

*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

COMMENTARY ON SECTIONS

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).

¹ S.R. 1989 No. 442

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 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

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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.