EXPLANATORY MEMORANDUM TO

THE PROTECTION OF FREEDOMS ACT 2012 (DESTRUCTION, RETENTION AND USE OF BIOMETRIC DATA) (TRANSITIONAL, TRANSITORY AND SAVING PROVISIONS) (AMENDMENT) ORDER 2020

2020 No. 688

1. Introduction

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

2. Purpose of the instrument

2.1 The 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") (destruction, retention and use of biometric data). The Order provides that, in relation to biometric material taken under counter-terrorism powers in Northern Ireland before the commencement of the 2012 Act, the destruction and retention provisions under Chapter 1 of the 2012 Act will commence from 31 October 2022.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the UK.

4.2 The territorial application of this instrument is the UK.

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

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 ("the retention provisions") before that date ("pre-commencement material"). 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.

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 2022. 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 Addressing the legacy of the past in Northern Ireland is an essential part of the transition to long term peace, stability and reconciliation in Northern Ireland. In a Written Ministerial Statement on 18 March[1], the Secretary of State for Northern Ireland set out the Government's proposals to address the legacy of the past in Northern Ireland. The Government has committed to introduce primary legislation to

[1] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-03-18/HCWS168/

deliver these proposals. It is important that Northern Ireland "pre-commencement" biometric material is retained due to its potential importance to legacy investigations.

7.2 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.

7.3 The current (2018) Transitional Order enables "pre-commencement" biometric material taken in Northern Ireland to be retained. The purpose is to make it available for use in investigations to address the legacy of the Troubles. This new Order will extend the transitional period during which this material is exempt from the 2012 Act retention and destruction regime, in order to provide for a further time limited period for retention to ensure that it is not destroyed and as a result may be used in future legacy investigations. Without this exemption biometric material that may provide important evidence in future legacy investigations would fall to be destroyed. This would impede the UK's ability to ensure Article 2 ECHR compliant investigations and address the legacy of the Troubles.

7.4 It is our intention that through the forthcoming Bill we will provide a time-limited and proportionate framework in primary legislation for the retention of Northern Ireland "pre-commencement" material for use in legacy investigations, replacing the need for transitional provisions.

7.5 At the point at which the biometric provisions in the Bill become operational, the transitional provisions provided for in this Order will no longer be required and can be revoked.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 This instrument does not consolidate any existing legislation.

10. Consultation outcome

10.1 No public consultation was deemed necessary in respect of this Order. The Police Service of Northern Ireland and the Department of Justice for Northern Ireland have been made aware of this instrument. The Information Commissioner's Office were consulted in accordance with Article 36(4) of the General Data Protection Regulation and confirmed that the ICO did not feel that it was necessary to consult any further on this matter.

11. Guidance

11.1 As the Order does not in practice alter arrangements anywhere aside from Northern Ireland, and as the only change in Northern Ireland is to the date of commencement of 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 An Impact Assessment has not been prepared for this instrument because no, or no significant impact on the private, voluntary or public sectors is foreseen. 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" biometrics for use in investigations in relation to the legacy of the Troubles.

14.2 In his Written Ministerial Statement, the Secretary of State for Northern Ireland set out the Government's proposals to address the legacy of the past in Northern Ireland and the Government's commitment to introduce a bill to deliver these proposals. It is the Government's intention, through that Bill, to legislate for a time-limited and proportionate legal framework for the retention of "pre-commencement" biometric material for use in legacy investigations.

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 2022, the biometric provisions contained in the new Bill will have commenced, allowing for the Transitional Order to be revoked.

15. Contact

15.1 Katherine Stoate at the Northern Ireland Office email: katherine.stoate@nio.gov.uk can be contacted with any queries regarding the instrument.

15.2 Ruth Sloan, Deputy Director for Legacy, at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Robin Walker, Minister of State at the Northern Ireland Office can confirm that this Explanatory Memorandum meets the required standard.