**EXPLANATORY MEMORANDUM TO**

# THE PROTECTION OF FREEDOMS ACT 2012 (DESTRUCTION, RETENTION AND USE OF BIOMETRIC DATA) (TRANSITIONAL, TRANSITORY AND SAVING PROVISIONS) (AMENDMENT) (No. 2) ORDER 2013

**2013 No. 2770**

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

This memorandum contains information for the Joint Committee on Statutory Instruments.

## 2. Purpose of the instrument

2.1 This instrument makes provisions in relation to a person whose DNA profile or fingerprints have been taken in connection with the investigation of an offence. If that person is arrested for or charged with a subsequent offence, or is convicted or given a penalty notice for a subsequent offence, then their profile or fingerprints can be retained by the rules applicable to that subsequent offence.

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

3.1 This instrument breaches the 21-day rule. The Department apologises for this breach of the convention which has arisen because it has only very recently come to light that some provisions in the Police and Criminal Evidence Act 1984 ("PACE"), as amended by the Protection of Freedoms Act 2012, do not produce the desired result. Those provisions come into force on 31st October 2013, and the Department regards it as necessary that the effect of those provisions is modified with effect from that same date, to avoid the possibility of fingerprints or DNA profiles being unlawfully retained.

## 4. Legislative Context

4.1 The Protection of Freedoms Act 2012 made amendments to PACE in respect of the destruction, retention and use of fingerprints and DNA. This instrument amends the Protection of Freedoms Act 2012 (Destruction, Retention and Use of Biometric Data) (Transitional, Transitory and Saving Provisions) Order 2013 (S.I. 2013/1813), which made general provision in respect of biometric material taken before commencement of the 2012 Act.

## 5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

## 6. European Convention on Human Rights

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 The policy on retention of DNA profiles and fingerprints as set out in the Protection of Freedoms Act 2012 is that DNA profiles and fingerprints of adults convicted of a recordable offence should be retained indefinitely, and other groups of people as defined should have their biometrics retained for finite periods (e.g. people charged but not convicted of a more serious offence have their biometrics retained for three years, and juveniles convicted of a minor offence have their biometrics retained for five year plus any custodial sentence.)

7.2 The policy is that retention should be based on the entirety of a person's criminal record. If something in their record allows retention of biometrics then DNA profiles and fingerprints can be retained. There need be no causal relationship between the arrest for which a person was sampled and the arrest that allows the retention.

7.3 Upon a first arrest, a person's DNA and fingerprints are taken. Upon subsequent arrests, a person's fingerprints are normally taken to confirm the identity of the person. The fingerprint comparison can be launched from the custody suite and the result is available in a matter of minutes. The person's DNA would not normally be taken from subsequent arrests if their DNA profile was already held on the DNA database. It would make little sense to go through the cost and effort of deriving, for the second time, the same DNA profile that was already held.

7.4 This sequence of sampling caused no difficulties under the previous regime in which retention was indefinite regardless of guilt or innocence, age of the arrestee or seriousness of the offence. With the introduction of the Protection of Freedoms Act, a potential difficulty arises whereby a person can be liable to have their DNA profile retained indefinitely because of a conviction in their criminal record and yet the actual DNA profile held was taken pursuant to an earlier arrest for an offence for which they were found to be innocent, or for an offence which only permitted their DNA to be retained for a finite period. A requirement to delete the original DNA profile, despite the existence of a later conviction (at which point no additional DNA was taken) would thwart the desired policy and add unnecessary costs to the police, and the taking of a fresh DNA sample at the time of the later arrest could amount to an unnecessary interference with the person's right to respect for his private life.

7.5 Two further consequences would arise as a result of applying the retention provisions of the Protection of Freedoms Act at a sample level rather than at a person level. The Commissioner for the Retention and Use of

Biometric Material would be unable to authorise retention of the biometrics of an arrestee for a qualifying offence if the initial arrest for which the DNA was taken was not the offence for which retention was being requested and if it occurred more than three years ago the retention period would have expired before the application could be made.

7.6 It was thought until recently that the Act gave full effect to the policy of allowing material to be retained if anything in a person's history allowed retention. However, recent dry-run testing has shown that the provisions in the Act to achieve this are insufficient and an amendment to the transitional order is required to ensure that the Act functions as intended.

7.7 The Department intends to table amendments to the Anti-Social Behaviour, Crime and Policing Bill currently before Parliament to amend the regime introduced by the Protection of Freedoms Actto ensure that the legislative intent is not frustrated by this technicality. In the meantime, this Order makes equivalent provision for a limited period, in relation to material taken before 30th September 2014.

## 8. Consultation outcome

8.1 No public consultation has been considered necessary.

## 9. Guidance

9.1 This amendment ensures that the Protection of Freedoms Act functions as planned. There is no need for further guidance.

## 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 operate the Protection of Freedoms Act as planned.

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 impact of the legislation will be monitored and reviewed by the Commissioner for the Retention and Use of Biometric Material under his general duty to review the operation of relevant legislation under section 20 of the Protection of Freedoms Act.

## 13. Contact

Carl Jennings (Tel: 020 7035 1320 or email: carl.jennings4@homeoffice.gsi.gov.uk) or Mick Carling (Tel: 020 7035 0602 or email: mick.carling@homeoffice.gsi.gov.uk) at the Police Transparency Unit of the Home Office can answer any queries regarding the instrument.