EXPLANATORY MEMORANDUM TO
THE PROTECTION OF FREEDOMS ACT 2012 (GUIDANCE ON THE MAKING OR RENEWING OF NATIONAL SECURITY DETERMINATIONS) ORDER 2014

2014 No. 198

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 The purpose of this Order is to make provision for guidance in relation to powers for the making or renewing of national security determinations allowing the retention of biometric data set out in the Terrorism Act 2000, Counter-Terrorism Act 2008, Terrorism Prevention and Investigation Measures Act 2011, Police and Criminal Evidence Act 1984, Police and Criminal Evidence (Northern Ireland) Order 1989 and the Criminal Procedure (Scotland) Act 1995, as amended by section 9 and Schedule 1 to the Protection of Freedoms Act 2012.

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

3.1 None.

4. Legislative Context

4.1 The powers to retain biometric material set out in relevant UK legislation were significantly altered by the Protection of Freedoms Act 2012 (enacted in May 2012). These changes were made as a result of the judgment of the European Court of Human Rights in *S and Marper v United Kingdom [2008]* (see: http://www.bailii.org/eu/cases/ECHR/2008/1581.html) and gave effect to the Government's commitment made in its *Programme for Government [2010]* to 'adopt the protections of the Scottish model.'

(see:http://webarchive.nationalarchives.gov.uk/20100526084809/http://programmeforgovernment.hmg.gov.uk).

4.2 Specifically, sections 9, 19 to 22 and Schedule 1 to the Protection of Freedoms Act 2012 provides the police and other law enforcement authorities with the power to extend retention of biometric material (DNA and fingerprints) where necessary for the purposes of national security i.e. make a national security determination (NSD). This process is subject to independent oversight by the Biometric Commissioner (including the power to order destruction of material), and requires the Secretary of State to issue guidance on the making or renewing of national security determinations allowing extended retention of such material.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Secretary of State has made the following statement regarding Human Rights:

"In my view the provisions of the Protection of Freedoms Act 2012 (Guidance on the Making or Renewing of National Security Determinations) Order 2014 are compatible with the Convention Rights".

7. Policy background

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

7.1 The Programme for Government (section 3: civil liberties) states that the Government "*will adopt the protections of the Scottish model for the DNA database*".

7.2 The existing framework for the taking, retention and destruction of fingerprints, footwear impressions, DNA samples and the profiles derived from such samples set out in Part 5 of Police and Criminal Evidence Act 1984 ("PACE") and as amended by the Criminal Justice and Public Order Act 1994 ("the 1994 Act") enabled DNA samples to be taken from anyone charged with, reported for summons, cautioned or convicted of a recordable offence; and allowed profiles obtained from such samples to be retained and speculatively searched against other profiles obtained from victims or scenes of crime.

7.3 The Criminal Justice and Police Act 2001 further amended PACE so as to remove the obligation to destroy a DNA sample or profile when a suspect was not prosecuted for or was acquitted of the offence with which he or she was charged. The power to take and retain DNA samples and profiles was further widened by the Criminal Justice Act 2003 ("the 2003 Act") which enabled a DNA sample to be taken from any person arrested for a recordable offence and detained in a police station, whether or not they are subsequently charged. Any such sample, and the profile derived from it, could be retained indefinitely.

7.4 In December 2008, in the case of *S and Marper v United Kingdom* [2008] ECHR 15812, the European Court of Human Rights ("ECtHR") ruled that the provisions in PACE (and the equivalent legislation in Northern Ireland) permitting the 'blanket and indiscriminate' retention of DNA from unconvicted individuals violated Article 8 (right to privacy) of the European Convention on Human Rights ("ECHR"). In response to this judgment, the then Government brought forward provisions in sections 14 to 23 of the Crime and Security Act 2010 ("the 2010 Act") which, amongst other things, allowed for the retention of fingerprints and DNA profiles of persons arrested for, but not convicted of, any recordable offence for six years. Sections 14 to 18, 20 and 21 of the 2010 Act established a separate approach to the retention of DNA profiles and fingerprints by the police for national security purposes and made provisions for the extended retention of DNA and fingerprints on national security grounds. These provisions of the 2010 Act were not brought into force and Part 1 of Schedule 10 to the 2012 Act repeals them. The equivalent legislation in

Scotland is contained in sections 18 to 20 of the Criminal Procedure (Scotland) Act 1995 (as amended).

7.5 Although retention on national security grounds was not addressed in the judgment in *Marper*, the Government sought to ensure that a comprehensive regime, which included this category of material, was established. To this end, section 9 and Schedule 1 to the Protection of Freedoms Act 2012 provide for a broadly equivalent regime to that governing retention of biometric material taken in respect of general purposes, for that encompassing national security.

7.6 This Order introduces for the first time statutory guidance governing the exercise of powers on the retention, destruction and use of biometric material held for national security purposes by police and other law enforcement authorities. It gives effect to section 22 of the Protection of Freedoms Act 2012 which places a duty on the Secretary of State to prepare guidance in respect of the use of powers to retain biometric data for national security purposes.

8. Consultation outcome

8.1 There is a statutory requirement to consult the Commissioner for the Retention and Use of Biometric Material ("Biometrics Commissioner") and the Lord Advocate on the draft guidance governing the national security retention powers contained in the relevant legislation (see paragraph 9.1 below), as amended by the Protection of Freedoms Act 2012. A consultation on the draft guidance was launched on 26 March 2013 and closed on 20 May 2013 (a period of eight weeks). The Home Office received eight submissions in response to the consultation – which broadly welcomed the new guidance as likely to be effective in ensuring the new powers of retention are used fairly and appropriately. Responses, including those from the Police Service, Information Commissioner, Northern Ireland Policing Board and the statutory consultees (the Biometrics Commissioner and the Lord Advocate) made particular reference to the need for appropriate, stringent safeguards and clear lines of accountability.

8.2 A summary of responses received is available on the GOV.UK website (see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206086/consultation-response.pdf).

8.3 The Department has given careful consideration to the submissions received as part of the consultation as well as to those from its own engagement with stakeholders in developing the guidance and has made a number of changes to it as a result.

9. Guidance

9.1 The Guidance sets out the basic principles for the use of the power by Chief Officers or Chief Constables to extend retention for national security purposes, under the following legislation:

i. Terrorism Act 2000;
ii. Counter-Terrorism Act 2008;

iii. Terrorism Prevention and Investigation Measures Act 2011;
iv. Police and Criminal Evidence Act 1984;
v. Police and Criminal Evidence (Northern Ireland) Order 1989;
vi. Criminal Procedure (Scotland) Act 1995.

9.2 The guidance includes direction on:

i. The scope of the powers;
ii. Requirements for making or renewing a national security determination (NSD);
iii. Recording, monitoring and reporting on the use of the powers;
iv. Engagement with the Commissioner for the Retention and Use of Biometric Material.

10. Impact

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

10.2 The impact on the public sector is less than £5million.

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

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Guidance provides for the monitoring of the use of the powers to retain biometric material for national security purposes.

12.2 Statistical data on the use of the powers should be provided on a quarterly basis to the Home Office.

13. Contact

13.1 The Counter-Terrorism Legislation Team at the Home Office can answer any queries regarding this instrument. The team can be contacted via email: counterterrorismlegislation@homeoffice.x.gsi.gov.uk; or by post: 2 Marsham Street, Peel 5th Floor, London SW1P 4DF.