These notes refer to the Criminal Justice Act (Northern Ireland) 2013 (c.7) which received Royal Assent on 25 April 2013

Criminal Justice Act (Northern Ireland) 2013

EXPLANATORY NOTES

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 though 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.