made by the Northern Ireland Assembly in 2013 or 2014 deals with one or more of the matters that are the subject of sections 1 to 18 and 23 to 25 of the 2012 Act. Part 7 of Schedule 1 to the 2012 Act supplies the Secretary of State with a related consequential order-making power.

4.5 Via this Order, the Secretary of State makes amendments to the 1989 Order which will permit the PSNI to use biometric material that is subject to the 1989 Order in the interests of national security and for the purposes of a terrorist investigation. The Order also makes changes to the Terrorism Act 2000 and the 2012 Act which are consequential upon the new biometric data retention regime introduced via the 2013 (NI) Act.

4.6 The 2012 Act additionally supplies, in Part 6 of Schedule 1, a power for the Chief Constable of the PSNI to determine that biometric material that is subject to the 1989 Order should be retained for an extended period for the purposes of national security. This is equivalent to the provision in section 9 of the 2012 Act for England and Wales. Such provision deals with national security and is outwith the legislative competence of the Northern Ireland Assembly. This Order makes a transitional provision in respect of material subject to the 1989 Order that was taken before the commencement of the new destruction regime. Such material, where it has been identified as requiring consideration as to whether it should be the subject of a national security determination under Part 6 of Schedule 1 to the 2012 Act, is not to be subject to destruction until six months after the date of commencement of the destruction requirements.

5. Territorial Extent and Application

5.1 This instrument extends to Northern Ireland. Articles 1 and 3 also extend to England, Wales and Scotland. The instrument applies to Northern Ireland.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State for Northern Ireland, Dr Andrew Murrison MP, has made the following statement regarding Human Rights:

In my view the provisions of The Protection of Freedoms Act 2012 (Northern Ireland) (Biometric data) Order 2015 are compatible with the Convention rights.

7. Policy background

7.1 The changes to the destruction and retention regime for biometric data, made for England and Wales in the 2012 Act and for Northern Ireland in the 2013 (NI) Act were made in response to the judgment of the European Court of Human Rights in *S and Marper v the United Kingdom* [2008] ECHR 1581. In that case, the Court ruled that the provisions in Part 5 of the Police and Criminal Evidence Act 1984 permitting the “blanket and indiscriminate” retention of DNA and other biometric data from individuals who had not been convicted of a criminal offence violated Article 8 of the European Convention on Human Rights. Equivalent provisions for Northern Ireland contained in the 1989 Order were thus similarly considered to violate Article 8. Accordingly, the new regimes set limits upon the retention of such material.

7.2 The new regimes also limit the purposes for which retained material may be used. The Order allows the PSNI to continue to make use of biometric data for excepted purposes (i.e. in the interests of national security and for the purposes of a terrorist investigation). It would not have been within the legislative competence of the Assembly to make equivalent provision in an Assembly Bill. The Government considers this to be a vital provision within the new regime for Northern Ireland, in order to continue to provide the PSNI with the capability to make use of biometric data in its investigations into terrorist activity and for national security purposes.

7.3 The Order also supplies a transitional period of six months during which the new destruction regime contained in the 1989 Order will not take effect in respect of material identified as requiring consideration as to whether it should continue to be held for national security purposes. This is to allow the Chief Constable of the PSNI sufficient time to consider whether to make a national security determination in respect of such material. While the PSNI will have identified all such material in advance of the date of commencement of the new retention and destruction regime for Northern Ireland, the power for the Chief Constable to make a national security determination, which is contained in Part 6 of Schedule 1 to the 2012 Act, will not itself be commenced until the commencement of the new regime in Northern Ireland. The transitional period is therefore a necessary practical arrangement to allow the power to make a national security determination to be exercised by the Chief Constable once the new destruction regime is commenced. Without it, the material identified as requiring consideration could fall to be destroyed immediately upon the commencement of the new regime. In the event that a national security determination is made, the material may be retained for up to two additional years. A similar transitional provision was made for England and Wales (SI 2013/1813).

8. Consultation outcome

8.1 No public consultation was deemed necessary in respect of this Order as it is consequential on the passing of the 2012 Act.

9. Guidance

9.1 A Home Office guidance document on the making of national security determinations has been made available to the PSNI.

10. Impact

10.1 The Order has no impact on business, charities or voluntary bodies.

10.2 Generally, the introduction of the new regime for the destruction of biometric data has significant resource implications for the PSNI, who will be required to review all biometric material that is currently held by them and consider whether and when it is required to be destroyed when the new regime commences. There is also a cost to the PSNI in configuring computer systems for their use in managing the new regime and in staff training. PSNI are fully cognisant of the burden resulting from the implementation of the new regime and of the need to allocate adequate resources to its administration.

10.3 There is, however, no direct effect on the PSNI or the wider public sector as a result of this Order, which allows for the continued use of biometric data in the interests of national security or for the purposes of a terrorist investigation. The Order eases the operational burden on the PSNI by allowing for a transitional period during which the Chief Constable may consider whether material already held by PSNI should be the subject of a national security determination and therefore subject to an extended retention period.

10.4 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 An independent Biometrics Commissioner has been appointed to keep under review the retention and use by the police of DNA samples, DNA profiles and fingerprints. In Northern Ireland, however, the role of the Commissioner is currently limited to the oversight of the making of national security determinations.

12.2 The transitional period in respect of material taken before the date of commencement of the new retention regime will expire six months after the date of the commencement, by the devolved administration in Northern Ireland, of the new destruction requirements.

13. Contact

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