

EXPLANATORY MEMORANDUM TO

THE PROTECTION OF FREEDOMS ACT 2012 (DESTRUCTION, RETENTION AND USE OF BIOMETRIC DATA) (TRANSITIONAL, TRANSITORY AND SAVING PROVISIONS) (AMENDMENT) ORDER 2018

2018 No. 657

1. Introduction

- 1.1 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 makes transitional provision for Northern Ireland in connection with the coming into force of Chapter 1 of Part 1 of the Protection of Freedoms Act 2012 (“the 2012 Act”) (destruction, retention and use of biometric data). The Order provides that, in relation to biometric material taken under counter-terrorism powers in Northern Ireland before the commencement of the 2012 Act, the destruction and retention provisions under Chapter 1 will commence from 31 October 2020.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 Part 1, Chapter 1 of the 2012 Act made new provision for the retention, destruction and use of fingerprints, DNA and other forensic samples taken in the course of a criminal investigation. These changes to the destruction and retention regime for biometric data 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 which the Court found that the blanket retention of DNA and other biometric data from individuals who had not been convicted of a criminal offence was in breach of their Article 8 rights.
- 4.2 Transitional provision has been in place since Chapter 1 came into force on 31 October 2013, dealing with the commencement of the new destruction and retention provisions in relation to material taken under counter-terrorism powers (“the retention provisions”) before that date (“pre-commencement material”). Provision was made under the Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) Order 2013 (“the 2013 Order”) that the retention provisions would commence from 31 October 2015.

- 4.3 The provisions of the 2013 Order were extended for a further year by the Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) (Amendment) Order 2015 (“the 2015 Order”) such that the destruction and retention provisions would commence from 31st October 2016. The provisions of the 2015 Order were amended on 30 October 2016 when the Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) (Amendment) Order 2016 (“the 2016 Order”) came into force. The amendments in the 2016 Order made provision for the commencement date of the relevant destruction and retention provisions for pre-commencement material taken under counter-terrorism powers in Northern Ireland to be extended by two years. This extension period is due to expire on 31 October 2018.
- 4.4 Under this Order, the Secretary of State for Northern Ireland makes provision for the commencement date of the relevant destruction and retention provisions for pre-commencement material taken under counter-terrorism powers in Northern Ireland to be extended to 31 October 2020. This Order makes no change to the commencement of destruction provisions for pre-commencement material taken elsewhere in the UK.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the UK.
- 5.2 The territorial application of this instrument is the UK.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

- 7.1 Addressing the legacy of the past in Northern Ireland is an essential part of the transition to long term peace, stability and reconciliation in Northern Ireland. Significant progress was made on this issue during the political talks which led to the signing of the Stormont House Agreement on 23 December 2014, and subsequently during the talks leading to the Fresh Start Agreement on 17 November 2015.
- 7.2 The Government remains committed to delivering on the Stormont House Agreement and continues to engage with the Northern Ireland political parties to seek a resolution on legacy matters; in particular, on the creation of and framework for four new legacy institutions.
- 7.3 Addressing the legacy of the past in Northern Ireland is a sensitive matter and it is important to ensure that the voices of victims, their families and all those affected are heard. This work has now moved from discussions with political parties to a public consultation phase in order to ensure that the final proposals have the support of the people of Northern Ireland, a vital step to ensure that these proposals are fit for purpose in the long term.
- 7.4 Currently, responsibility for investigating Troubles-related deaths in Northern Ireland rests with the PSNI Legacy Investigations Branch and the Police Ombudsman. Under the proposals which have gone out to consultation and which were fully discussed

with political parties it is proposed that one of the new institutions, the Historical Investigations Unit (“HIU”), would be responsible in future for investigating these deaths.

- 7.5 The investigation of these historical deaths creates particular challenges because the evidential trail has significantly narrowed given the significant passage of time. The Government considers that biometric data collected in Northern Ireland before the commencement of the 2012 Act could have significant investigative value to the work of bodies charged with investigating these historical deaths. This is particularly the case in light of the paucity of other evidential sources as memories fade and witnesses die.
- 7.6 This Order seeks to ensure that the timing of the commencement of the destruction provisions in relation to biometric material taken under counter-terrorism powers in Northern Ireland allows for a public consultation on legacy to be carried out.
- 7.7 The implementation of provisions relating to the retention and destruction of material taken under the Police and Criminal Evidence (Northern Ireland) Order 1989 are a matter for the Northern Ireland Department of Justice, who are taking this work forward.

8. Consultation outcome

- 8.1 No public consultation was deemed necessary in respect of this Order. The Police Service of Northern Ireland and the Department of Justice for Northern Ireland have been made aware of this instrument.

9. Guidance

- 9.1 As the Order does not in practice alter arrangements anywhere aside from Northern Ireland, and as the only change in Northern Ireland is to the date of commencement of provisions, it is not considered necessary to provide guidance.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 The Government remains committed to working with the Northern Ireland political parties to seek a resolution on legacy matters as a matter of priority and to consider the views of the public through the legacy public consultation. The extended transitional provision made under this Order will be kept under review, with the expectation that prior to the expiry of the transitional period under this Order on 31 October 2020, an agreement on the creation of and framework for a number of new legacy institutions will have been reached.

13. Contact

- 13.1 Victoria McMullan at the Northern Ireland Office Telephone: 02890 523529 or email: Victoria.mcmullan@nio.gov.uk can answer any queries regarding the instrument.