EXPLANATORY MEMORANDUM TO

THE POLICE AND CRIMINAL EVIDENCE ACT 1984 (AMENDMENT: QUALIFYING OFFENCES) ORDER 2013

2013 No. [XXXX]

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 This instrument adds certain offences to the list of 'qualifying' offences in section 65A of the Police and Criminal Evidence Act 1984 (PACE).

2.2 Designation of an offence as a 'qualifying' offence has implications for the circumstances in which a person convicted of such an offence can be required to attend a police station to have biometrics (i.e. fingerprints or a non-intimate sample such as DNA) taken, and for the length of time biometrics taken from a person arrested for or charged with the offence can be retained.

2.3 The primary purpose of the instrument is to equalise the treatment of those convicted of certain (mainly sexual) offences under past legislation and those convicted of equivalent offences under current legislation.

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

3.1 None

4. Legislative Context

4.1 Section 65A of PACE designates certain offences as 'qualifying' offences. Section 65A(3) allows the Secretary of State to amend this list by means of a statutory instrument. Section 65A(4) states that such an instrument shall not be made unless a draft has been laid before, and approved by resolution of, each House of Parliament. Further information on other relevant legislation is provided in the 'policy background' section below.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

The Lords Minister and Minister for Criminal Information (Lord Taylor of Holbeach) has made the following statement regarding Human Rights:

In my view the provisions of the Police and Criminal Evidence Act 1984 (Amendment: Qualifying Offences) Order 2013 are compatible with the Convention rights.

7. Policy background

- ***What is being done and why***

7.1 The principal purpose of the instrument is to equalise the treatment of those convicted of certain (mainly sexual) offences under past legislation and those convicted of equivalent offences under current legislation.

7.2 Before 2011, the police had powers to take biometrics on arrest and from persons in prison, but this power lapsed after a month in relation to persons arrested but not in prison. The reasons why someone might not have had biometrics taken on arrest are either that their offence took place before taking biometrics (particularly DNA) was routine, or in a few cases that the police missed the opportunity. Thus it was possible for someone to have been convicted of a serious offence, but for there to be no power to take their biometrics, and thus no means of using this technology to link them to unsolved past crimes or crimes they might commit in the future.

7.3 Section 6 of the Crime and Security Act 2010 addressed this issue by inserting Schedule 2A into PACE. Under this, with effect from 7 March 2011 a power was created to take biometrics from those convicted of past offences, which continued indefinitely where the conviction was for a more serious ('qualifying') offence, but lapsed after two years (i.e. on 7 March 2013) where the conviction was for another offence. A list of qualifying offences was set out in a new section 65A of PACE, together with a power to amend this list by means of a statutory instrument.

7.4 However, the list included only offences currently in force, not equivalent offences under repealed legislation. In particular, offences under the Sexual Offences Act 1956 (which was largely repealed and replaced by the Sexual Offences Act 2003) were not included in the list whereas offences under the 2003 Act were. So a person convicted of (for example) rape in 2005 who did not have their biometrics taken at the time may have them taken now, but someone convicted of rape in 2002 may not.

7.5 The designation by this order of additional offences as "qualifying offences" also has implications for the exercise of powers to retain biometrics for a limited period from persons arrested or charged with qualifying offences, although in a small number of cases. Under sections 63F and 63G of PACE (inserted by the Protection of Freedoms Act 2012 and due to be brought into force in October 2013), persons arrested for (but not charged with or convicted of) a qualifying offence may have their DNA profile and fingerprints retained for three years with the consent of the Biometrics Commissioner; those charged with but not convicted of a qualifying offence may have their biometrics retained for three years, without need for the Biometrics Commissioner's agreement. Of course, the great majority of people arrested for or charged with relevant offences are now arrested or charged under

current legislation (e.g. the Sexual Offences Act 2003) and therefore will not be affected by the instrument. However, persons accused now of offences which took place when past legislation was in force are arrested or charged under that legislation (e.g. those accused now of sexual offences committed before 2003 are arrested or charged under the 1956 Act). The instrument will therefore put retention of their biometrics on the same footing as those arrested or charged under current legislation.

7.6 The instrument also adds a small number of non-sexual offences to the qualifying offences list, either to be consistent with offences already on the list, or because of their seriousness.

7.7 Turning to the detail of the instrument, the rationale for the offences added is as follows.

7.8 **Article 2(2):** these indecent exposure offences are added for consistency with the indecent exposure offence under section 66 of the Sexual Offences Act 2003 which is already a qualifying offence.

7.9 **Article 2(3) and 2(4) inserting new section 65A(2)(fa) and (ga) of PACE:** these offences of child destruction and infanticide are added for consistency with murder and manslaughter which are already qualifying offences.

7.10 **Article 2(4) inserting new section 65A(2)(gb) and (gc):** these add offences in the Sexual Offences Act 1956 which are essentially equivalent to offences in the Sexual Offences Act 2003 which are already qualifying offences.

7.11 Convictions under sections 12 and 13 of the 1956 Act (buggery and gross indecency) may relate either to non-consensual and underage gay sex acts (which are offences under sections 1to 7 of the 2003 Act and are already qualifying offences) and consensual adult gay sex acts which are no longer offences. The instrument is worded to include the former, and exclude the latter from, the list of qualifying offences. (There is one type of consensual adult gay sex act which remains an offence – sexual activity in a public lavatory, under section 71 of the 2003 Act. However, as this is not currently a qualifying offence, the instrument is worded so as not to include convictions under sections 12 and 13 of the 1956 Act which relate to this activity in the list).

7.12 Section 18 of the 1956 Act (fraudulent abduction of heiress from parent or guardian) was repealed by the Family Law Reform Act 1969. It is not included as there are no convictions for this offence recorded on the Police National Computer (PNC).

7.13 Section 32 of the 1956 Act (solicitation for immoral purposes by men) is not included as no equivalent offence in the 2003 Act is included in the existing list of qualifying offences (in fact there is no equivalent offence in the 2003 Act at all).

7.14 **Article 2(4) inserting new section 65A(2)(gd):** Section 128 of the Mental Health Act 1959 (sexual intercourse with hospital or care home patients) is added for consistency with similar offences under sections 38 to 41 of the 2003 Act which are already qualifying offences.

7.15 **Article 2(4) inserting new section 65A(2)(ge):** Section 1 of the Indecency with Children Act 1960 (acts of gross indecency with children under 16) is added for consistency with similar offences under sections 7 and 13 of the 2003 Act which are already qualifying offences.

7.16 **Article 2(5):** Section 5 of the Sexual Offences Act 1967 (living on the earnings of a male prostitute) is added for consistency with similar offences under sections 7 and 13 of the 2003 Act which are already qualifying offences.

7.17 **Article 2(6) and 2(9) inserting new section 65(2)(ob):** Section 1(1) of the Genocide Act 1969 and section 51 of the International Criminal Court Act 2001 (offences involving genocide and war crimes) are added for consistency with murder and manslaughter which are already qualifying offences.

7.18 **Article 2(7):** Section 54 of the Criminal Law Act 1977 (incitement of girl under 16 to commit incest) is added for consistency with the similar offence under section 26 of the 2003 Act which is already a qualifying offence.

7.19 **Article 2(8) inserting new section 65A(2)(na) and article 2(9) inserting new section 65A(2)(oc):** Sections 1 to 3 of the Prohibition of Female Circumcision Act 1985 are added because of the seriousness of these offences relating to female genital mutilation.

7.20 **Article 2(8) inserting new section 65A(2)(nb):** Section 1 of the Public Order Act 1986 (Riot – violence putting others in fear with more than 12 people involved) is added because of the seriousness of this offence.

7.21 **Article 2(9) inserting new section 65A(2)(oa):** Section 3 of the Sexual Offences (Amendment) Act 2000 (sexual offences involving abuse of a position of trust) is added for consistency with similar offences under sections 16 to 19 of the 2003 Act which are already qualifying offences.

- ***Consolidation***

7.22 Consolidation of the amendments with the existing text of section 65A(2) is not considered to be necessary at this time.

8. Consultation outcome

8.1 No public consultation has been considered necessary.

9. Guidance

9.1 Police forces will be made aware of this change by means of existing mechanisms used to communicate with them on implementation of the

Protection of Freedoms Act: a letter from the national lead on forensics to Chief Officers and other relevant postholders; information posted on the POLKA website which provides the police with guidance; and email and phone enquiry lines.

10. Impact

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

10.2 The impact on the public sector is that police will have a power to take biometrics from certain persons convicted of past offences where this power does not currently exist. This will assist the detection of crime by allowing the use of biometrics to link such persons to unsolved past crimes, or crimes they might commit in the future. Where retention of records on the Police National Computer (PNC), National DNA Database and national fingerprint system (IDENT1) is affected by the instrument, this will be implemented automatically by means of the table of qualifying offences held on PNC and will not require any police action.

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

11. Regulating small business

11.1 This instrument does not apply to small business.

12. Monitoring & review

12.1 The number of additional matches to unsolved past crimes obtained will be monitored.

13. Contact

Carl Jennings (Tel: 020 7035 1320 or email: carl.jennings4@homeoffice.gsi.gov.uk) or Rebecca Taylor (Tel: 020 7035 8066 or email: rebecca.taylor@homeoffice.gsi.gov.uk) at the Police Transparency Unit of the Home Office can answer any queries regarding the instrument.