

EXPLANATORY MEMORANDUM TO
THE PROTECTION OF FREEDOMS ACT 2012 (DESTRUCTION, RETENTION
AND USE OF BIOMETRIC DATA) (TRANSITIONAL, TRANSITORY AND
SAVING PROVISIONS) (AMENDMENT) ORDER 2016

2016 No. 682

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 2018.

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 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 new destruction provisions for pre-commencement material taken under counter-terrorism powers in the UK would commence from 31 October 2016.

- 4.3 Under this Order, the Secretary of State for Northern Ireland makes provision for pre-commencement material taken under counter-terrorism powers in Northern Ireland, with the effect that the relevant new destruction and retention provisions will commence in relation to such material from 31 October 2018. This Order makes no change to the commencement of destruction provisions for pre-commencement material taken elsewhere in the UK.

5. Territorial Extent and Application

- 5.1 This 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

- 7.1 Dealing with the legacy of Northern Ireland's past forms the transition to long term peace and stability in Northern Ireland. Political negotiations aimed at addressing the legacy of the past in Northern Ireland are ongoing. Significant progress was made on this issue during the political talks leading 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. 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 a number of new legacy institutions. There is a broadly held view that these bodies have the potential to deliver improved outcomes for victims and survivors.
- 7.2 Currently the PSNI Legacy Investigations Branch and Police Ombudsman have responsibility to investigate Troubles-related deaths in Northern Ireland. It is proposed that one of the new institutions, the Historical Investigations Unit ("HIU"), would be responsible for investigating these deaths in future. The investigation of these historic 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 historic deaths. This is particularly the case in light of the paucity of other evidential sources as memories fade and witnesses die.
- 7.3 This Order seeks to ensure that the timing of commencement of the destruction provisions in relation to biometric material taken under counter-terrorism powers in Northern Ireland allows for political agreement on legacy investigations to be reached. This is with a view to ensuring that investigations into Troubles related deaths can be conducted as thoroughly as possible.
- 7.4 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 therefore 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. 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 2018, an agreement on the creation of and framework for a number of new legacy institutions will have been reached.

13. Contact

- 13.1 Joanne Doherty at the Northern Ireland Office - Telephone: 028 9052 7032 or email: joanne.doherty@nio.gov.uk - can answer any queries regarding the instrument.