



Protection of Freedoms Act 2012

2012 CHAPTER 9

PART 1

REGULATION OF BIOMETRIC DATA

CHAPTER 1

DESTRUCTION, RETENTION AND USE OF FINGERPRINTS ETC.

Destruction rule for fingerprints and DNA profiles subject to PACE

1 Destruction of fingerprints and DNA profiles

After section 63C of the Police and Criminal Evidence Act 1984 insert—

“63D Destruction of fingerprints and DNA profiles

- (1) This section applies to—
 - (a) fingerprints—
 - (i) taken from a person under any power conferred by this Part of this Act, or
 - (ii) taken by the police, with the consent of the person from whom they were taken, in connection with the investigation of an offence by the police, and
 - (b) a DNA profile derived from a DNA sample taken as mentioned in paragraph (a)(i) or (ii).
- (2) Fingerprints and DNA profiles to which this section applies (“section 63D material”) must be destroyed if it appears to the responsible chief officer of police that—

Status: This is the original version (as it was originally enacted).

- (a) the taking of the fingerprint or, in the case of a DNA profile, the taking of the sample from which the DNA profile was derived, was unlawful, or
 - (b) the fingerprint was taken, or, in the case of a DNA profile, was derived from a sample taken, from a person in connection with that person's arrest and the arrest was unlawful or based on mistaken identity.
- (3) In any other case, section 63D material must be destroyed unless it is retained under any power conferred by sections 63E to 63O (including those sections as applied by section 63P).
- (4) Section 63D material which ceases to be retained under a power mentioned in subsection (3) may continue to be retained under any other such power which applies to it.
- (5) Nothing in this section prevents a speculative search, in relation to section 63D material, from being carried out within such time as may reasonably be required for the search if the responsible chief officer of police considers the search to be desirable.”

Modification of rule for particular circumstances

2 Material retained pending investigation or proceedings

After section 63D of the Police and Criminal Evidence Act 1984 (for which see section 1) insert—

“63E Retention of section 63D material pending investigation or proceedings

- (1) This section applies to section 63D material taken (or, in the case of a DNA profile, derived from a sample taken) in connection with the investigation of an offence in which it is suspected that the person to whom the material relates has been involved.
- (2) The material may be retained until the conclusion of the investigation of the offence or, where the investigation gives rise to proceedings against the person for the offence, until the conclusion of those proceedings.”

3 Persons arrested for or charged with a qualifying offence

After section 63E of the Police and Criminal Evidence Act 1984 (for which see section 2) insert—

“63F Retention of section 63D material: persons arrested for or charged with a qualifying offence

- (1) This section applies to section 63D material which—
 - (a) relates to a person who is arrested for, or charged with, a qualifying offence but is not convicted of that offence, and
 - (b) was taken (or, in the case of a DNA profile, derived from a sample taken) in connection with the investigation of the offence.

- (2) If the person has previously been convicted of a recordable offence which is not an excluded offence, or is so convicted before the material is required to be destroyed by virtue of this section, the material may be retained indefinitely.
- (3) Otherwise, material falling within subsection (4) or (5) may be retained until the end of the retention period specified in subsection (6).
- (4) Material falls within this subsection if it—
 - (a) relates to a person who is charged with a qualifying offence but is not convicted of that offence, and
 - (b) was taken (or, in the case of a DNA profile, derived from a sample taken) in connection with the investigation of the offence.
- (5) Material falls within this subsection if—
 - (a) it relates to a person who is arrested for a qualifying offence but is not charged with that offence,
 - (b) it was taken (or, in the case of a DNA profile, derived from a sample taken) in connection with the investigation of the offence, and
 - (c) the Commissioner for the Retention and Use of Biometric Material has consented under section 63G to the retention of the material.
- (6) The retention period is—
 - (a) in the case of fingerprints, the period of 3 years beginning with the date on which the fingerprints were taken, and
 - (b) in the case of a DNA profile, the period of 3 years beginning with the date on which the DNA sample from which the profile was derived was taken (or, if the profile was derived from more than one DNA sample, the date on which the first of those samples was taken).
- (7) The responsible chief officer of police or a specified chief officer of police may apply to a District Judge (Magistrates' Courts) for an order extending the retention period.
- (8) An application for an order under subsection (7) must be made within the period of 3 months ending on the last day of the retention period.
- (9) An order under subsection (7) may extend the retention period by a period which—
 - (a) begins with the end of the retention period, and
 - (b) ends with the end of the period of 2 years beginning with the end of the retention period.
- (10) The following persons may appeal to the Crown Court against an order under subsection (7), or a refusal to make such an order—
 - (a) the responsible chief officer of police;
 - (b) a specified chief officer of police;
 - (c) the person from whom the material was taken.
- (11) In this section—

“excluded offence”, in relation to a person, means a recordable offence—

 - (a) which—
 - (i) is not a qualifying offence,

Status: This is the original version (as it was originally enacted).

- (ii) is the only recordable offence of which the person has been convicted, and
- (iii) was committed when the person was aged under 18, and
- (b) for which the person was not given a relevant custodial sentence of 5 years or more,
“relevant custodial sentence” has the meaning given by section 63K(6),
“a specified chief officer of police” means—
 - (a) the chief officer of the police force of the area in which the person from whom the material was taken resides, or
 - (b) a chief officer of police who believes that the person is in, or is intending to come to, the chief officer’s police area.

63G Retention of section 63D material by virtue of section 63F(5): consent of Commissioner

- (1) The responsible chief officer of police may apply under subsection (2) or (3) to the Commissioner for the Retention and Use of Biometric Material for consent to the retention of section 63D material which falls within section 63F(5)(a) and (b).
- (2) The responsible chief officer of police may make an application under this subsection if the responsible chief officer of police considers that the material was taken (or, in the case of a DNA profile, derived from a sample taken) in connection with the investigation of an offence where any alleged victim of the offence was, at the time of the offence—
 - (a) under the age of 18,
 - (b) a vulnerable adult, or
 - (c) associated with the person to whom the material relates.
- (3) The responsible chief officer of police may make an application under this subsection if the responsible chief officer of police considers that—
 - (a) the material is not material to which subsection (2) relates, but
 - (b) the retention of the material is necessary to assist in the prevention or detection of crime.
- (4) The Commissioner may, on an application under this section, consent to the retention of material to which the application relates if the Commissioner considers that it is appropriate to retain the material.
- (5) But where notice is given under subsection (6) in relation to the application, the Commissioner must, before deciding whether or not to give consent, consider any representations by the person to whom the material relates which are made within the period of 28 days beginning with the day on which the notice is given.
- (6) The responsible chief officer of police must give to the person to whom the material relates notice of—
 - (a) an application under this section, and
 - (b) the right to make representations.
- (7) A notice under subsection (6) may, in particular, be given to a person by—

Status: This is the original version (as it was originally enacted).

- (a) leaving it at the person’s usual or last known address (whether residential or otherwise),
 - (b) sending it to the person by post at that address, or
 - (c) sending it to the person by email or other electronic means.
- (8) The requirement in subsection (6) does not apply if the whereabouts of the person to whom the material relates is not known and cannot, after reasonable inquiry, be ascertained by the responsible chief officer of police.
- (9) An application or notice under this section must be in writing.
- (10) In this section—
“victim” includes intended victim,
“vulnerable adult” means a person aged 18 or over whose ability to protect himself or herself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise,
and the reference in subsection (2)(c) to a person being associated with another person is to be read in accordance with section 62(3) to (7) of the Family Law Act 1996.”

4 Persons arrested for or charged with a minor offence

After section 63G of the Police and Criminal Evidence Act 1984 (for which see section 3) insert—

“63H Retention of section 63D material: persons arrested for or charged with a minor offence

- (1) This section applies to section 63D material which—
 - (a) relates to a person who—
 - (i) is arrested for or charged with a recordable offence other than a qualifying offence,
 - (ii) if arrested for or charged with more than one offence arising out of a single course of action, is not also arrested for or charged with a qualifying offence, and
 - (iii) is not convicted of the offence or offences in respect of which the person is arrested or charged, and
 - (b) was taken (or, in the case of a DNA profile, derived from a sample taken) in connection with the investigation of the offence or offences in respect of which the person is arrested or charged.
- (2) If the person has previously been convicted of a recordable offence which is not an excluded offence, the material may be retained indefinitely.
- (3) In this section “excluded offence” has the meaning given by section 63F(11).”

5 Persons convicted of a recordable offence

After section 63H of the Police and Criminal Evidence Act 1984 (for which see section 4) insert—

Status: This is the original version (as it was originally enacted).

“63I Retention of material: persons convicted of a recordable offence

- (1) This section applies, subject to subsection (3), to—
- (a) section 63D material which—
 - (i) relates to a person who is convicted of a recordable offence, and
 - (ii) was taken (or, in the case of a DNA profile, derived from a sample taken) in connection with the investigation of the offence, or
 - (b) material taken under section 61(6) or 63(3B) which relates to a person who is convicted of a recordable offence.
- (2) The material may be retained indefinitely.
- (3) This section does not apply to section 63D material to which section 63K applies.”

6 Persons convicted of an offence outside England and Wales

After section 63I of the Police and Criminal Evidence Act 1984 (for which see section 5) insert—

“63J Retention of material: persons convicted of an offence outside England and Wales

- (1) This section applies to material falling within subsection (2) relating to a person who is convicted of an offence under the law of any country or territory outside England and Wales.
- (2) Material falls within this subsection if it is—
- (a) fingerprints taken from the person under section 61(6D) (power to take fingerprints without consent in relation to offences outside England and Wales), or
 - (b) a DNA profile derived from a DNA sample taken from the person under section 62(2A) or 63(3E) (powers to take intimate and non-intimate samples in relation to offences outside England and Wales).
- (3) The material may be retained indefinitely.”

7 Persons under 18 convicted of first minor offence

After section 63J of the Police and Criminal Evidence Act 1984 (for which see section 6) insert—

“63K Retention of section 63D material: exception for persons under 18 convicted of first minor offence

- (1) This section applies to section 63D material which—
- (a) relates to a person who—
 - (i) is convicted of a recordable offence other than a qualifying offence,

Status: This is the original version (as it was originally enacted).

- (ii) has not previously been convicted of a recordable offence, and
 - (iii) is aged under 18 at the time of the offence, and
 - (b) was taken (or, in the case of a DNA profile, derived from a sample taken) in connection with the investigation of the offence.
- (2) Where the person is given a relevant custodial sentence of less than 5 years in respect of the offence, the material may be retained until the end of the period consisting of the term of the sentence plus 5 years.
- (3) Where the person is given a relevant custodial sentence of 5 years or more in respect of the offence, the material may be retained indefinitely.
- (4) Where the person is given a sentence other than a relevant custodial sentence in respect of the offence, the material may be retained until—
- (a) in the case of fingerprints, the end of the period of 5 years beginning with the date on which the fingerprints were taken, and
 - (b) in the case of a DNA profile, the end of the period of 5 years beginning with—
 - (i) the date on which the DNA sample from which the profile was derived was taken, or
 - (ii) if the profile was derived from more than one DNA sample, the date on which the first of those samples was taken.
- (5) But if, before the end of the period within which material may be retained by virtue of this section, the person is again convicted of a recordable offence, the material may be retained indefinitely.
- (6) In this section, “relevant custodial sentence” means any of the following—
- (a) a custodial sentence within the meaning of section 76 of the Powers of Criminal Courts (Sentencing) Act 2000;
 - (b) a sentence of a period of detention and training (excluding any period of supervision) which a person is liable to serve under an order under section 211 of the Armed Forces Act 2006 or a secure training order.”

8 Persons given a penalty notice

After section 63K of the Police and Criminal Evidence Act 1984 (for which see section 7) insert—

“63L Retention of section 63D material: persons given a penalty notice

- (1) This section applies to section 63D material which—
- (a) relates to a person who is given a penalty notice under section 2 of the Criminal Justice and Police Act 2001 and in respect of whom no proceedings are brought for the offence to which the notice relates, and
 - (b) was taken (or, in the case of a DNA profile, derived from a sample taken) from the person in connection with the investigation of the offence to which the notice relates.
- (2) The material may be retained—
- (a) in the case of fingerprints, for a period of 2 years beginning with the date on which the fingerprints were taken,

Status: This is the original version (as it was originally enacted).

- (b) in the case of a DNA profile, for a period of 2 years beginning with—
 - (i) the date on which the DNA sample from which the profile was derived was taken, or
 - (ii) if the profile was derived from more than one DNA sample, the date on which the first of those samples was taken.”

9 **Material retained for purposes of national security**

After section 63L of the Police and Criminal Evidence Act 1984 (for which see section 8) insert—

“63M Retention of section 63D material for purposes of national security

- (1) Section 63D material may be retained for as long as a national security determination made by the responsible chief officer of police has effect in relation to it.
- (2) A national security determination is made if the responsible chief officer of police determines that it is necessary for any section 63D material to be retained for the purposes of national security.
- (3) A national security determination—
 - (a) must be made in writing,
 - (b) has effect for a maximum of 2 years beginning with the date on which it is made, and
 - (c) may be renewed.”

10 **Material given voluntarily**

After section 63M of the Police and Criminal Evidence Act 1984 (for which see section 9) insert—

“63N Retention of section 63D material given voluntarily

- (1) This section applies to the following section 63D material—
 - (a) fingerprints taken with the consent of the person from whom they were taken, and
 - (b) a DNA profile derived from a DNA sample taken with the consent of the person from whom the sample was taken.
- (2) Material to which this section applies may be retained until it has fulfilled the purpose for which it was taken or derived.
- (3) Material to which this section applies which relates to—
 - (a) a person who is convicted of a recordable offence, or
 - (b) a person who has previously been convicted of a recordable offence (other than a person who has only one exempt conviction),
 may be retained indefinitely.
- (4) For the purposes of subsection (3)(b), a conviction is exempt if it is in respect of a recordable offence, other than a qualifying offence, committed when the person is aged under 18.”

11 Material retained with consent

After section 63N of the Police and Criminal Evidence Act 1984 (for which see section 10) insert—

“63O Retention of section 63D material with consent

- (1) This section applies to the following material—
 - (a) fingerprints (other than fingerprints taken under section 61(6A)) to which section 63D applies, and
 - (b) a DNA profile to which section 63D applies.
- (2) If the person to whom the material relates consents to material to which this section applies being retained, the material may be retained for as long as that person consents to it being retained.
- (3) Consent given under this section—
 - (a) must be in writing, and
 - (b) can be withdrawn at any time.”

12 Material obtained for one purpose and used for another

After section 63O of the Police and Criminal Evidence Act 1984 (for which see section 11) insert—

“63P Section 63D material obtained for one purpose and used for another

- (1) Subsection (2) applies if section 63D material which is taken (or, in the case of a DNA profile, derived from a sample taken) from a person in connection with the investigation of an offence leads to the person to whom the material relates being arrested for or charged with, or convicted of, an offence other than the offence under investigation.
- (2) Sections 63E to 63O and sections 63Q and 63T have effect in relation to the material as if the material was taken (or, in the case of a DNA profile, derived from a sample taken) in connection with the investigation of the offence in respect of which the person is arrested or charged.”

13 Destruction of copies

After section 63P of the Police and Criminal Evidence Act 1984 (for which see section 12) insert—

“63Q Destruction of copies of section 63D material

- (1) If fingerprints are required by section 63D to be destroyed, any copies of the fingerprints held by the police must also be destroyed.
- (2) If a DNA profile is required by that section to be destroyed, no copy may be retained by the police except in a form which does not include information which identifies the person to whom the DNA profile relates.”

Destruction rules for samples and impressions of footwear subject to PACE

14 Destruction of samples

After section 63Q of the Police and Criminal Evidence Act 1984 (for which see section 13) insert—

“63R Destruction of samples

- (1) This section applies to samples—
 - (a) taken from a person under any power conferred by this Part of this Act, or
 - (b) taken by the police, with the consent of the person from whom they were taken, in connection with the investigation of an offence by the police.
- (2) Samples to which this section applies must be destroyed if it appears to the responsible chief officer of police that—
 - (a) the taking of the samples was unlawful, or
 - (b) the samples were taken from a person in connection with that person’s arrest and the arrest was unlawful or based on mistaken identity.
- (3) Subject to this, the rule in subsection (4) or (as the case may be) (5) applies.
- (4) A DNA sample to which this section applies must be destroyed—
 - (a) as soon as a DNA profile has been derived from the sample, or
 - (b) if sooner, before the end of the period of 6 months beginning with the date on which the sample was taken.
- (5) Any other sample to which this section applies must be destroyed before the end of the period of 6 months beginning with the date on which it was taken.
- (6) The responsible chief officer of police may apply to a District Judge (Magistrates’ Courts) for an order to retain a sample to which this section applies beyond the date on which the sample would otherwise be required to be destroyed by virtue of subsection (4) or (5) if—
 - (a) the sample was taken from a person in connection with the investigation of a qualifying offence, and
 - (b) the responsible chief officer of police considers that the condition in subsection (7) is met.
- (7) The condition is that, having regard to the nature and complexity of other material that is evidence in relation to the offence, the sample is likely to be needed in any proceedings for the offence for the purposes of—
 - (a) disclosure to, or use by, a defendant, or
 - (b) responding to any challenge by a defendant in respect of the admissibility of material that is evidence on which the prosecution proposes to rely.
- (8) An application under subsection (6) must be made before the date on which the sample would otherwise be required to be destroyed by virtue of subsection (4) or (5).

Status: This is the original version (as it was originally enacted).

- (9) If, on an application made by the responsible chief officer of police under subsection (6), the District Judge (Magistrates' Courts) is satisfied that the condition in subsection (7) is met, the District Judge may make an order under this subsection which—
- (a) allows the sample to be retained for a period of 12 months beginning with the date on which the sample would otherwise be required to be destroyed by virtue of subsection (4) or (5), and
 - (b) may be renewed (on one or more occasions) for a further period of not more than 12 months from the end of the period when the order would otherwise cease to have effect.
- (10) An application for an order under subsection (9) (other than an application for renewal)—
- (a) may be made without notice of the application having been given to the person from whom the sample was taken, and
 - (b) may be heard and determined in private in the absence of that person.
- (11) A sample retained by virtue of an order under subsection (9) must not be used other than for the purposes of any proceedings for the offence in connection with which the sample was taken.
- (12) A sample that ceases to be retained by virtue of an order under subsection (9) must be destroyed.
- (13) Nothing in this section prevents a speculative search, in relation to samples to which this section applies, from being carried out within such time as may reasonably be required for the search if the responsible chief officer of police considers the search to be desirable.”

15 Destruction of impressions of footwear

After section 63R of the Police and Criminal Evidence Act 1984 (for which see section 14) insert—

“63S Destruction of impressions of footwear

- (1) This section applies to impressions of footwear—
- (a) taken from a person under any power conferred by this Part of this Act, or
 - (b) taken by the police, with the consent of the person from whom they were taken, in connection with the investigation of an offence by the police.
- (2) Impressions of footwear to which this section applies must be destroyed unless they are retained under subsection (3).
- (3) Impressions of footwear may be retained for as long as is necessary for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.”

Status: This is the original version (as it was originally enacted).

Supplementary provision for material subject to PACE

16 Use of retained material

After section 63S of the Police and Criminal Evidence Act 1984 (for which see section 15) insert—

“63T Use of retained material

- (1) Any material to which section 63D, 63R or 63S applies must not be used other than—
 - (a) in the interests of national security,
 - (b) for the purposes of a terrorist investigation,
 - (c) for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution, or
 - (d) for purposes related to the identification of a deceased person or of the person to whom the material relates.
- (2) Material which is required by section 63D, 63R or 63S to be destroyed must not at any time after it is required to be destroyed be used—
 - (a) in evidence against the person to whom the material relates, or
 - (b) for the purposes of the investigation of any offence.
- (3) In this section—
 - (a) the reference to using material includes a reference to allowing any check to be made against it and to disclosing it to any person,
 - (b) the reference to crime includes a reference to any conduct which—
 - (i) constitutes one or more criminal offences (whether under the law of England and Wales or of any country or territory outside England and Wales), or
 - (ii) is, or corresponds to, any conduct which, if it all took place in England and Wales, would constitute one or more criminal offences, and
 - (c) the references to an investigation and to a prosecution include references, respectively, to any investigation outside England and Wales of any crime or suspected crime and to a prosecution brought in respect of any crime in a country or territory outside England and Wales.”

17 Exclusions for certain regimes

After section 63T of the Police and Criminal Evidence Act 1984 (for which see section 16) insert—

“63U Exclusions for certain regimes

- (1) Sections 63D to 63T do not apply to material to which paragraphs 20A to 20J of Schedule 8 to the Terrorism Act 2000 (destruction, retention and use of material taken from terrorist suspects) apply.

Status: This is the original version (as it was originally enacted).

- (2) Any reference in those sections to a person being arrested for, or charged with, an offence does not include a reference to a person—
 - (a) being arrested under section 41 of the Terrorism Act 2000, or
 - (b) being charged with an offence following an arrest under that section.
- (3) Sections 63D to 63T do not apply to material to which paragraph 8 of Schedule 4 to the International Criminal Court Act 2001 (requirement to destroy material) applies.
- (4) Sections 63D to 63T do not apply to material to which paragraph 6 of Schedule 6 to the Terrorism Prevention and Investigation Measures Act 2011 (requirement to destroy material) applies.
- (5) Sections 63D to 63Q, 63S and 63T do not apply to material which is, or may become, disclosable under—
 - (a) the Criminal Procedure and Investigations Act 1996, or
 - (b) a code of practice prepared under section 23 of that Act and in operation by virtue of an order under section 25 of that Act.
- (6) Sections 63D to 63T do not apply to material which—
 - (a) is taken from a person, but
 - (b) relates to another person.
- (7) Nothing in sections 63D to 63T affects any power conferred by—
 - (a) paragraph 18(2) of Schedule 2 to the Immigration Act 1971 (power to take reasonable steps to identify a person detained), or
 - (b) section 20 of the Immigration and Asylum Act 1999 (disclosure of police information to the Secretary of State for use for immigration purposes).”

18 Interpretation and minor amendments of PACE

- (1) The Police and Criminal Evidence Act 1984 is amended as follows.
- (2) In section 65(1) (interpretation of Part 5)—
 - (a) after the definition of “appropriate consent” insert—

““DNA profile” means any information derived from a DNA sample;
“DNA sample” means any material that has come from a human body and consists of or includes human cells;”
 - (b) after the definition of “registered health care professional” insert—

““the responsible chief officer of police”, in relation to material to which section 63D or 63R applies, means the chief officer of police for the police area—

 - (a) in which the material concerned was taken, or
 - (b) in the case of a DNA profile, in which the sample from which the DNA profile was derived was taken;

“section 63D material” means fingerprints or DNA profiles to which section 63D applies;”, and
 - (c) after the definition of “terrorism” insert—

““terrorist investigation” has the meaning given by section 32 of that Act;”.

Status: This is the original version (as it was originally enacted).

- (3) After section 65(2) (meaning of references to a sample’s proving insufficient) insert—
- “(2A) In subsection (2), the reference to the destruction of a sample does not include a reference to the destruction of a sample under section 63R (requirement to destroy samples).
- (2B) Any reference in sections 63F, 63H, 63P or 63U to a person being charged with an offence includes a reference to a person being informed that the person will be reported for an offence.”
- (4) In section 65A(2) (list of “qualifying offences” for purposes of Part 5), in paragraph (j) (offences under the Theft Act 1968), for “section 9” substitute “section 8, 9”.
- (5) After section 65A insert—

“65B Persons convicted of an offence”

- (1) For the purposes of this Part, any reference to a person who is convicted of an offence includes a reference to—
- (a) a person who has been given a caution in respect of the offence which, at the time of the caution, the person has admitted,
 - (b) a person who has been warned or reprimanded under section 65 of the Crime and Disorder Act 1998 for the offence,
 - (c) a person who has been found not guilty of the offence by reason of insanity, or
 - (d) a person who has been found to be under a disability and to have done the act charged in respect of the offence.
- (2) This Part, so far as it relates to persons convicted of an offence, has effect despite anything in the Rehabilitation of Offenders Act 1974.
- (3) But a person is not to be treated as having been convicted of an offence if that conviction is a disregarded conviction or caution by virtue of section 92 of the Protection of Freedoms Act 2012.
- (4) If a person is convicted of more than one offence arising out of a single course of action, those convictions are to be treated as a single conviction for the purposes of calculating under sections 63F, 63H and 63N whether the person has been convicted of only one offence.
- (5) See also section 65(3) (which deals with findings equivalent to those mentioned in subsection (1)(c) or (d) by courts which exercise jurisdiction under the laws of countries or territories outside England and Wales).”

Amendments of regimes other than PACE

19 Amendments of regimes other than PACE

Schedule 1 (which amends regimes other than the regime in the Police and Criminal Evidence Act 1984 amended by sections 1 to 18) has effect.

The Commissioner for the Retention and Use of Biometric Material

20 Appointment and functions of Commissioner

- (1) The Secretary of State must appoint a Commissioner to be known as the Commissioner for the Retention and Use of Biometric Material (referred to in this section and section 21 as “the Commissioner”).
- (2) It is the function of the Commissioner to keep under review—
 - (a) every national security determination made or renewed under—
 - (i) section 63M of the Police and Criminal Evidence Act 1984 (section 63D material retained for purposes of national security),
 - (ii) paragraph 20E of Schedule 8 to the Terrorism Act 2000 (paragraph 20A material retained for purposes of national security),
 - (iii) section 18B of the Counter-Terrorism Act 2008 (section 18 material retained for purposes of national security),
 - (iv) paragraph 11 of Schedule 6 to the Terrorism Prevention and Investigation Measures Act 2011 (paragraph 6 material retained for purposes of national security),
 - (v) section 18G of the Criminal Procedure (Scotland) Act 1995 (certain material retained for purposes of national security), and
 - (vi) paragraph 7 of Schedule 1 to this Act (material subject to the Police and Criminal Evidence (Northern Ireland) Order 1989 retained for purposes of national security),
 - (b) the uses to which material retained pursuant to a national security determination is being put.
- (3) It is the duty of every person who makes or renews a national security determination under a provision mentioned in subsection (2)(a) to—
 - (a) send to the Commissioner a copy of the determination or renewed determination, and the reasons for making or renewing the determination, within 28 days of making or renewing it, and
 - (b) disclose or provide to the Commissioner such documents and information as the Commissioner may require for the purpose of carrying out the Commissioner’s functions under subsection (2).
- (4) If, on reviewing a national security determination made or renewed under a provision mentioned in subsection (2)(a), the Commissioner concludes that it is not necessary for any material retained pursuant to the determination to be so retained, the Commissioner may order the destruction of the material if the condition in subsection (5) is met.
- (5) The condition is that the material retained pursuant to the national security determination is not otherwise capable of being lawfully retained.
- (6) The Commissioner also has the function of keeping under review—
 - (a) the retention and use in accordance with sections 63A and 63D to 63T of the Police and Criminal Evidence Act 1984 of—
 - (i) any material to which section 63D or 63R of that Act applies (fingerprints, DNA profiles and samples), and
 - (ii) any copies of any material to which section 63D of that Act applies (fingerprints and DNA profiles),

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- (b) the retention and use in accordance with paragraphs 20A to 20J of Schedule 8 to the Terrorism Act 2000 of—
 - (i) any material to which paragraph 20A or 20G of that Schedule applies (fingerprints, relevant physical data, DNA profiles and samples), and
 - (ii) any copies of any material to which paragraph 20A of that Schedule applies (fingerprints, relevant physical data and DNA profiles),
 - (c) the retention and use in accordance with sections 18 to 18E of the Counter-Terrorism Act 2008 of—
 - (i) any material to which section 18 of that Act applies (fingerprints, DNA samples and DNA profiles), and
 - (ii) any copies of fingerprints or DNA profiles to which section 18 of that Act applies,
 - (d) the retention and use in accordance with paragraphs 5 to 14 of Schedule 6 to the Terrorism Prevention and Investigation Measures Act 2011 of—
 - (i) any material to which paragraph 6 or 12 of that Schedule applies (fingerprints, relevant physical data, DNA profiles and samples), and
 - (ii) any copies of any material to which paragraph 6 of that Schedule applies (fingerprints, relevant physical data and DNA profiles).
- (7) But subsection (6) does not apply so far as the retention or use of the material falls to be reviewed by virtue of subsection (2).
- (8) In relation to Scotland—
- (a) the reference in subsection (6)(b) to use of material, or copies of material, in accordance with paragraphs 20A to 20J of Schedule 8 to the Terrorism Act 2000 includes a reference to use of material, or copies of material, in accordance with section 19C(2)(c) and (d) of the Criminal Procedure (Scotland) Act 1995, and
 - (b) the reference in subsection (6)(d) to use of material, or copies of material, in accordance with paragraphs 5 to 14 of Schedule 6 to the Terrorism Prevention and Investigation Measures Act 2011 is to be read as a reference to use only for a purpose mentioned in paragraph 13(1)(a) or (b) of that Schedule to that Act.
- (9) The Commissioner also has functions under sections 63F(5)(c) and 63G (giving of consent in relation to the retention of certain section 63D material).
- (10) The Commissioner is to hold office in accordance with the terms of the Commissioner’s appointment; and the Secretary of State may pay in respect of the Commissioner any expenses, remuneration or allowances that the Secretary of State may determine.
- (11) The Secretary of State may, after consultation with the Commissioner, provide the Commissioner with—
- (a) such staff, and
 - (b) such accommodation, equipment and other facilities,
- as the Secretary of State considers necessary for the carrying out of the Commissioner’s functions.

21 Reports by Commissioner

- (1) The Commissioner must make a report to the Secretary of State about the carrying out of the Commissioner’s functions as soon as reasonably practicable after the end of—

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- (a) the period of 9 months beginning when this section comes into force, and
 - (b) every subsequent 12 month period.
- (2) The Commissioner may also, at any time, make such report to the Secretary of State on any matter relating to the Commissioner's functions as the Commissioner considers appropriate.
- (3) The Secretary of State may at any time require the Commissioner to report on any matter relating to the Commissioner's functions.
- (4) On receiving a report from the Commissioner under this section, the Secretary of State must—
- (a) publish the report, and
 - (b) lay a copy of the published report before Parliament.
- (5) The Secretary of State may, after consultation with the Commissioner, exclude from publication any part of a report under this section if, in the opinion of the Secretary of State, the publication of that part would be contrary to the public interest or prejudicial to national security.

Other provisions

22 Guidance on making national security determinations

- (1) The Secretary of State must give guidance about making or renewing national security determinations under a provision mentioned in section 20(2)(a).
- (2) Any person authorised to make or renew any such national security determination must have regard to any guidance given under this section.
- (3) The Secretary of State may give different guidance for different purposes.
- (4) In the course of preparing the guidance, or revising guidance already given, the Secretary of State must consult the Commissioner for the Retention and Use of Biometric Material and the Lord Advocate.
- (5) Before giving guidance under this section, or revising guidance already given, the Secretary of State must lay before Parliament—
- (a) the proposed guidance or proposed revisions, and
 - (b) a draft of an order providing for the guidance, or revisions to the guidance, to come into force.
- (6) The Secretary of State must make the order, and issue the guidance or (as the case may be) make the revisions to the guidance, if the draft of the order is approved by a resolution of each House of Parliament.
- (7) Guidance, or revisions to guidance, come into force in accordance with an order under this section.
- (8) Such an order—
- (a) is to be a statutory instrument, and
 - (b) may contain transitional, transitory or saving provision.
- (9) The Secretary of State must publish any guidance given or revised under this section.

23 Inclusion of DNA profiles on National DNA Database

After section 63A of the Police and Criminal Evidence Act 1984 insert—

“63AA Inclusion of DNA profiles on National DNA Database

- (1) This section applies to a DNA profile which is derived from a DNA sample and which is retained under any power conferred by any of sections 63E to 63L (including those sections as applied by section 63P).
- (2) A DNA profile to which this section applies must be recorded on the National DNA Database.”

24 National DNA Database Strategy Board

After section 63AA of the Police and Criminal Evidence Act 1984 (for which see section 23) insert—

“63AB National DNA Database Strategy Board

- (1) The Secretary of State must make arrangements for a National DNA Database Strategy Board to oversee the operation of the National DNA Database.
- (2) The National DNA Database Strategy Board must issue guidance about the destruction of DNA profiles which are, or may be, retained under this Part of this Act.
- (3) A chief officer of a police force in England and Wales must act in accordance with guidance issued under subsection (2).
- (4) The National DNA Database Strategy Board may issue guidance about the circumstances in which applications may be made to the Commissioner for the Retention and Use of Biometric Material under section 63G.
- (5) Before issuing any such guidance, the National DNA Database Strategy Board must consult the Commissioner for the Retention and Use of Biometric Material.
- (6) The Secretary of State must publish the governance rules of the National DNA Database Strategy Board and lay a copy of the rules before Parliament.
- (7) The National DNA Database Strategy Board must make an annual report to the Secretary of State about the exercise of its functions.
- (8) The Secretary of State must publish the report and lay a copy of the published report before Parliament.
- (9) The Secretary of State may exclude from publication any part of the report if, in the opinion of the Secretary of State, the publication of that part would be contrary to the public interest or prejudicial to national security.”

25 Material taken before commencement

- (1) The Secretary of State must by order make such transitional, transitory or saving provision as the Secretary of State considers appropriate in connection with the coming into force of any provision of this Chapter.
- (2) The Secretary of State must, in particular, provide for the destruction or retention of PACE material taken, or (in the case of a DNA profile) derived from a sample taken, before the commencement day in connection with the investigation of an offence.
- (3) Such provision must, in particular, ensure—
 - (a) in the case of material taken or derived 3 years or more before the commencement day from a person who—
 - (i) was arrested for, or charged with, the offence, and
 - (ii) has not been convicted of the offence,the destruction of the material on the coming into force of the order if the offence was a qualifying offence,
 - (b) in the case of material taken or derived less than 3 years before the commencement day from a person who—
 - (i) was arrested for, or charged with, the offence, and
 - (ii) has not been convicted of the offence,the destruction of the material within the period of 3 years beginning with the day on which the material was taken or derived if the offence was a qualifying offence, and
 - (c) in the case of material taken or derived before the commencement day from a person who—
 - (i) was arrested for, or charged with, the offence, and
 - (ii) has not been convicted of the offence,the destruction of the material on the coming into force of the order if the offence was an offence other than a qualifying offence.
- (4) An order under this section may, in particular, provide for exceptions to provision of the kind mentioned in subsection (3).
- (5) Subsection (6) applies if an order under section 113(1) of the Police and Criminal Evidence Act 1984 (application of that Act to Armed Forces) makes provision equivalent to sections 63D to 63U of that Act.
- (6) The power to make an order under section 113(1) of the Act of 1984 includes the power to make provision of the kind that may be made by an order under this section; and the duties which apply to the Secretary of State under this section in relation to an order under this section apply accordingly in relation to an order under section 113(1) of that Act.
- (7) An order under this section is to be made by statutory instrument.
- (8) A statutory instrument containing an order under this section is subject to annulment in pursuance of a resolution of either House of Parliament.
- (9) In this section—

“the commencement day” means the day on which section 1 comes into force,

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“PACE material” means material that would have been material to which section 63D or 63R of the Police and Criminal Evidence Act 1984 applied if those provisions had been in force when it was taken or derived.

CHAPTER 2

PROTECTION OF BIOMETRIC INFORMATION OF CHILDREN IN SCHOOLS ETC.

26 **Requirement to notify and obtain consent before processing biometric information**

- (1) This section applies in relation to any processing of a child’s biometric information by or on behalf of the relevant authority of—
 - (a) a school,
 - (b) a 16 to 19 Academy, or
 - (c) a further education institution.
- (2) Before the first processing of a child’s biometric information on or after the coming into force of subsection (3), the relevant authority must notify each parent of the child—
 - (a) of its intention to process the child’s biometric information, and
 - (b) that the parent may object at any time to the processing of the information.
- (3) The relevant authority must ensure that a child’s biometric information is not processed unless—
 - (a) at least one parent of the child consents to the information being processed, and
 - (b) no parent of the child has withdrawn his or her consent, or otherwise objected, to the information being processed.
- (4) Section 27 makes further provision about the requirement to notify parents and the obtaining and withdrawal of consent (including when notification and consent are not required).
- (5) But if, at any time, the child—
 - (a) refuses to participate in, or continue to participate in, anything that involves the processing of the child’s biometric information, or
 - (b) otherwise objects to the processing of that information,
 the relevant authority must ensure that the information is not processed, irrespective of any consent given by a parent of the child under subsection (3).
- (6) Subsection (7) applies in relation to any child whose biometric information, by virtue of this section, may not be processed.
- (7) The relevant authority must ensure that reasonable alternative means are available by which the child may do, or be subject to, anything which the child would have been able to do, or be subject to, had the child’s biometric information been processed.

27 **Exceptions and further provision about consent and notification**

- (1) For the purposes of section 26(2) and (3), the relevant authority is not required to notify a parent, or obtain the consent of a parent, if the relevant authority is satisfied that—

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- (a) the parent cannot be found,
 - (b) the parent lacks capacity (within the meaning of the Mental Capacity Act 2005) to object or (as the case may be) consent to the processing of the child's biometric information,
 - (c) the welfare of the child requires that the parent is not contacted, or
 - (d) it is otherwise not reasonably practicable to notify the parent or (as the case may be) obtain the consent of the parent.
- (2) A notification under section 26(2) must be given in writing, and any objection to the processing of a child's biometric information must be made in writing.
- (3) Consent under section 26(3) may be withdrawn at any time.
- (4) Consent under section 26(3) must be given, and (if withdrawn) withdrawn, in writing.
- (5) Section 26 and this section are in addition to the requirements of the Data Protection Act 1998.

28 Interpretation: Chapter 2

- (1) In this Chapter—
- “biometric information” is to be read in accordance with subsections (2) to (4),
 - “child” means a person under the age of 18,
 - “further education institution” means an institution within the further education sector (within the meaning given by section 91(3)(a) to (c) of the Further and Higher Education Act 1992),
 - “parent” is to be read in accordance with subsections (5) to (8),
 - “parental responsibility” is to be read in accordance with the Children Act 1989,
 - “processing” has the meaning given by section 1(1) of the Data Protection Act 1998,
 - “proprietor”, in relation to a school or 16 to 19 Academy, has the meaning given by section 579(1) of the Education Act 1996, subject to the modification in subsection (9),
 - “relevant authority” means—
 - (a) in relation to a school, the proprietor of the school,
 - (b) in relation to a 16 to 19 Academy, the proprietor of the Academy,
 - (c) in relation to a further education institution, the governing body of the institution (within the meaning given by paragraphs (a), (c) and (d) of the definition of “governing body” in section 90(1) of the Further and Higher Education Act 1992),
 - “school” has the meaning given by section 4 of the Education Act 1996, subject to the modification in subsection (10),
 - “16 to 19 Academy” has the meaning given by section 1B of the Academies Act 2010.
- (2) “Biometric information” means information about a person's physical or behavioural characteristics or features which—
- (a) is capable of being used in order to establish or verify the identity of the person, and

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- (b) is obtained or recorded with the intention that it be used for the purposes of a biometric recognition system.
- (3) Biometric information may, in particular, include—
- (a) information about the skin pattern and other physical characteristics or features of a person’s fingers or palms,
 - (b) information about the features of an iris or any other part of the eye, and
 - (c) information about a person’s voice or handwriting.
- (4) In subsection (2) “biometric recognition system” means a system which, by means of equipment operating automatically—
- (a) obtains or records information about a person’s physical or behavioural characteristics or features, and
 - (b) compares the information with stored information that has previously been so obtained or recorded, or otherwise processes the information, for the purpose of establishing or verifying the identity of the person, or otherwise determining whether the person is recognised by the system.
- (5) “Parent” means a parent of the child and any individual who is not a parent of the child but who has parental responsibility for the child.
- (6) In a case where the relevant authority is satisfied that, by virtue of section 27(1), there is no person falling within subsection (5) who must be notified or whose consent is required, “parent” is to be read as including each individual who has care of the child, but this is subject to subsections (7) and (8).
- (7) In a case to which subsection (6) applies where the child is looked after by a local authority (within the meaning given by section 22(1) of the Children Act 1989), “parent” is to be read as meaning the local authority looking after the child.
- (8) In a case to which subsection (6) applies where the child is not looked after by a local authority (within the meaning given by section 22(1) of the Children Act 1989) but a voluntary organisation has provided accommodation for the child in accordance with section 59(1) of that Act by—
- (a) placing the child with a foster parent, or
 - (b) maintaining the child in a children’s home,
- “parent” is to be read as meaning the voluntary organisation that so placed or maintains the child.
- (9) A reference to the proprietor of a school is to be read, in relation to a pupil referral unit for which there is a management committee established by virtue of paragraph 15 of Schedule 1 to the Education Act 1996, as a reference to that committee; and for this purpose “pupil referral unit” has the meaning given by section 19(2) of that Act.
- (10) A reference to a school is to be read as if it included a reference to any independent educational institution (within the meaning given by section 92 of the Education and Skills Act 2008).