



EXPLANATORY NOTES

Criminal Justice Act (Northern Ireland) 2013

Chapter 7

CRIMINAL JUSTICE ACT (NORTHERN IRELAND) 2013

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Criminal Justice Act (Northern Ireland) 2013 which received Royal Assent on 25 April 2013. They have been prepared by the Department of Justice in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by the Assembly.
2. The Notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act, so where a section or part of a section or Schedule does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

Sex offender notification

3. The Sex Offenders Act 1997 introduced notification requirements for sex offenders, which became widely known as ‘signing the sex offender register’. The legislation allowed the police to hold information on the whereabouts of convicted sex offenders in the interests of the prevention and detection of sexual offences. These provisions were further developed in the Criminal Justice and Court Services Act 2000, which reduced the initial time allowed to give the required information to the police from 14 to 3 days.
4. Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”) replaced the previous legislation and consolidated and expanded the requirements further. The 2003 Act prescribes the periods of notification which attach to an offender based on the length and type of disposal. The period begins on the date of conviction or caution. The shortest period of 2 years is in respect of a caution. All other non-custodial disposals attract 5 years. Custodial sentences of up to 6 months attract 7 years, up to 30 months 10 years and over 30 months an indefinite period.
5. The notification requirements are not part of the court order on conviction but are a statutory obligation placed on the offender as a consequence of conviction. It is an offence to fail without reasonable excuse to comply with the notification requirements. The offence is punishable on indictment by imprisonment for up to 5 years and on summary conviction by imprisonment for up to 6 months or a fine.
6. In 2008, the Divisional Court in England granted claims for judicial review made by two sex offenders, one a juvenile when convicted, that the absence of a right of review of the indefinite nature of their notification requirements breached their right to privacy protected by Article 8 of the European Convention on Human Rights.

7. The Divisional Court made a declaration that section 82(1) of the 2003 Act was incompatible with Article 8. The Court of Appeal dismissed an appeal by the Home Secretary, who then appealed to the Supreme Court. That appeal was turned down in April 2010 and the court held unanimously that the absence of a review mechanism under the 2003 Act does render the indefinite notification requirements incompatible with Article 8 of the ECHR. In the absence of any evidence to demonstrate that it was not possible to identify at least some convicted sex offenders who pose no significant risk of re-offending, the lack of a review mechanism was disproportionate. The court also noted that almost all similar registration systems in other jurisdictions contain a review mechanism; however, it is open to the legislature to impose an appropriately high threshold for review.
8. Following the judgment, all UK jurisdictions looked at options to address the ruling. Scotland introduced remedial legislation in January 2011 and England and Wales followed in July 2012. All jurisdictions consulted with each other to ensure that the broad principles of their respective review mechanisms were consistent.
9. Proposals for Northern Ireland were also put before the Assembly at Consideration Stage of a previous Justice Bill in February 2011 and again at Further Consideration Stage in March of the same year but failed to attract cross-community support and were withdrawn by the Justice Minister. The Minister, at that stage, said that similar proposals would have to be brought back to the Assembly after the May 2011 elections. The provisions in the Act represent that undertaking.
10. The Act is also being used to make several other changes to the law on sex offender notification. One is a minor consequential change to allow for removal of notification requirements in respect of some offences which no longer exist in law. Others strengthen the law by introducing provisions to make notification requirements more effective and to adjust the scope of sexual offences prevention orders.

Human Trafficking provisions

11. The United Kingdom opted into the EU Directive on preventing and combating trafficking in human beings and protecting its victims (Directive 2011/36/EU) in July 2011. The Department of Justice in Northern Ireland was therefore required to legislate to amend the Sexual Offences Act 2003 (“the 2003 Act”) and the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (“the 2004 Act”) to introduce new offences to comply with the Directive. These have been included in the Act.
12. Trafficking is criminalised in the United Kingdom pursuant to a number of criminal offences. These are set out in the 2003 Act where a person is trafficked for the purpose of sexual exploitation, and in the 2004 Act where a person is trafficked for the purpose of labour exploitation and certain other types of exploitation.
13. In order to comply with the Directive, this Act creates an offence where a UK resident (who has not previously been trafficked into the UK) is trafficked within the UK e.g. from London to Belfast, for the purposes of non-sexual exploitation; this is already an offence in relation to trafficking for sexual exploitation. A further change has been made in order to create an offence to allow for the prosecution of a UK national who has trafficked someone anywhere outside the UK either for sexual or non-sexual exploitation, e.g. if a UK national trafficked a person from Mexico to Brazil.

14. Given the serious nature of these offences, the opportunity has also been taken to remove the existing provision for summary conviction of human trafficking offences to make human trafficking offences triable on indictment only. This will ensure that, from commencement, all future offences of human trafficking, for any form of exploitation, will be triable on indictment in the Crown Court, attracting, essentially, a maximum sentence of 14 years imprisonment.

The retention of fingerprints, samples etc

15. The existing framework for the taking, retention and destruction of fingerprints, DNA samples and the profiles derived from such samples is set out in Part VI of the Police and Criminal Evidence (Northern Ireland) Order 1989 (“PACENI”). A DNA sample is a sample taken for analysis, such as a mouth swab, plucked hair roots or blood, which contains the DNA of the individual. The DNA profile derived from the sample is the pattern of DNA characteristics used to distinguish individuals and is stored on the database as a numeric code. etc.
16. The amendments to PACENI made by the Police (Amendment)(Northern Ireland) Order 1995 enabled DNA samples to be taken from anyone charged with, reported for or convicted of a recordable offence, and allowed profiles obtained from such samples to be retained and checked for matches against other profiles obtained from victims or scenes of crime. If the person was acquitted, samples and profiles had to be destroyed.
17. The Criminal Justice and Police Act 2001 further amended PACENI so as to remove the obligation to destroy fingerprints, DNA samples or profiles 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 fingerprints, DNA samples and profiles was further widened by the Criminal Justice Act 2003, which allowed a DNA sample to be taken from any person arrested for a recordable offence and detained in a police station, whether or not they were subsequently charged. Any such sample, and the profile derived from it, could be retained indefinitely.
18. In December 2008, in the case of *S and Marper v United Kingdom* [2008] ECHR 1581, the European Court of Human Rights (“ECtHR”) ruled that the provisions in the Police and Criminal Evidence Act 1984 for England and Wales, permitting the indefinite retention of DNA and fingerprints from unconvicted individuals, violated Article 8 (right to privacy) of the European Convention on Human Rights. Northern Ireland has equivalent provisions in PACENI.
19. In particular, the Court was struck by the ‘blanket and indiscriminate’ nature of the power to retain material irrespective of the nature or gravity of the offence with which the individual was originally suspected or the age of the suspected offender. The Court found that retention was not time limited and there existed only limited possibilities for an acquitted individual to have the data removed from the database or materials destroyed. The Court pointed to the current retention policy in Scotland as a model which, in relation to unconvicted persons, discriminated between different kinds of cases and applied strictly defined storage periods for data, even in more serious cases. The equivalent legislation in Scotland is contained in sections 18 to 20 of the Criminal Procedure (Scotland) Act 1995 (as amended).

20. Since then, a number of proposals have been brought forward to remedy the incompatibility with Convention rights identified by the ECtHR. The overarching objective throughout the policy development process has been to put in place a retention framework which has the support and confidence of the public and achieves a proportionate balance between the rights of the individual and the protection of the public.

Release on licence of child convicted of serious offence

21. Children found guilty of particularly serious offences may be sentenced to a period of detention. Under Articles 45(2) and 46 of the Criminal Justice (Children)(Northern Ireland) Order 1998 it is a matter for the Minister of Justice to decide when within the sentence period a child should be released, under what licence conditions and under what circumstances the child should be recalled to custody. This process has been declared incompatible with Article 5 of the ECHR because it lacks judicial or judicial-style independence. The Act introduces this required element by transferring the powers currently held by the Minister to the sentencing judge and the Parole Commissioners for Northern Ireland.

Examination of accused through intermediary

22. Article 17 (Examination of witness through intermediary) of the Criminal Evidence (Northern Ireland) Order 1999 is one of a suite of special measures. Before a court may use a special measure, it must be issued with a Statutory Notice by the Department of Justice. In bringing forward a similar provision in respect of the examination of an accused through an intermediary (Article 21BA of the 1999 Order, as inserted by section 12 of Justice Act (Northern Ireland) 2011), providing for the issue of a statutory notice was overlooked. The Act corrects this, thereby providing legislative consistency between the provisions for examination of witnesses and the accused through an intermediary.

Abolition of scandalising the judiciary as a form of contempt of court

23. Scandalising the judiciary (also referred to as scandalising the court or scandalising judges) is defined as any act done or writing published which is calculated to bring a court or a judge into contempt or lower his authority and is a common law offence. A call to abolish the offence arose when, in March 2012, the Attorney General of Northern Ireland obtained leave to prosecute the Rt Hon Peter Hain MP following comments made in his autobiography about a High Court judge. Although the proceedings were withdrawn, the proposed use of the offence attracted considerable media and political attention, with some perceiving it as an attack on free speech.

Criminal proceedings on Sunday

24. Current legislation under the Sunday Observance Act (Ireland) 1695 has the effect that only certain types of court business can be conducted on a Sunday. Under that Act, Sunday courts can only conduct proceedings relating to indictable offences, breaches of the peace or acts of treason. This Act makes provision for magistrates' courts to deal with summary offences on Sundays on a short-term basis and in exceptional circumstances. The provision is designed primarily to cater for any public disorder that might arise during the G8 Conference to be held in Northern Ireland in summer 2013.

CONSULTATION

Consultation on sex offender notification and violent offender orders

25. Consultation on changes to the law on sex offender notification and the introduction of violent offender orders began on 6 July 2011 and closed on 5 October 2011. 13 responses were received.
26. The consultation document sought views on a number of proposed changes to the law on notification requirements for sex offenders and on measures to better protect the public from the risk posed by violent offenders.
27. The changes consulted on were the introduction of a mechanism to allow offenders subject to notification for an indefinite period to apply for a review after a certain amount of time in the community; strengthening public protection through additional notification requirements; amending the law to allow for removal of notification where offences have been abolished, and introduction of orders to more effectively manage risk from violent offenders.
28. The consultation document and summary of responses can be found at:

<http://www.dojni.gov.uk/index/public-consultations/archive-consultations/consultation-on-sex-offender-notification-and-violent-offender-orders.htm>

Consultation on human trafficking provisions

29. The Department of Justice launched a consultation on the proposed new offences on 5 April 2012, for a period of eight weeks.
30. The consultation concluded on 31 May. At that date 43 comments had been received, none of them negative.
31. A number of the responses highlighted the importance of sentencing as a deterrent and the legislative amendment, removing the provision for summary conviction, was included in the Act as a result. Stakeholders, including members of the Organised Crime Task Force's Immigration and Human Trafficking (IHT) Subgroup, were also consulted and signalled their support for the amendment.
32. The consultation document and summary of responses can be found at:

<http://www.dojni.gov.uk/index/public-consultations/archive-consultations/consultation-on-legislative-amendments-and-department-of-justice-engagement-in-relation-to-human-trafficking.htm>

Consultation on the retention of fingerprints, samples etc.

33. Following the ECtHR judgment, in May 2009 the UK Government issued a consultation paper entitled 'Keeping the right people on the DNA Database'. This contained a range of proposals aimed at replacing the 'blanket' retention policy with a framework which would discriminate between different kinds of case and apply strictly-defined storage periods for data. As the judgment applied equally to the

legislative position in Northern Ireland, a joint public consultation exercise was carried out on the policy proposals in England, Wales and Northern Ireland.

34. Two sets of legislative proposals prepared following the consultation were subsequently abandoned and, following the devolution of justice to the Assembly and the General Election in May 2010, proposals for England and Wales were published in what is now the Protection of Freedoms Act 2012. The Department of Justice proceeded with public consultation on proposals based largely on the framework described in that Act. Overall, the proposed framework was viewed favourably by most respondents as a proportionate and balanced approach to replacing the current indefinite retention policy. As expected, given the subject matter, a wide range of views was expressed on various aspects of the policy proposals.
35. The consultation document and summary of responses can be found at:

http://www.dojni.gov.uk/index/public-consultations/archive-consultations/consultation_on_proposals_for_the_retention_and_destruction_of_fingerprints_and_dna_in_northern_ireland.htm

OVERVIEW

36. The Act has 16 sections and 4 Schedules.
37. Sections 1 to 5 and Schedule 1 relate to sex offender notification and make changes to Part 2 of the Sexual Offences Act 2003 (“the 2003 Act”). The principle aim of these sections is to increase public safety whilst complying with the human rights of offenders subject to notification requirements for sexual offences. The sections and Schedule—
- provide for a mechanism to review indefinite notification requirements;
 - require offenders to notify the police if they intend to leave their home address to travel within the UK;
 - end notification requirements for acts which are no longer criminal offences;
 - ensure relevant sexual offenders coming to Northern Ireland with convictions from countries outside the United Kingdom are subject to the notification requirements; and
 - increase the scope of sexual offences prevention orders to allow courts to order offenders to take positive actions as well as place restrictions on their behaviour.
38. Sections 6 and 7 create new human trafficking offences. Section 6 amends the 2003 Act to create an offence in Northern Ireland of trafficking for the purposes of sexual exploitation which takes place wholly outside the UK. Section 7 amends the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (“the 2004 Act”) to allow prosecution for trafficking someone for exploitation anywhere outside the UK, and to ensure that an offence will have been committed where a person who has not previously been trafficked into the United Kingdom is trafficked within the United Kingdom for the purposes of labour or other non-sexual exploitation. The creation of

these offences ensures that the legislative framework to tackle human trafficking in Northern Ireland complies with the requirements of the EU Directive.

39. Section 8 amends the 2003 Act and the 2004 Act to remove the existing provision for summary conviction of human trafficking offences in order to make human trafficking offences triable on indictment only.
40. Section 9 and Schedules 2 and 3 insert into PACENI the new retention framework for fingerprints and samples, etc. and make consequential amendments. The key proposals are as follows.

Non-convicted persons

Immediate destruction of fingerprints and DNA profile from persons—

- arrested for or charged with, but not convicted of, a minor offence; or
- arrested for, but not charged with, a serious offence (unless prescribed circumstances apply).

Retention of fingerprints and DNA profile from persons—

- arrested for, but not charged with, a serious offence (if prescribed circumstances apply); or
- charged with, but not convicted of, a serious offence,

for a period of three years, with an extension of two years available on application to the courts.

Convicted adults

Indefinite retention of fingerprints and DNA profiles for all adults convicted of or cautioned for a recordable offence

Convicted under-18s

On first conviction for a minor offence, retention of fingerprints and DNA profiles for—

- five years, if the sentence is non-custodial; or
- five years plus length of sentence (if given a custodial sentence of less than five years).

Indefinite retention of fingerprints and DNA profiles—

- where a custodial sentence of five years or more is imposed;
- on conviction for a serious offence; or
- on a second conviction.

Diversiónary disposals

On a caution for a recordable offence committed while under the age of 18, or on completion of a diversionary youth conference, retention of material for five years.

On a penalty notice issued pursuant to an arrest for a recordable offence, retention of material for two years.

DNA samples

Destruction of all DNA samples taken from persons on arrest, whether the individual goes on to be convicted or not. Samples to be retained for only as long as necessary to create a DNA profile and, in any event, for no longer than six months, with an exception for temporary retention where the sample is likely to be needed in proceedings.

Statutory grounds for early deletion

Statutory requirement for Chief Constable to destroy fingerprints and DNA in cases where the taking of the samples was unlawful or the arrest of the person was unlawful or based on mistaken identity, with an exception for temporary retention where the material has evidential value, subject to its admittance by a court.

Searches

Relevant databases to be searched for a match against all fingerprints and DNA before destruction.

Biometric Commissioner

Cases involving prescribed circumstances to require independent approval.

41. Section 10 removes the power of the Minister of Justice to determine matters relating to the release, setting of licence conditions and recall to custody for a child subject to determinate detention orders and, instead, provide for these to be determined by the sentencing court and the Parole Commissioners for Northern Ireland.
42. Section 11 provides that a statutory notice must be issued before a court can give an intermediary direction and also provides for the withdrawal of that notice.
43. Section 12 abolishes the common law offence of scandalising the judiciary as a form of contempt of court.
44. Section 13 provides for magistrates' courts to deal with criminal business for a time-limited period on Sundays in exceptional circumstances. It allows the Department to make an order disapplying section 7 of the Sunday Observance Act (Ireland) 1695 for a one month period (or further such periods if exceptional circumstances re-arise) subject to a series of requirements. If the Chief Constable makes a request to the Department for disapplication, the Department must consult with the Lord Chief Justice, and conclude that exceptional circumstances exist. Any order to be made must also have the approval of the First Minister and deputy First Minister acting jointly.
45. Section 14 and Schedule 4 make repeals.

COMMENTARY ON SECTIONS

Section 1: Review of indefinite offender notification requirements

This section inserts a new Schedule 3A into Part 2 of the Sexual Offences Act 2003 ('the 2003 Act'). This Schedule provides for the review and discharge of indefinite sex offender notification requirements. The 2003 Act places requirements on sex offenders convicted of

‘relevant’ offences, as set out in the Act, to notify the police of certain personal details. If they do not comply with these requirements they are committing a criminal offence with a maximum sentence of 5 years imprisonment. The most serious offenders (with custodial sentences of 30 months or more) have to notify for an indefinite period with currently no right of review. The shortest period is for 2 years (for those who have been cautioned).

As a result of a UK Supreme Court judgment of incompatibility with Article 8 of the European Convention on Human Rights (ECHR), the law has been changed, in the rest of the UK, to allow offenders who are subject to an indefinite period of notification under Part 2 of the 2003 Act to apply to have the requirements lifted. The Schedule inserted into the 2003 Act addresses the Supreme Court judgement by introducing a similar review mechanism in this jurisdiction for indefinite notification.

Section 2: Notification requirements: absence from notified residence

This section adds an additional piece of information which must be provided to the police by sex offenders subject to notification. The provision requires them to notify the police in advance if they intend to leave their registered home address for more than three days to travel elsewhere in the UK, but where they are not intending to reside at another address which has been, or must be, registered under existing provisions in the 2003 Act.

Section 3: Ending notification requirement for acts which are no longer offences

This section makes a consequential adjustment to section 93 of and Schedule 4 to the 2003 Act in its application to Northern Ireland, to amend the scope of the procedure for ending notification for abolished homosexual offences.

Section 93 of and Schedule 4 to the 2003 Act currently provide a procedure which allows certain offenders to make administrative application to have their notification requirements lifted for offences which have been abolished since the original notification requirement was attached. The only applicable offences in the 2003 Act are homosexual offences.

The Sexual Offences (Northern Ireland) Order 2008 changed the age at which the law in Northern Ireland recognised consent to sexual activity from 17 to 16, both heterosexual and homosexual. This change to the ‘age of consent’ means a consequential amendment is required to Schedule 4 to the 2003 Act, as it applies in Northern Ireland, to allow for applications for ending notification requirements in respect of consensual offences where the other party had been 16 instead of 17, or where the offender held an honest belief, established in court, that the other party was 16. The abolished offences also now include unlawful carnal knowledge of a girl under 17 where the other party to the act was 16.

Section 4: Offences committed in a country outside the United Kingdom

This section inserts into Part 2 of the 2003 Act new sections 96A and 96B which make offenders who come to Northern Ireland with convictions (or cautions, etc.) from other jurisdictions statutorily subject to the notification requirements of the 2003 Act, that is, without the need for the police to make an application to the courts for a notification order.

The change to notification procedures is in respect of offenders coming to Northern Ireland with a conviction from another country for a relevant offence, within the specified time, as set out in the 2003 Act. A relevant offence is one listed in Schedule 3 to the 2003 Act. It

removes the need for the police to apply to the court for a notification order and instead makes the individual offender liable to notify after three days once he or she has stayed for a qualifying period. The qualifying period is the first seven days (including where two or more periods in one year together amount to seven days) that a person, who does not normally reside in Northern Ireland, is in Northern Ireland. Offenders with convictions from states which are not members of the Council of Europe will have a right to apply to the High Court for an order to remove notification, if the court is satisfied that the conviction which led to notification was obtained by human rights abuses.

Section 5: Sexual offences prevention orders

This section amends Part 2 of the 2003 Act so that a person subject to a sexual offences prevention order can be required to undertake a particular action. The current orders only allow the court to prohibit an offender from doing anything described in the order. This change will allow for greater flexibility in how risk of serious sexual harm is managed in the community.

Section 6: Trafficking people for sexual exploitation

Section 6 inserts section 58A into the 2003 Act. Section 58A creates an offence where a person is trafficked for sexual exploitation into, within and out of countries outside the UK e.g. if a person arranged for an individual to be trafficked across Spain. The offence deals with the abuse of trafficked victims at all stages of their journey or ongoing travel outside the UK, and may be committed by British citizens, habitual residents of Northern Ireland and bodies incorporated under the law of any part of the United Kingdom. A person guilty of the offence is liable, on conviction on indictment, to a term of imprisonment not exceeding 14 years. The offence is added to the list of serious offences in Schedule 1 (specified violent offences) and Schedule 2 (specified sexual offences) to the Criminal Justice (Northern Ireland) Order 2008.

Section 7: Trafficking people for other exploitation

Section 7 amends section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (“the 2004 Act”), and inserts new subsections (3A) and (4A). The amendments, in a similar manner to section 58A mentioned above, create an offence to allow for the prosecution of a person who has trafficked someone anywhere outside the UK e.g. if a person trafficked an individual from Mexico to Brazil. Again, the offence deals with the abuse of trafficked victims at all stages of their journey or ongoing travel, and applies to British citizens, habitual residents of Northern Ireland and bodies incorporated under the law of a part of the United Kingdom. A person guilty of the offence is liable, on conviction on indictment, to a term of imprisonment not exceeding 14 years. The amendments include a reference to the Human Tissue Act 2004 in relation to the meaning of “exploitation”. The sentence for an offence under section 4 may now be referred to the Court of Appeal under section 36 of the Criminal Justice Act 1988.

Section 7 also amends section 4(2) so that trafficking a person within the United Kingdom for the purposes of labour or other exploitation is an offence even if the person was not trafficked into the United Kingdom in the first place, e.g. it will be an offence if a person who has always resided in the United Kingdom is trafficked from, say, London to Belfast for the purpose of labour exploitation; this is already an offence in relation to trafficking for sexual exploitation.

Section 8: Trafficking offences to be triable only on indictment

Section 8 amends sections 57, 58 and 59 of the 2003 Act and section 4 of the 2004 Act to remove provision for summary conviction of human trafficking offences. Section 8 ensures that, from commencement, all future offences of human trafficking, whether for sexual exploitation or other forms of exploitation, will be triable on indictment only in the Crown Court, where the maximum sentence available is 14 years.

Section 9: Retention of fingerprints, DNA profiles, etc.

Section 9 gives effect to Schedules 2 and 3 to the Act, which insert the new retention framework in PACENI and make consequential amendments.

It also requires the Department of Justice to make an order (subject to the negative resolution procedure) containing transitional or saving provisions associated with the coming into force of that section, and the repeals in Part 3 of Schedule 4. In particular, the Department must provide for the destruction or retention of biometric material already in existence at the point this legislation comes into operation.

This will enable the Department to ensure that the retention and destruction regime set out in the Act is applied to existing material, while recognising that this exercise may take some time to complete.

Section 10: Release on licence of child convicted of serious offence

Section 10 addresses an ECHR-incompatibility issue that has arisen with the use of detention orders for children found guilty of serious offending. The amended provisions remove the power of the Minister of Justice to determine matters relating to the release, setting of licence conditions and recall to custody for a child subject to such an order and, instead, provide for these to be determined by the sentencing court and the Parole Commissioners for Northern Ireland. This introduces the necessary element of judicial or judicial-style independence for compliance with the ECHR and brings the detention order into line with all other custodial orders that involve release under licence.

Section 11: Examination of accused through intermediary

Section 11 inserts into Article 21BA of the Criminal Evidence (Northern Ireland) Order 1999 a requirement that a court may not give a direction under paragraph (3) of Article 21BA unless it has been notified by the Department of Justice that arrangements for implementing such a direction have been made in relation to that court and that the notice has not been withdrawn.

Section 12: Abolition of scandalising the judiciary as form of contempt of court

Section 12(1) abolishes the common law offence of scandalising the judiciary (also referred to as scandalising the court or scandalising judges) as a form of contempt of court in Northern Ireland. Subsection (2) clarifies that conduct which is a contempt of court (such as abuse of a judge in the face of the court or that otherwise interferes with particular proceedings) and which would also have been scandalising the judiciary, remains contempt of court.

Section 13: Criminal proceedings on Sunday

Section 13 disapplies section 7 of the Sunday Observance Act (Ireland) 1695 in specified circumstances and subject to certain requirements. (Section 7 of the Act otherwise prohibits the service or execution on a Sunday of any writ, process, order, judgment or decree except in certain cases.) Subsection (1)(a) and (b) disapplies section 7 for the holding of a magistrates' court in the exercise of its criminal jurisdiction. Subsection (2) allows the Department of Justice to commence this provision by order and for any such order to be effective for a one month period from the date the order appoints. Subsection (3) allows for further orders to be made on separate occasions and on the same basis. Subsection (5) requires a series of steps before an order can be made. Such an order requires the approval of the First Minister and deputy First Minister acting jointly. An order cannot be made unless the Chief Constable has made a request to the Department and the Department, after consulting with the Lord Chief Justice, is satisfied that exceptional circumstances exist for the making of an order.

Section 14: Repeals

Section 15: Commencement and transitional, etc. provisions

Section 15 provides that the Act's provisions will commence on the day after Royal Assent, with the exception of section 13 and those sections and Schedules listed in subsection (2), which will be commenced by order of the Department of Justice. Subsection (3) provides that such an order may contain such transitional or saving provisions as the Department thinks appropriate (except an order bringing section 9 or the repeals in Part 3 of Schedule 4 into operation).

Schedules

Schedule 1: Schedule 3A to the Sexual Offences Act 2003, as inserted

This Schedule provides for the review and discharge of indefinite notification requirements.

Paragraph 1: Introductory

This paragraph outlines that the provisions of the Schedule apply to a person who is subject to notification requirements for an indefinite period on or after the commencement of section 1 of this Act. It also defines some of the terms used in this Schedule.

Paragraph 2: Initial review: applications

This paragraph sets out the period which must elapse from the start of their notification requirements before an offender can apply in writing to the Chief Constable to discharge them from the notification requirements. An offender cannot apply if they are subject to a sexual offences prevention order or an interim sexual offences prevention order or notification requirements for a fixed period which has not expired. Otherwise an offender can apply to be reviewed eight years after the beginning of the notification period if the offender was under 18 at the time of conviction or after 15 years if the offender was an adult. The paragraph also ensures that any period spent in prison for a relevant event after the date of notification is disregarded for the purpose of calculating the review period.

Paragraph 3: Initial review: determination of application

This paragraph specifies the test for discharging the notification requirements and sets out the matters the Chief Constable must take into account when deciding whether to discharge the notification requirements.

Paragraph 4: Initial review: notice of decision

This paragraph requires the Chief Constable to inform the offender of a decision within 12 weeks of the date of application. If the Chief Constable discharges the notification requirements, the offender ceases to be subject to them from that date. If the Chief Constable decides not to discharge, he must inform the offender of the reasons for the decision.

Paragraph 5: Initial review: application to Crown Court

This paragraph allows the offender to apply to the Crown Court to have their notification requirements discharged if the Chief Constable does not do so, or fails to respond within the 12 week period. It also sets out that the Crown Court must review and determine the application on the same basis as the police.

Paragraph 6: Further reviews

This paragraph sets out the period which must elapse between applications to the Chief Constable for discharge from the notification requirements. An offender cannot apply if they are subject to a sexual offences prevention order or an interim sexual offences prevention order or notification requirements for a fixed period which has not expired. Otherwise an offender can apply to be reviewed four years after the previous decision by the Chief Constable or the Crown Court if the offender was under 18 at the time of the offence or after 8 years if the offender was an adult.

Paragraph 7: Guidance

This paragraph places a duty on the Department of Justice to issue guidance on the making, and determination by the Chief Constable, of applications. The provision allows for the guidance to be revised and requires the Department to make arrangements for it to be published.

Paragraph 8: Discharge in Great Britain

This paragraph outlines that an offender who is discharged from notification requirements from corresponding legislation in England and Wales or Scotland is also discharged from the notification requirements as they apply in Northern Ireland.

Schedule 2: Articles 63B to 63R of the Police and Criminal Evidence (Northern Ireland) Order 1989, as inserted

This Schedule inserts seventeen new Articles after Article 63A of PACENI to replace the existing framework governing the retention and destruction of fingerprints, DNA samples and profiles and other samples (referred to generally as “biometric material”) taken from a person under the powers in Part VI of PACENI or in cases where such material is provided voluntarily.

In relation to the retention framework, the following definitions are relevant.

A ‘**recordable offence**’ is one punishable by imprisonment or otherwise listed in regulation 2 of the Northern Ireland Criminal Records (Recordable Offences) Regulations 1989¹.

A ‘**qualifying offence**’ is an offence listed in Article 53A of PACENI (to be inserted by section 13 of the Crime and Security Act 2010). In general, the list broadly covers serious violent, sexual or terrorist offences. The concept is used to distinguish between serious and less serious offences for the purposes of the retention regime.

An ‘**excluded offence**’ is defined in Article 63D(14) as a recordable offence which—

- is not a qualifying offence;
- is the only recordable offence of which the person has been convicted;
- was committed when under the age of 18 years; and
- did not incur a custodial sentence of 5 years or more.

The new provisions are as follows.

Article 63B – Destruction of fingerprints and DNA profiles: basic rule

This Article sets out the basic rules governing the destruction of fingerprints and DNA profiles (collectively referred to as Article 63B material) taken under the powers in Part VI of PACENI or taken with consent during the investigation of an offence. Article 63B(2) requires the destruction of material unless new Articles 63C to 63M detailed below allow for its retention, in which case the Article which delivers the longest retention period will determine the period for which material may be kept. Article 63B(3) requires the destruction of material if it appears that the taking of the material was unlawful or the arrest was unlawful or based on a case of mistaken identity, unless Article 63C applies i.e. the material has potential evidential value, in which case it may be retained for the duration of the associated investigation or proceedings, and its admissibility as evidence considered by the court. Article 63B(5) enables a person’s fingerprints and DNA profile, which would otherwise fall to be destroyed under Article 63B, to be retained until a search of the relevant databases has been carried out.

Article 63C – Retention of Article 63B material pending investigation or proceedings

This Article enables Article 63B material taken from a person in connection with the investigation of an offence to be retained until the Chief Constable determines that it is of no evidential value in relation to the investigation or, where legal proceedings are instituted against a person, until the conclusion of those proceedings (e.g. the point that charges are dropped or at the outcome of a trial).

Article 63D – Retention of material: persons arrested for or charged with a qualifying offence

This Article provides for the further retention of material taken from persons (both adults and juveniles) arrested for or charged with, but not convicted of, a qualifying offence. Where

¹ S.R. 1989 No. 442

such a person has previously been convicted of a recordable offence which is not an excluded offence, his or her fingerprints and DNA profile may be retained indefinitely (Article 63D(2)).

Where such a person has no previous conviction for a recordable offence and is—

- charged with, but not convicted of, a qualifying offence; or
- arrested for, but not charged with, a qualifying offence, and prescribed circumstances apply,

the fingerprints and DNA profile may be retained for three years from the date the material was taken (Article 63D(3) – (6)). The three year period may be extended by court order made on application by the Chief Constable to a District Judge (Magistrates' Courts) for an additional two years (Article 63D(9)). An application can only be made within the three month period before the date the material is due to be destroyed. The retention period cannot be further extended under this process. Either party may appeal to the county court against an order for extension or a refusal to make such an order (Article 63D(10)).

The Article also provides for the Department of Justice to appoint a Biometric Commissioner (Article 63D(11)). The Chief Constable must apply to the Commissioner if he wishes to retain biometric material falling within Article 63(D)(5) on grounds of prescribed circumstances, and the Commissioner may consent to the retention of that material if he considers it appropriate (Article 63D(13)).

The prescribed circumstances are to be set out in an order under Article 63(D)(5)(c), which may also make provision about the procedure to be followed in relation to any application to the Commissioner (Article 63D(13)).

Article 63E – Retention of material: persons arrested for or charged with a recordable offence other than a qualifying offence

This Article provides that the fingerprints and DNA profile of a person arrested for or charged with, but not convicted of, a recordable offence other than a qualifying offence may be retained indefinitely if the person has been convicted previously of a recordable offence, unless that earlier recordable offence was an excluded offence. If the person has no previous convictions the material will fall to be destroyed under Article 63B unless it can be retained under one of the other retention powers in the Act.

Article 63F – Retention of material: persons convicted of a recordable offence

This Article provides that a person's fingerprints or DNA profile may be retained indefinitely if convicted of a recordable offence (Article 63F(2)) except where a person under the age of 18 years at the time of the offence is convicted of a non-qualifying offence and has no previous convictions. In such a case the retention periods in new Article 63H will apply (Article 63F(3)).

Article 63G – Retention of material: persons convicted of an offence outside Northern Ireland

This Article provides that fingerprints or a DNA profile derived from a DNA sample may be retained indefinitely if taken in connection with a conviction for an offence under the law of any country or territory outside Northern Ireland. The existing Articles 61 to 63 of PACENI

(as amended by section 9 of the Crime and Security Act 2010) include provisions to take fingerprints and DNA samples from persons convicted of a qualifying offence outside Northern Ireland. Article 63G(3) provides that material obtained under those provisions may be retained indefinitely.

Article 63H – Retention of material: exception for persons under 18 convicted of first minor offence

This Article makes provision for the retention of fingerprints and DNA profiles of persons convicted of a minor offence (a recordable offence that is not a qualifying offence) committed while under the age of 18. In such cases, the retention period will be determined by the length and nature of the sentence for that offence. Where a person is given a custodial sentence of less than 5 years (i.e. where the offence is an excluded offence as defined in Article 63D(14)), the retention period will be 5 years plus the term of the sentence (Article 63H(2)). For a person receiving a custodial sentence of 5 years or more, the material may be retained indefinitely (Article 63H(3)). In the case of a person convicted of a minor offence not attracting a custodial sentence, the retention period will be 5 years from the date the material was taken (Article 63H(4)). Persons subject to a further conviction will have their material retained indefinitely (Article 63H(5)).

Article 63I – Retention of material: persons under 18 given a caution

This Article makes provision for the retention of a DNA profile and fingerprints taken from a person who has been issued with a caution in connection with a recordable offence committed while under the age of 18. In such cases the material may be retained for a period of five years.

Article 63J – Retention of material: persons completing diversionary youth conference process

This Article makes provision for the retention of a DNA profile and fingerprints taken from a person who completes a diversionary youth conference process in connection with a recordable offence. In such cases the material may be retained for a period of five years.

Article 63K – Retention of material: persons given a penalty notice

This Article makes provision for the retention of a DNA profile and fingerprints taken from a person who is given a penalty notice under section 60 of the Justice Act (Northern Ireland) 2011 pursuant to an arrest for a recordable offence. In such cases material may be retained for a period of two years.

Article 63L – Retention of material given voluntarily

This Article contains provision for fingerprints or a DNA profile taken with consent to be destroyed after it has fulfilled the purpose for which it was taken or derived (Article 63L(2)) unless the person has been previously or is subsequently convicted of a recordable offence, in which case the material may be retained indefinitely (unless the previous conviction is for a recordable offence other than a qualifying offence committed while under the age of 18) (Article 63L(3)).

Article 63M – Retention of material with consent

This Article makes provision for Article 63B material to remain on the relevant database if the person from whom it is taken specifically consents in writing to its continued retention (Article 63M(2)). This provision applies both to material taken in accordance with the powers in PACENI and to material given voluntarily. The Article allows for a person to withdraw his or her consent at any time (Article 63M(3)).

Article 63N – Material obtained for one purpose and used for another

This Article makes provision where a person arrested for one offence is subsequently arrested for, charged with or convicted of a second unrelated offence. The retention of that person's fingerprints and DNA profile in connection with the first offence will be governed by the rules applicable to the second offence for which the person was arrested, charged and/or convicted.

Article 63O – Destruction of copies

This Article requires that if fingerprints are required to be destroyed under the retention framework then any copies must also be destroyed. Similarly, if a DNA profile is to be destroyed, no copy may be kept except in a form that does not identify the person to whom the profile relates.

Article 63P – Destruction of samples

This Article requires DNA samples to be destroyed as soon as a DNA profile has been derived from the sample, and no later than 6 months from the date on which it was taken (Article 63P(2)), with an exception for temporary retention where the sample is likely to be needed in proceedings. Any other sample, for example, dental or skin impressions, must also be destroyed within 6 months of being taken (Article 63P(3)). However, Article 63P(4) to (10) provides that samples may be retained for a longer period than six months where it appears to the Chief Constable that, in relation to a serious offence, retention is necessary to ensure that key evidence (in the form of DNA samples) remains available for disclosure to the defendant or to respond to an evidential challenge by the defendant. In such cases, the decision to extend the permissible retention period would fall to a District Judge (Magistrates' Court) following an *ex parte* application made by the Chief Constable. If approved, the District Judge would authorise retention of the material for 12 months, extendable (on one or more occasions) following a further (*inter partes*) application by the Chief Constable. Any material retained in this way would only be available for use in that case. The time within which material is to be destroyed will be subject to the time required to carry out a search against the material (Article 63P(11)).

Article 63Q – Use of retained material

This Article restricts the use to which fingerprints, DNA and other samples, and DNA profiles may be put during the period in which they are retained. Such material may only be used for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution or for identification purposes (including of a deceased person) (Article 63Q(1)). Article 63Q(2) makes clear that material which is required to be destroyed in accordance with Article 63B of PACENI must not at any time after it is required

to be destroyed be used against the person to whom the material relates or for the purposes of the investigation of any offence.

Article 63R – Exclusion for certain regimes

This Article excludes from the general retention regime material taken from terrorist suspects and those in respect of whom a Terrorism Prevention and Investigation Measure (TPIM) notice has been imposed; those whose biometrics are held under immigration powers; and material taken in response to a request from the International Criminal Court for assistance in obtaining evidence of identity. These matters are excepted and hence not within the legislative competence of the Assembly. It also excludes biological material that originates from one person but is recovered from another; and hard copies of material on case files, in order to ensure that it remains available for examination by defence experts and potentially the Criminal Cases Review Commission, in accordance with the disclosure requirements of the Criminal Procedure and Investigations Act 1996.

Schedule 3: Amendments: fingerprints, DNA profiles, etc.

Paragraph 1(2) adds definitions of ‘Article 63B material’, ‘DNA profile’ and ‘DNA sample’ to the interpretation of Part VI in Article 53(1) of PACENI.

Paragraph 1(3) inserts new paragraphs (3A) and (3B) into Article 53 of PACENI. Paragraph (3A) excludes the destruction of samples under Article 63P as grounds for police to take a fresh sample. New paragraph (3B) clarifies that the definition of persons who are ‘charged with an offence’ includes persons who are informed that they will be reported for an offence.

Paragraph 2 adds to the list of qualifying offences in Article 53A(2) of PACENI (as inserted by section 13 of the Crime and Security Act 2010) the offences of robbery and assault with intent to rob under section 8 of the Theft Act (Northern Ireland) 1969.

Paragraph 3 inserts a new Article 53B into PACENI to provide a number of interpretational provisions relevant to the application of the new retention framework.

Paragraphs 4, 6 and 7 are consequential amendments.

Paragraph 5 provides that the order to be made under Article 63D(5)(c) will be subject to the affirmative resolution procedure.

Schedule 4: Repeals

This Schedule sets out consequential repeals.

HANSARD REPORTS

46. The following table sets out the dates of the Hansard reports for each stage of the Act’s passage through the Assembly.

STAGE	DATE
First Stage – introduction to the Assembly	25 June 2012
Briefing for the Committee for Justice on the principles of the Act	28 June 2012
Second Stage debate	3 July 2012
Committee Stage—	
Evidence from the Organised Crime Task Force Immigration and Human Trafficking Subgroup	20 September 2012
Consideration of Human Trafficking clauses	
Consideration of Sex Offender Notification and DNA/ Fingerprint clauses	27 September 2012
Evidence from the Children’s Law Centre, the Northern Ireland Commissioner for Children and Young People and the Northern Ireland Human Rights Commission	4 October 2012
Evidence from Christian Action Research and Education and the Northern Ireland Council for Ethnic Minorities	11 October 2012
Evidence from the Police Service of Northern Ireland	18 October 2012
Further Consideration of Sex Offender Notification and Human Trafficking clauses	8 November 2012
Further consideration of DNA/Fingerprint clauses	15 November 2012
Further consideration	22 November 2012
	4 December 2012
Clause-by-clause consideration	6 December 2012
Committee’s report on the Act – Report NIA 86/11-15	13 December 2012
Consideration Stage	19 February 2013
	25 February 2013
Further Consideration Stage	12 March 2013
Final Stage	8 April 2013
Royal Assent	25 April 2013



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