

*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

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.

¹ S.R. 1989 No. 442

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 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.