

# PROTECTION OF FREEDOMS ACT 2012

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## EXPLANATORY NOTES

### THE ACT

#### *Commentary on Sections*

#### **Part 1: Regulation of biometric data**

#### *Chapter 1: Destruction, retention and use of fingerprints etc.*

#### *Section 1: Destruction of fingerprints and DNA profiles*

83. **Section 1** inserts new section 63D into the Police and Criminal Evidence Act 1984 (“PACE”) which sets out the basic rules governing the destruction of fingerprints and DNA profiles (collectively referred to as ‘section 63D material’) taken from a person under the powers in Part 5 of PACE or given voluntarily in connection with the investigation of an offence. New section 63D(2) requires the destruction of section 63D material if it appears to the responsible chief officer of police that the material was taken unlawfully, or that the material was taken from a person following an unlawful arrest or where the arrest was as a result of mistaken identity. Any other section 63D material must be destroyed as soon as reasonably practicable, subject to the operation of the provisions in new sections 63E to 63O and 63U of PACE detailed below. It is a general feature of new sections 63D to 63O that material must be destroyed unless one or more of those sections applies to that material, in which case the section which delivers the longest retention period will determine the period of retention. New section 63U(3), as inserted by section 17, provides that section 63D material need not be destroyed where it may be fall to be disclosed under the Criminal Procedure and Investigations Act 1996 or its attendant Code of Practice.
84. New section 63D(5) of PACE enables a person’s section 63D material, which would otherwise fall to be destroyed, to be retained for a short period until a speculative search of the relevant databases has been carried out. The fingerprints and DNA profile of an arrested person will be searched against the national fingerprint and DNA databases respectively to ascertain whether they match any other fingerprints or DNA profile on those databases. Where such a match occurs, it may serve to confirm the person’s identity, indicate that he or she had previously been arrested under a different name, or indicate that the person may be linked to a crime scene from which fingerprints or a DNA sample had been taken.

#### *Section 2: Material retained pending investigation or proceedings*

85. **Section 2** inserts new section 63E into PACE, which enables material taken from a person in connection with the investigation of an offence to be retained until the conclusion of the investigation by the police or, where legal proceedings are instituted against the person, until the conclusion of those proceedings (for example, the point that charges are dropped or at the outcome of a trial).

***Section 3: Persons arrested for or charged with a qualifying offence***

86. **Section 3** inserts new section 63F into PACE which provides for the further retention of material taken from persons (both adults and juveniles) arrested for or charged with a qualifying offence, but not subsequently convicted. The concept of a qualifying offence is used to distinguish between serious and less serious offences for the purposes of the retention regime. A list of qualifying offences is contained in section 65A(2) of PACE (as inserted by section 7 of the Crime and Security Act 2010 (“the 2010 Act”)); the list broadly covers serious violent, sexual and terrorist offences. Where a person who is arrested for, but not convicted of, a qualifying offence has previously been convicted of a recordable offence, that is not an ‘excluded offence’, his or her section 63D material may be retained indefinitely (new section 63F(2)). A recordable offence is defined in section 118 of PACE. In practice, all offences which are punishable with imprisonment are recordable offences, as are around 60 other non-imprisonable offences which are specified in regulations made under section 27 of PACE. An excluded offence for these purposes is defined in new section 63F(11) of PACE (inserted by the section) as a conviction for a minor (that is, non-qualifying) offence, committed when the person was under the age of 18, for which a sentence of less than five years imprisonment (or equivalent) was imposed.
87. Where a person who is charged with, but not convicted of, a qualifying offence has no previous convictions, his or her section 63D material may be retained for three years (new sections 63F(3), (4) and (6)). Where a person with no previous convictions is arrested for a qualifying offence, but is not subsequently charged or convicted, his or her section 63D material may be retained for three years only if a successful application is made under new section 63G to the independent Commissioner for the Retention and Use of Biometric Material appointed under section 20(1) of the Act (new section 63F(5)).
88. The standard three-year retention period (whether following being charged with a qualifying offence, or arrested for such an offence and a successful application to the Commissioner) may be extended on a case by case basis with the approval of a District Judge (Magistrates’ Courts). In any particular case, the police may apply during the last three months of the three-year period to a District Judge (Magistrates’ Court) for an order extending the retention period by an additional two years (new section 63F(7), (8) and (9)). The retention period cannot be extended beyond five years in total under this process. The police may appeal to the Crown Court against a refusal by a District Judge (Magistrates’ Court) to grant such an order and the person from whom the material was taken may similarly appeal to the Crown Court against the making of such an order (new section 63F(10)). Separate arrangements (see new section 63M, inserted by section 9) apply in cases where the retention period is to be extended on national security grounds.
89. New section 63G sets out the procedure for the police to apply to the independent Commissioner for the Retention and Use of Biometric Material to retain section 63D material from a person with no previous convictions who has been arrested for a qualifying offence, but not subsequently charged or convicted. Applications may be made on the basis that either the victim of the alleged offence is vulnerable (which is defined as being under the age of 18, a vulnerable adult or in a close personal relationship with the arrested person) or, in other cases, where the police consider that retention is necessary for the prevention or detection of crime (new section 63G(2) and (3)). Notice of such an application must be given to the person to whom the section 63D material relates (new section 63G(6) to (8)) and that person may make representations to the Commissioner in respect of an application (new section 63G(5)).

***Section 4: Persons arrested for or charged with a minor offence***

90. **Section 4** inserts new section 63H into PACE. Where a person is arrested for or charged with a minor offence (that is, a recordable offence which is not a qualifying offence) and is not subsequently convicted, their section 63D material must be destroyed, unless

they have previously been convicted of a recordable offence that is not an ‘excluded offence’ (new section 63H(2)) in which case the material can be retained indefinitely. An excluded offence has the same meaning as in section 3 (new section 63H(3)).

***Section 5: Persons convicted of a recordable offence***

91. **Section 5** inserts new section 63I into PACE, which governs the retention period applicable where a person has been convicted of a recordable offence. Where an adult is convicted of a recordable offence, his or her section 63D material may be retained indefinitely (as now). Where a person under the age of 18 is convicted of a recordable offence, if that offence is a qualifying offence his or her fingerprints and DNA profile may also be retained indefinitely (as now). The retention period in respect of a person under 18 convicted of his or her first minor offence is governed by new section 63K of PACE (see section 7).

***Section 6: Persons convicted of an offence outside England and Wales***

92. **Section 6** inserts new section 63J into PACE. The existing sections 61 to 63 of PACE (as amended by section 3 of the 2010 Act) include provisions to take fingerprints and DNA samples from persons convicted of a qualifying offence outside England and Wales. New section 63J provides that section 63D material obtained under those provisions may be retained indefinitely.

***Section 7: Persons under 18 convicted of first minor offence***

93. **Section 7**, which inserts new section 63K into PACE, makes provision for the retention of section 63D material taken from persons convicted of a first minor offence, committed when they were under the age of 18. In such cases, the retention period is to be determined by the length and nature of the sentence for that minor offence. Where a custodial sentence of five or more years is imposed, the person’s section 63D material may be retained indefinitely (new section 63K(3)). Where a custodial sentence of less than five years is imposed, the person’s section 63D material may be retained for the duration of the sentence (both the period spent in custody and the period of the sentence served in the community) plus a further five years (new section 63K(2)). Where a young person is given a non-custodial sentence on conviction for his or her first minor offence, his or her section 63D material may be retained for five years from the date the material was taken (new section 63K(4)). Any subsequent conviction for the recordable offence, whether before or after they turn 18, will enable the section 63D material to be retained indefinitely (new section 63J(5)).

***Section 8: Persons given a penalty notice***

94. **Section 8** inserts new section 63L into PACE, which provides that, where a person is given a penalty notice under section 2 of the Criminal Justice and Police Act 2001, his or her section 63D material may be retained for two years from the date the material was taken (new section 63L(2)). Where a person opts to be tried for the offence for which the penalty notice was issued, that notice will be disregarded and the rules set out in the previous sections will apply (new section 63L(1)(a)).

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

95. **Section 9** inserts new section 63M of PACE which makes provision for the retention of material for the purposes of national security. Where a person’s section 63D material would otherwise fall to be destroyed, it may be retained for up to two years where the responsible chief officer of police determines that it is necessary to retain it for the purposes of national security (a ‘national security determination’). A responsible chief officer may renew a national security determination in respect of the same material, thus further extending the retention period by up to two years at a time. See section 20

(paragraphs 129 to 133) which set out the functions of the Commissioner for the Retention and Use of Biometric Material in respect of national security determinations.

***Section 10: Material given voluntarily***

96. **Section 10** inserts new section 63N into PACE, which provides for section 63D material that has been given voluntarily to be destroyed as soon as it has fulfilled the purpose for which it was taken, unless the individual is previously or subsequently convicted of a recordable offence, in which case it can be retained indefinitely (new section 63N(3)).

***Section 11: Material retained with consent***

97. **Section 11** inserts new section 63O into PACE. New section 63O provides that a person's section 63D material, which would otherwise fall to be destroyed, may be retained for as long as that person consents in writing to its retention. This provision applies both to material taken in accordance with the powers in Part 5 of PACE and to material given voluntarily. A person may withdraw his or her consent at any time (new section 63O(3)).

***Section 12: Material obtained for one purpose and used for another***

98. This section inserts new section 63P into PACE. Under new section 63P, where a person arrested for one offence is subsequently arrested for, charged with or convicted of a second unrelated offence, the retention of that person's section 63D material will be governed by the rules applicable to the second offence.

***Section 13: Destruction of copies***

99. **Section 13** inserts new section 63Q into PACE which provides that all copies of fingerprints and DNA profiles held by the police must be destroyed when the obligation to destroy material set out in section 1 applies. This would also cover material held on behalf of the police by those providing services under contract, such as on the national databases or in forensic science laboratories.

***Section 14: Destruction of samples***

100. **Section 14** inserts new section 63R into PACE, which provides for the immediate destruction of samples if it appears to the responsible chief officer of police that the material was taken unlawfully, or where the material was taken from a person following an unlawful arrest or where the arrest was as a result of mistaken identity (that is, in the same circumstances as section 63D material (see new section 63D(2), as inserted by section 1). In addition, DNA samples must be destroyed as soon as a DNA profile has been satisfactorily derived from the sample (including the carrying out of the necessary quality and integrity checks) and, in any event, within six months of the taking of the sample. Any other sample, such as a blood or urine sample taken to test for alcohol or drugs, must similarly be destroyed within six months of it having been taken (new section 63R(5)).
101. New sections 63R(6) to (12) of PACE provide that samples may be retained for a longer period than six months in certain limited circumstances. Those circumstances are where it appears to the responsible chief officer of police that, in relation to a serious offence, it is necessary to ensure that key evidence (in the form of DNA samples) remains available for disclosure to the defendant or to respond to an evidential challenge by the defendant. In such cases, the decision to extend the permissible retention period would fall to a District Judge (Magistrates' Court) following an *ex parte* application made by the chief officer. If the application was approved, the district judge would authorise retention of the material for 12 months, which may be extended (on one or more occasions) following a further (*inter partes*) application by the responsible chief officer. Any material retained in this way would only be available for use in that case

and the police would be under a duty to notify the person whose sample was to be retained, including any application for a subsequent order to retain and the outcome.

102. New section 63R(13) of PACE enables a person's DNA or other sample, which would otherwise fall to be destroyed, to be retained until a DNA profile has been derived from the sample and a speculative search of the relevant database has been carried out (that is, in the same circumstances as section 63D material (see new section 63D(5)).

### ***Section 15: Destruction of impressions of footwear***

103. **Section 15** inserts new section 63S into PACE, which governs the retention and destruction of impressions of footwear. Where a footwear impression has been taken under section 61A of PACE or otherwise is obtained in connection with the investigation of an offence, it must be destroyed unless it is necessary to retain it for any of the purposes set out in new section 63S(3).

### ***Section 16: Use of retained material***

104. **Section 16** inserts new section 63T into PACE which restricts the use to which fingerprints, DNA and other samples, DNA profiles and footwear impressions may be put. Such material may only be used for the purposes set out in new section 63T(1). New section 63T(2) provides that material which should otherwise have been destroyed in accordance with new sections 63D, 63R and 63S of PACE must not be used against the person to whom the material relates or for the purposes of the investigation of any offence; any evidence arising from the impermissible use of such material would therefore be likely to be ruled inadmissible in criminal proceedings.

### ***Section 17: Exclusions for certain regimes***

105. This section inserts new section 63U into PACE, which excludes from the PACE retention regime set out above those persons whose biometric data is held under the Terrorism Act 2000 Act ("the 2000 Act"), the International Criminal Court Act 2001 and the Terrorism Prevention and Investigation Measures Act 2011, as well as those whose fingerprints are held under immigration powers. A broadly equivalent retention regime for terrorist suspects is provided for in Schedule 8 to the 2000 Act, as amended by Part 1 of Schedule 1 to this Act.
106. New section 63U(5) provides that section 63D material need not be destroyed where it may fall to be disclosed under the Criminal Procedure and Investigations Act 1996 or its attendant Code of Practice. Where section 63D material is retained in order to comply with that Act, it will be removed from the National DNA Database and held only in hard copy on the police case file, where it will be available for use only in connection with that particular case.
107. New section 63U(6) provides that section 63D material need not be destroyed where it relates to the biometric material of another person other than the one from whom it was taken. This would apply, for example, to material transferred in the course of a physical encounter, such as an assault, where one party's DNA or saliva is recovered from the other party.

### ***Section 18: Interpretation and minor amendments of PACE***

108. **Subsection (2)** adds definitions of a "DNA profile", "DNA sample", "responsible chief officer of police", "section 63D material" and "terrorist investigation" into the list of definitions in section 65(1) of PACE.
109. **Subsection (3)** inserts new subsections (2A) and (2B) into section 65 of PACE. New section 65(2A) ensures that destruction of a DNA sample under section 14 of the Act does not give the police grounds to take a fresh sample, while new section 65(2B) provides that, in new sections 63F, 63H, 63P and 63U, the definition of persons who



are ‘charged with an offence’ includes (where Part 4 of the Criminal Justice Act 2003 is not in force) those who are informed that they will be reported to a Magistrates’ Court for the issue of a summons to begin criminal proceedings.

110. *Subsection (4)* adds the offences of robbery and assault with intent to rob under section 8 of the Theft Act 1968 to the definition of qualifying offences in section 65A(2) of PACE.
111. *Subsection (5)* inserts new section 65B into PACE, which provides that, for the purpose of the rules set out in new sections 63D to 63U of PACE (as inserted by sections 1 to 17) governing the retention of fingerprints and DNA profiles, a person who has been given a caution (or, in the case of a person under 18, a warning or reprimand) is to be treated in the same way as a person who has been convicted of an offence. In addition, those individuals found not guilty by reason of insanity or otherwise to have committed the offence while under a disability will also be treated as having been convicted of an offence for the purpose of the retention rules as set out in those sections of PACE. New section 65B(2) provides that the retention rules in Part 5 of PACE, as amended, are to apply irrespective of the provisions of the Rehabilitation of Offences Act 1974 (under that Act certain offences are treated as being spent, and therefore to be disregarded for most purposes, after the expiry of specified rehabilitation periods). However, by virtue of new section 65B(3), a person is not to be regarded as having been convicted of or cautioned for an offence under section 12 (buggery) or 13 (gross indecency between men) of the Sexual Offences Act 1956 (“the 1956 Act”) (and similar offences) if that conviction or caution is disregarded under the provisions in Chapter 4 of Part 5 of this Act. Accordingly, if a person was arrested for an offence and that person had no previous conviction save for a disregarded conviction, his fingerprints and DNA profile taken following the arrest could not be retained indefinitely as would be the case if the previous conviction or caution for an offence under section 12 or 13 of the 1956 Act had not been disregarded.

### ***Section 19: Amendments of regimes other than PACE***

112. *Section 19* gives effect to Schedule 1.

### ***Schedule 1: Amendments of regimes other than PACE***

#### **Part 1: Material subject to the Terrorism Act 2000**

113. Paragraph 14 of Schedule 8 to the Terrorism Act 2000 (“the 2000 Act”) as originally enacted provides for the retention of fingerprints and samples (and DNA profiles derived from samples) taken from persons detained under section 41 of or Schedule 7 to the 2000 Act (that is persons arrested as a suspected terrorist or persons detained under the ports and border control provisions in Schedule 7) without reference to a retention period. Paragraph 14 of Schedule 8 also sets out the purposes for which these fingerprints, samples and profiles may be used.
114. Paragraph 14 of Schedule 8 to the 2000 Act is repealed by Part 1 of Schedule 1 to this Act. *Paragraph 1(4)* inserts new paragraphs 20A to 20I into Schedule 8 of the 2000 Act, which make provision for a destruction and retention regime broadly equivalent to that set out in new sections 63D to 63T of PACE. It is a general feature that material must be destroyed unless it is retained under a power conferred under new paragraphs 20B to 20E; except in the case of samples which must be destroyed as soon as a DNA profile has been satisfactorily derived from the sample and in any event within six months of taking the sample (new paragraph 20G). New paragraphs 20(6) to 20(13) replicate the provisions in new sections 63R(6) to (12) of PACE (see paragraph 101 above) to provide that samples may be retained for a longer period than six months in certain circumstances. The time limits for retention depend on whether the person has previous convictions or one exempt conviction (that is, a conviction for a minor offence committed when they were under 18) and whether the person has been detained under

section 41 (arrest on reasonable suspicion of being a terrorist) of, or under Schedule 7 (detention at ports and borders) to, the 2000 Act. Where, following detention under section 41 or Schedule 7, the person is convicted of a recordable offence in England and Wales or Northern Ireland or an offence punishable by imprisonment in Scotland (or where the person already has such a conviction in England and Wales or Northern Ireland, other than an exempt conviction), the material need not be destroyed and may be retained indefinitely.

115. As is the case in relation to section 63D material in PACE, where fingerprints or DNA profiles would otherwise need to be destroyed, if a chief officer of police (or chief constable in Northern Ireland) determines that it is necessary to retain that material for the purposes of national security, that material may be further retained for up to two years (new paragraph 20E). It is open to that chief officer to renew a national security determination in respect of the same material to further extend the retention period by up to two years at a time.
116. New paragraph 20F replicates the effect of the new provisions in new section 63Q of PACE in relation to the destruction of copies of fingerprints and DNA profiles. New paragraph 20H largely replicates the provisions as originally enacted in paragraph 14 of Schedule 8 to the 2000 Act (as prospectively amended by section 16 of the Counter-Terrorism Act 2008 (“the 2008 Act”)) in relation to the uses to which retained material may be put; it may be used in the interests of national security, for the purposes of a terrorist investigation, for the investigation of crime or for identification-related purposes (*sub-paragraph (1)*). Where a responsible chief officer of police considers that a relevant search (that is, the checking of fingerprints or DNA profiles against other material held) is desirable, paragraph 20H(2) provides an express power to carry out such a search. Paragraph 20H(3) is also new, and provides that, once the new requirement to destroy material applies, the material cannot be used in evidence against the person to whom it relates or for the purposes of the investigation of any offence.
117. New paragraph 20I replicates the new section 63U(3) of PACE (see section 17) to provide that material taken from a person detained under section 41 of the 2000 Act need not be destroyed where it may fall to be disclosed under the Criminal Procedure and Investigations Act 1996 or its Code of Practice. Where material is retained in order to comply with that Act, it will be removed from the relevant database and held only in hard copy on the police case file, where it will be available for use only in connection with that particular case.
118. *Paragraph 1(5) to (8)* makes further consequential amendments to Schedule 8 to the 2000 Act.

## **Part 2: Material subject to the International Criminal Court Act 2001**

119. Fingerprints and samples may be taken from a person under Schedule 4 to the International Criminal Court Act 2001 if the International Criminal Court (“ICC”) requests assistance in obtaining evidence of the identity of a person (who will usually be a person suspected of committing an “ICC crime” such as genocide or war crimes). Under new section 63U(3) of PACE, inserted by section 17 of this Act, the regime in Chapter 1 of Part 1 of this Act does not apply to such material. Part 2 of Schedule 1 instead substitutes a new paragraph 8 of Schedule 4 to the International Criminal Court Act 2001 to make provision for the retention and destruction of material taken under that Schedule, so that all material must be destroyed within six months of it being transferred to the ICC or, if later, as soon as it has fulfilled the purposes for which it was taken.

## **Part 3: National security material subject to section 18 of the Counter-Terrorism Act 2008**

120. *Part 3* inserts a new section 18 and new sections 18A to 18E into the 2008 Act (section 18 of the 2008 Act has not been brought into force). New section 18 makes

provision for the destruction of national security material that is not subject to existing statutory restrictions.

121. New section 18 makes provision for the retention, by law enforcement authorities under the law of England and Wales and Northern Ireland, of fingerprints, DNA samples and profiles on national security grounds which has been obtained by or supplied to the authority in the way described in section 18(3) (mostly covertly acquired material and material supplied by overseas authorities) and which is not subject to “existing statutory restrictions”, such as those set out in the Immigration Act 1971, PACE, the PACE (Northern Ireland) Order 1989, or in Schedule 8 to the 2000 Act. It is a general feature that material must be destroyed unless it is retained under a power conferred under new sections 18A and 18B; except in the case of samples which must be destroyed as soon as a DNA profile has been satisfactorily derived from the sample and in any event within six months of taking the sample.
122. New section 18A makes provision for limited retention of material taken from persons with no previous convictions. New section 18B provides for extended retention for the purposes of national security. Where fingerprints or DNA profiles would otherwise need to be destroyed (because of the expiry of a time limit set out in the new provisions), if the ‘responsible officer’ determines that it is necessary to retain that material for the purposes of national security, those fingerprints or DNA profiles may be further retained for up to two years. It is open to that chief officer to renew a national security determination in respect of the same material to further extend the retention period by up to two years at a time. ‘Responsible officer’ is defined in new section 18E.
123. New section 18C replicates the effect of the new provisions in new section 63Q of PACE (destruction of copies) and new paragraph 20F of Schedule 8 to the 2000 Act about the destruction of copies of fingerprints and DNA profiles that are held by a law enforcement agency. New section 18D makes provision about the purposes for which material may be used which are the same as those now included in new section 63T of PACE. It also includes (new section 18(2)) an express power for section 18 material to be checked against other material (held by law enforcement authorities or the Scottish Police Services Authority). New section 18D(3) provides that, once the new requirement to destroy material applies, the material cannot be used in evidence against the person to whom it relates or for the purposes of the investigation of any offence. New section 18E provides definitions of terms used in new sections 18 to 18D.

#### **Part 4: Material subject to the Terrorism Prevention and Investigation Measures Act 2011**

124. *Paragraph 5* amends Schedule 6 to the Terrorism Prevention and Investigation Measures (“TPIM”) Act 2011 which makes provision for the taking and retention of biometric material from a person subject to a TPIM notice. This paragraph makes similar provision to new section 65B(3) of PACE (see section 18), namely that for the purpose of the rules set down in Schedule 6 to the TPIM Act governing the retention of fingerprints and DNA profiles, a person is not to be regarded as having been convicted of or cautioned for an offence under section 12 (buggery) or 13 (gross indecency between men) of the Sexual Offences Act 1956 (and similar offences) if that conviction or caution is disregarded under the provisions of Chapter 4 of Part 5 of the Act.

#### **Part 5: Material subject to the Criminal Procedure (Scotland) Act 1995**

125. *Paragraph 6(3)* inserts new section 18G into the Criminal Procedure (Scotland) Act 1995 This provides that where relevant physical data, samples or information derived from samples taken under the powers mentioned in that new section would otherwise need to be destroyed because of the expiry of a time limit set out in the new provisions, if the ‘relevant chief constable’ determines that it is necessary to retain that material for the purposes of national security, those fingerprints or DNA profiles may be further retained for up to two years. The relevant chief constable may make further determinations to



retain the material, which again have effect for a maximum of two years. ‘Relevant chief constable’ is defined in new section 18G(6) and [paragraph 6\(2\)](#) makes a consequential amendment to the Criminal Procedure (Scotland) Act.

### **Part 6: Material subject to the Police and Criminal Evidence (Northern Ireland) Order 1989**

126. This Part makes provision in respect of Northern Ireland equivalent to that in section 9 (material retained for the purposes of national security) in respect of England and Wales.

### **Part 7: Corresponding Northern Ireland provision for excepted or reserved matters etc.**

127. **Part 7** confers two order-making powers on the Secretary of State to amend the Police and Criminal Evidence (Northern Ireland) Order 1989 in respect of the retention and destruction of fingerprints and DNA for excepted or reserved purposes, that is, where retention is in the interests of national security or for the purposes of a terrorist investigation, and in respect of a transferred matter where that matter is ancillary to a reserved or excepted matter. The Police and Criminal Evidence (Northern Ireland) Order 1989 makes provision for the taking, retention and destruction of fingerprints and DNA by police in Northern Ireland for transferred purposes and closely reflects the provisions in Part 5 of PACE which operates in England and Wales. The order making powers conferred on the Secretary of State by [paragraph 8\(2\)](#) and [\(3\)](#) are required as the Northern Ireland Assembly is expected to legislate in the near future, following public consultation, in relation to the taking and retention of fingerprints and DNA for transferred purposes (in response to the ECtHR judgment in the case of *S and Marper v UK* [2008] ECHR 1581). It is only when this legislation is enacted that the Secretary of State can make certain further provision in relation to excepted and reserved matters. By virtue of [paragraph 8\(6\)](#) and [\(7\)](#), an order made under this paragraph is subject to the affirmative resolution procedure if it amends or repeals primary legislation but is otherwise subject to the negative resolution procedure.

### **Section 20: Appointment and functions of Commissioner**

128. *Subsection (1)* places a duty on the Secretary of State to appoint a Commissioner for the Retention and Use of Biometric Material (the Commissioner). *Subsection (10)* makes provision for the terms of the Commissioner’s appointment and for the payment of allowances to the Commissioner and of his or her expenses. *Subsection (11)* enables the Secretary of State to provide staff, accommodation, equipment and other facilities to support the work of the Commissioner.
129. *Subsection (2)* confers on the Commissioner the function of keeping under review determinations made by chief officers of police and others that the fingerprints and DNA profiles of a person are required to be retained for national security purposes, and the use to which fingerprints and DNA profiles so retained are being put.
130. To enable the Commissioner to discharge this function, *subsection (3)* requires persons making national security determinations to notify the Commissioner in writing of the making of a determination, including a statement of the reasons why it was made, and to provide such other documents or information as the Commissioner may require in the exercise of his or her functions.
131. *Subsections (4)* and *(5)* enable the Commissioner, having reviewed a national security determination, to order the destruction of the fingerprints and DNA profile held pursuant to it where he or she is satisfied that a determination should not have been made. There is no appeal against such a ruling by the Commissioner save by way of judicial review. The Commissioner may not order the destruction of material that could otherwise be retained pursuant to any other statutory provision, for example under the provisions in new section 63F(5) and (9) of PACE (as inserted by section 3).

132. *Subsections (6) to (8)* confer on the Commissioner a general function of keeping under review the retention and use, by the police and others, of fingerprints and DNA profiles not subject to a national security determination, whether taken under PACE, the 2000 Act, the 2008 Act or the TPIM Act 2011.
133. *Subsection (9)* provides that the Commissioner also has the function of determining (in response to applications by the police) whether the fingerprints and DNA profiles of persons arrested for, but not charged with, a qualifying offence may be retained pursuant to the provisions in new section 63G of PACE (as inserted by section 3 of this Act).

### ***Section 21: Reports by Commissioner***

134. *Subsections (1) and (2)* require that the Commissioner make an annual report to the Secretary of State and enables the Commissioner to make such other reports on any matter relating to the Commissioner's functions. The Secretary of State may also, at any time, commission a report from the Commissioner on any matter relating to the retention and use of biometric material by law enforcement authorities for national security purposes (*subsection (3)*). The Secretary of State is required to lay any report from the Commissioner before Parliament, but before doing so he or she may exclude from publication any part of the report which would, in his or her opinion, be contrary to the public interest or prejudicial to national security (*subsections (4) and (5)*).

### ***Section 22: Guidance on making national security determinations***

135. *Subsection (1)* places a duty on the Secretary of State to issue guidance as to the making or renewing of national security determinations. The draft of such guidance, and any revisions to it, must be laid before each House of Parliament which must approve an order giving effect to the guidance, or revised guidance, before it can come into force (*subsections (5) and (6)*). Chief officers of police and others who may make national security determinations are required to have regard to such guidance (*subsection (2)*).

### ***Section 23: Inclusion of DNA profiles on National DNA Database***

136. *Section 23* inserts a new section 63AA into PACE which places on a statutory footing the existing National DNA Database. The new section requires DNA profiles taken under PACE or in connection with an investigation to be recorded on the relevant database. The National DNA Database is maintained and operated by the National Police Improvement Agency on behalf of the police.

### ***Section 24: National DNA Database Strategy Board***

137. *Section 24* inserts new section 63AB into PACE, which provides for the Secretary of State to make arrangements for a National DNA Database Strategy Board. Such a Board already exists, and reports to the Home Secretary, providing strategic oversight of the application of powers under PACE for taking and using DNA. The principal members of the Board are the Association of Chief Police Officers, the Association of Police Authorities (in future, a representative of Police and Crime Commissioners following their election towards the end of 2012) and the Home Office, but there is also an independent element to the Board from non-police bodies such as the Information Commissioner and the National DNA Database Ethics Group. This section puts the Board on a statutory footing and requires the Secretary of State to lay the Board's governance rules and annual reports before Parliament (new section 63AB(8) and (9)).
138. New section 63AB(2) requires the Board to issue guidance to chief officers on the circumstances in which DNA samples and profiles should be removed immediately from the National DNA Database. Chief officers will be required to act in accordance with the Board's guidance (new section 63AB(3)). Following consultation with the Commissioner for the Retention and Use of Biometric Material the Board will also have the power to issue guidance to the police on the making of applications under

*These notes refer to the Protection of Freedoms Act  
2012 (c.9) which received Royal Assent on 1 May 2012*

new section 63G (inserted by section 3) to retain material from those arrested for, but charged with, a qualifying offence (new section 63AB(4) and (5)).

***Section 25: Material taken before commencement***

139. **Section 25** requires the Secretary of State to make an order (subject to the negative resolution procedure) prescribing the manner, timing and other procedures in respect of destroying relevant biometric material already in existence at the point this legislation comes into force. This will enable the Secretary of State to ensure that the retention and destruction regime set out in Chapter 1 of Part 1 of the Act is applied to existing material, while recognising that this exercise may take some time to complete; for example, there are just over one million profiles of unconvicted persons on the National DNA Database.