

EXPLANATORY MEMORANDUM TO
THE INDEPENDENT COMMISSION FOR RECONCILIATION AND
INFORMATION RECOVERY (BIOMETRIC MATERIAL) REGULATIONS 2024

2024 No. 556

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.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments (at 11.1).

2. Declaration

- 2.1 Steve Baker, Minister of State at the Northern Ireland Office confirms that this Explanatory Memorandum meets the required standard.
- 2.2 Ruth Sloan, Deputy Director for Legacy, at the Northern Ireland Office confirms that this Explanatory Memorandum meets the required standard.

3. Contact

- 3.1 Simon Jones at the Northern Ireland Office Telephone: 07866058488 or email: legacy.group@nio.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

- 4.1 The regulations designate collections of biometric material (DNA and fingerprints). The regulations require that material in those designated collections, which would otherwise be destroyed under certain statutory destruction provisions, is retained. The regulations ensure that preserved material is available for use by the Independent Commission for Reconciliation and Information Recovery (“the ICRIR”) in conducting Article 2 compliant investigations into Troubles-related deaths and serious injuries.

Where does the legislation extend to, and apply?

- 4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.
- 4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. Policy Context

What is being done and why?

- 5.1 The ICRIR was legally established as a new and independent public body on 1 December 2023, when the relevant provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (“the Act”) were commenced. The ICRIR has

been set up to find answers to questions individuals and families have relating to deaths and serious injuries that occurred during the Troubles. The regulations preserve biometric material which may be of relevance to ICRIR in its investigations, otherwise at risk of destruction under certain statutory destruction provisions. The material preserved by the regulations needs to be retained so that it may be used by the ICRIR, in order to facilitate its conduct of Article 2 compliant investigations into Troubles-related deaths and serious injuries. The regulations stipulate that within a reasonable period following the conclusion of the ICRIR's work it must delete the preserved material, and it must also carry out regular periodic reviews of the need to retain the preserved material. The regulations designate two collections of biometric material and stipulate that biometric material in those collections which would otherwise be destroyed under the destruction provisions in the Act is to be retained. The destruction provisions are certain statutory provisions dealing with the destruction of biometric material collected or held by law enforcement authorities. The first designated collection is biometric material taken before 31 October 2013 in Northern Ireland. Secondly, GB data designated for retention is that taken from individuals arrested or convicted of any offences under a list of historic anti-terror legislation between the dates of the Troubles stipulated in the Act. The reason different approaches are being taken for the retention of biometric material taken in Northern Ireland and England and Wales, and Scotland, is because of the different retention regimes for biometric material in place in these jurisdictions, and the varying data management practices of police forces across the United Kingdom.

What was the previous policy, how is this different?

- 5.2 If these regulations do not come into force, any potentially relevant biometric data left on the databases of police forces in Great Britain would be liable for deletion under statutory provisions. There is existing legislation governing the retention of biometric data in Great Britain (these provisions do not apply to Northern Ireland because of the Transitional Order). In Northern Ireland, The Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) Order 2013 (“the Transitional Order”) as amended delayed the implementation of certain provisions in the Protection of Freedoms Act 2012 to preserve material taken in Northern Ireland under the Terrorism Act 2000. This means potentially relevant data taken under the Terrorism Act 2000 would be retained regardless until 31 October 2024, when the Order expires. Following that date, without these regulations, all biometric data in Northern Ireland would be left unprotected from future NI-specific deletion provisions. These regulations protect this material, and provide a longer term (but not indefinite) basis for the retention of biometric material that may be of interest to the ICRIR in its investigations into Troubles-related deaths and serious injuries (which may or may not lead to prosecutorial outcomes).

6. Legislative and Legal Context

How has the law changed?

- 6.1 The Protection of Freedoms Act 2012 (“POFA 2012”) introduced strict controls on the retention of biometric material taken under general policing powers from people in England and Wales, and in Scotland. In Northern Ireland, the Department of Justice brought forward similar legislative proposals which received Royal Assent on 25 April 2013 but these have not yet been commenced. The Department of Justice (DOJ) conducted a public consultation exercise in 2020 on proposals to amend the legislation governing the retention of DNA and fingerprints in Northern Ireland.

- 6.2 In addition, POFA 2012 introduced controls which applied to the retention of material taken in England and Wales, Scotland and Northern Ireland under certain counter-terrorism powers. The Transitional Order delays application of these provisions to material taken in Northern Ireland but only until 31 October 2024. After that period, material taken under the relevant provisions in Northern Ireland will become subject to the statutory destruction regime.
- 6.3 Regulation 3 of the regulations disapplies certain aspects of the statutory destruction regimes in relation to the material in the designated collections in the regulations. The destruction provisions which are disapplied are listed in section 35(4) of the Act. This will mean that material in the designated collections which would otherwise be required to be destroyed under those provisions will now be retained. Regulation 4 limits the purpose for which the retained material may be used.

Why was this approach taken to change the law?

- 6.4 Section 35 of the Act allows the Secretary of State to make provision in regulations about the retention of biometric data for the ICRIR functions, other than the function of producing the historical record. This legislation is made in exercise of that power.

7. Consultation

Summary of consultation outcome and methodology

- 7.1 Relevant stakeholders, including the representatives of police forces across the United Kingdom, as well as officials in relevant devolved administrations, were consulted on the policy. They had views on the practical outworking and played an active role in advising from a technical standpoint through raising important technical issues for us to address, and undertaking database searches to test the policy approach. A wider public consultation was not deemed necessary as the technical implementation of the policy was the key focus. We were able to ensure this through consultation with relevant police forces. It is also worth noting that the regulations follow primary legislation (the Act itself followed a public consultation on legacy undertaken in 2018¹) dealing with the Legacy of the Troubles in Northern Ireland.

8. Applicable Guidance

- 8.1 N/A.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

- 9.1 A full Impact Assessment has not been prepared for this instrument because the relevant Impact Assessment² was completed for the Act, which these regulations flow from. There is also no significant impact foreseen on the private, voluntary or public sector, as the regulations concern the narrow policy area of biometric retention for the purposes of ICRIR investigations into Troubles-related deaths and serious injuries. There will be an operational impact on relevant police forces who will have to retain

¹ The Consultation on Addressing the Legacy of Northern Ireland's past can be found at:

<https://www.gov.uk/government/consultations/addressing-the-legacy-of-northern-irelands-past>

² The Equality Impact Assessment for the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 can be found at:

https://assets.publishing.service.gov.uk/media/62828d60d3bf7f1f40ca508e/EQIA_NI_Troubles_Legacy_and_Reconciliation_Bill.pdf

material for use by the ICRIR, that otherwise may have been deleted. Relevant police forces will also have to work with ICRIR on the practicalities of data retention, storage and deletion.

Impact on businesses, charities and voluntary bodies

- 9.2 There is no, or no significant, impact on business, charities or voluntary bodies because the legislation is dealing with the retention of legacy biometric material for the ICRIR.
- 9.3 The legislation does not impact small or micro businesses.
- 9.4 There is no, or no significant, impact on the public sector because these regulations specifically concern the retention of biometric data for legacy purposes in Northern Ireland.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

- 10.1 The approach to monitoring this legislation is that the Northern Ireland Office will keep the operation of the instrument under review.
- 10.2 The instrument does not include a statutory review clause.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

- 11.1 The Joint Committee on Statutory Instruments should note that these regulations are laid in breach of the 21-day convention. This approach has been taken because the ICRIR will commence operational functions on 1 May, and without the guarantee that relevant biometric material will be retained for its use, there is a risk of undermining confidence in its ability to conduct effective investigations. We were not able to lay the SI sooner as the necessary operational stress testing of the policy had not yet been completed. If the SI is not in force on 1 May, police forces will continue deleting data in line with statutory provisions, meaning the ICRIR may have access to less biometric data than it otherwise would have done if these regulations were not coming into force on 1 May.

12. European Convention on Human Rights

- 12.1 The Secretary of State for Northern Ireland, Chris Heaton-Harris MP has made the following statement regarding Human Rights:

“In our view the provisions of The Independent Commission for Reconciliation and Information Recovery (Biometric Material) Regulations 2024 are compatible with the Convention rights.”

13. The Relevant European Union Acts

- 13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).