

## EXPLANATORY MEMORANDUM TO

### THE PROTECTION OF FREEDOMS ACT 2012 (DESTRUCTION, RETENTION, AND USE OF BIOMETRIC DATA) (TRANSITIONAL, TRANSITORY AND SAVING PROVISIONS) (AMENDMENT) ORDER 2022

2022 No. 1022

#### 1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of His Majesty.

#### 2. Purpose of the instrument

- 2.1 This 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”). The Order extends the transitional provisions that temporarily exempt biometric material taken in Northern Ireland using counter-terrorism powers prior to 31 October 2013 (“pre-commencement material”) from the retention and destruction regime set out in 2012 Act, until 31 October 2024.

#### 3. Matters of special interest to Parliament

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

#### 4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.  
4.2 The territorial application of this instrument is the whole of the United Kingdom.

#### 5. European Convention on Human Rights

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

#### 6. Legislative Context

- 6.1 Part 1 of 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 2 individuals who had not been convicted of a criminal offence was in breach of their Article 8 rights.
- 6.2 Part 1 of Chapter 1 of the 2012 Act applies to biometric material taken in Northern Ireland using counter-terrorism powers, as that is an excepted matter. The 2012 Act does not apply to biometric material taken in Northern Ireland under general policing matters. This Order, therefore, relates only to material taken in Northern Ireland under counter-terrorism powers.

- 6.3 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. 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.
- 6.4 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. The Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) (Amendment) Order 2018 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 a further two years until 31 October 2020. Most recently, the Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) (Amendment) Order 2020 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 a further two years until 31 October 2022.
- 6.5 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 2024. This Order makes no change in relation to pre-commencement material taken elsewhere in the UK.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The purpose is to enable these biometric materials to be retained so that they are available for use in investigations to address the legacy of the Troubles. These investigations are to be carried out by the Independent Commission for Information Recovery and Reconciliation (ICRIR) to be established by the Northern Ireland Troubles (Legacy and Reconciliation) Bill currently before Parliament. In order to ensure the investigations done by the body are Article 2 (ECHR) compliant, it must have access to relevant legacy-related biometric material. Given the Northern Ireland Troubles (Legacy and Reconciliation) Bill is unlikely to be commenced by this October, if the transitional period is not extended, biometrics that may provide essential evidence in legacy investigations would fall to be destroyed on 31 October 2022, potentially impeding the UK’s ability to address the legacy of the Troubles and meet its obligations to conduct Article 2 ECHR-compliant investigations.

- 7.2 It is important that Northern Ireland ‘pre commencement’ biometric material is retained due to its potential importance to legacy investigations. The State is under an obligation to conduct effective investigations under the ECHR. This is a time limited provision, to be in place until the relevant provisions in the Northern Ireland Troubles (Legacy and Reconciliation) Bill and the associated regulations take full effect. The investigation of these historical deaths creates particular challenges because the evidential trail has significantly narrowed given the 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. Additionally, advances in fingerprint technology and the advent, and developments in, DNA profiling mean that new evidence can be uncovered using modern techniques not available at the time of initial investigations.

### ***Explanations***

#### *What did any law do before the changes to be made by this instrument?*

- 7.3 The current (2020) Order enables pre-commencement material in Northern Ireland to be retained.

#### *Why is it being changed?*

- 7.4 Without this extension pre commencement material that may provide important evidence in future legacy investigations would fall to be destroyed before the relevant biometric provisions in the Northern Ireland Troubles (Legacy and Reconciliation) Bill are commenced. This would impede the UK’s ability to conduct Article 2 compliant investigations and address the legacy of the Troubles.

#### *What will it now do?*

- 7.5 This Order will have the same effect as the previous (2020) Order, extending the retention period during which pre commencement material is exempt from the 2012 Act retention and destruction regime by a further two years to 31 October 2024. Once the biometric provisions in the Bill are commenced and implemented, the transitional provisions provided for in this Order will no longer be required and can be revoked.

## **8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

## **9. Consolidation**

- 9.1 This Order does not consolidate any existing legislation.

## **10. Consultation outcome**

- 10.1 No engagement has been needed to this point specifically on this instrument but extensive engagement on the Northern Ireland Troubles (Legacy and Reconciliation) Bill more widely has taken place, as well as extensive engagement with the Police Service of Northern Ireland and the Department of Justice (DoJ) on our approach to biometric retention more generally. The Secretary of State for Northern Ireland will write to the Shadow Secretary of State for Northern Ireland, the Chair of the Northern

Ireland Affairs Select Committee, and relevant operational stakeholders ahead of the instrument being laid.

## **11. Guidance**

- 11.1 As this Order only amends the date of commencement of the relevant provisions, it is not considered necessary to provide guidance.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because this instrument will not impact businesses. The legislation will maintain the current situation.

## **13. Regulating small business**

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

## **14. Monitoring & review**

- 14.1 The approach to monitoring of this legislation is dependent on the ongoing need to maintain transitional arrangements to preserve pre-commencement material for use in investigations in relation to the legacy of the Troubles.
- 14.2 Clause 31 of the Northern Ireland Troubles (Legacy and Reconciliation) Bill makes provision for the Secretary of State, by regulations, to designate a collection of biometric material to be retained and used by ICRIR for the purpose of carrying out its review and investigatory functions.
- 14.3 This new legal framework is intended to replace the need for the transitional provision made under this Order. The Transitional Order will be kept under review in that context, with the expectation that prior to the expiry of the transitional period under this Order on 31 October 2024, the biometric provisions contained in the Bill and necessary regulations will be in force, allowing for the Transitional Order to be revoked.

## **15. Contact**

- 15.1 Simon Jones at the Northern Ireland Office email: [simon.jones@nio.gov.uk](mailto:simon.jones@nio.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Ruth Sloan, Deputy Director for Legacy Group, at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister of State Steve Baker at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.