

## EXPLANATORY MEMORANDUM TO

### THE PROTECTION OF FREEDOMS ACT 2012 (DESTRUCTION, RETENTION AND USE OF BIOMETRIC DATA) (TRANSITIONAL, TRANSITORY AND SAVING PROVISIONS) (AMENDMENT) ORDER 2015

2015 No. 1739

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

#### 2. Purpose of the instrument

2.1 Chapter 1 of Part 1 of the Protection of Freedoms Act 2012 (“the Act”), which commenced on 31st October 2013, established regimes for the destruction, retention and use by the police of biometric material, including provision for the retention of such material where a responsible chief officer of police has determined that this is necessary for national security purposes. This instrument provides for a one year extension of a transitional period in which the police may complete a review of certain biometric material taken before commencement of the relevant provisions of the Act to identify whether it is necessary to retain that material for national security purposes.

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

3.1 None.

#### 4. Legislative Context

4.1 Section 25 of the Act provides that 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 Chapter 1. The Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) Order 2013 (S.I. 2013/1813, the “2013 Order”) was made under section 25 and came into force on 31st October 2013. Amongst other things, it provided for a two year transitional period in which the police could consider whether biometric material taken prior to the commencement of Chapter 1 of Part 1 of the Act should be retained for national security purposes. On 31st October 2015 that period ends and the material in respect of which no national security determination has been made falls to be destroyed.

4.2 This instrument is also made under section 25 of the Act and amends the 2013 Order so as to extend the transitional period by a further year, to 31st October 2016.

#### 5. Territorial Extent and Application

5.1 This instrument applies to England and Wales in respect of material taken under the Police and Criminal Evidence Act 1984 (“PACE”). It applies UK wide for material taken under other legislation into which Chapter 1 of Part 1 of the Act inserted regimes governing the destruction, retention and use of biometric data.

## 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 Chapter 1 of Part 1 of the Act, established new regimes for destruction, retention and use by the police of DNA, fingerprint and other forensic samples taken from individuals in the course of an investigation so that only material from those who are convicted can be retained indefinitely. The Act gives effect to the UK's response to the 2008 judgment of the European Court of Human Rights in *S and Marper v UK* (48 EHRR 1169). The Court in this case ruled that blanket retention of DNA taken from innocent people posed a disproportionate interference with the right to private life, in violation of Article 8 of the European Convention on Human Rights.

7.2 Prior to the Act coming into effect, biometric material taken from individuals had been stored indefinitely, either in forensic laboratories or on the National DNA Database or the national fingerprint database. Following the passing of the Act, it has been the Government's intention that material taken prior to commencement of the Act would be destroyed or retained in accordance with the retention provisions in the Act. This has required the destruction of a large volume of existing material. In order to comply with the Act, approximately 1.8 million DNA profiles and approximately 1.7 million fingerprint records were deleted from the national databases before commencement in October 2013. Before deletion a comprehensive cross searching exercise was undertaken by the Counter Terrorism police to ensure Counter Terrorism databases were up to date and potential matches were not lost.

7.3 The Act makes provision for the retention of biometric material where a responsible chief officer of police determines this is necessary for national security purposes (see, for example, section 63M of PACE, inserted by section 9 of the Act; similar provisions have been inserted into other counter-terrorism legislation – see section 19 of, and Schedule 1 to, the Act). A “national security determination” or “NSD” will have effect for a period of up to 2 years and is renewable. The Commissioner for the Retention and Use of Biometrics (the “Biometrics Commissioner”) is required by the Act to keep under review every NSD made or renewed and has the power to order destruction of material where he considers the “necessity” test has not been met.

7.4 Material taken prior to the commencement date of the destruction and retention regimes established by the Act which has been identified as material which may be eligible for an NSD is currently being reviewed by the police on a case by case basis to determine whether it is necessary to make a NSD in relation to it. The 2013 Order provided for a two year transitional period for the police to conduct this review before the destruction obligation commenced in respect of the material. The Metropolitan Police Service, who are completing this review on behalf of national Counter Terrorism policing, have made good progress in reviewing this material but will not have completed the review by the expiry of the transitional period on 31st October 2015. This instrument therefore extends the transitional period for a further year until 31st October 2016 to provide sufficient extra time for the completion of this review. It is considered necessary to extend this transitional period to rule out the possibility of

being required to destroy material in respect of which an NSD may otherwise have been made.

### ***Consolidation***

7.5 Consolidation is not necessary.

## **8. Consultation outcome**

8.1 No public consultation has been considered necessary.

## **9. Guidance**

9.1 No guidance is necessary in relation to this instrument.

## **10. Impact**

10.1 There is no impact on business, charities or voluntary bodies.

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

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

## **12. Monitoring & review**

12.1 The extended transitional provisions and the continued review of material which they allow will be kept under review, with the expectation that the review will be completed by the new deadline of 31st October 2016. The extended review that this instrument permits is subject to the independent oversight of the Biometrics Commissioner, appointed under section 20 of the Act.

## **13. Contact**

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