

# **CRIMINAL JUSTICE (NORTHERN IRELAND) ORDER 2004**

**S.I. 2004 No. 1500 (N.I. 9)**

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## **EXPLANATORY MEMORANDUM**

### **INTRODUCTION**

1. This Order is made under the Northern Ireland Act 2000 (c. 1) and the Criminal Justice Act 2003 (c. 44) (“the 2003 Act”). It is made under the negative resolution procedure. Part II amends the Police and Criminal Evidence (Northern Ireland) Order 1989 (“PACE”). Part III provides for the use of live links in certain criminal proceedings. Part IV provides a right for the prosecution to appeal to the Court of Appeal in trials on indictment.
2. This Explanatory Memorandum has been prepared by the Northern Ireland Office in order to assist the reader in understanding the Order. It does not form part of the Order.

### **BACKGROUND AND POLICY OBJECTIVES**

3. The 2003 Act gained Royal Assent on 20 November 2003. Although primarily an Act for England and Wales parts of the Act apply directly to Northern Ireland. Section 334 of the Act also provides that Orders in Council may make provision for Northern Ireland in respect of certain other parts of the Act..
4. The Criminal Justice (No. 2) (Northern Ireland) Order 2003 (NI 18) made provision for purposes corresponding with the purposes of section 3(3) of the 2003 Act. The Criminal Justice (Evidence) (Northern Ireland) Order 2004 (made at the same time as this Order) makes provision for purposes corresponding with the purposes of Part 11 of the 2003 Act. This Order makes provision for the remaining purpose listed in section 334 of the 2003 Act.

### **HUMAN RIGHTS ISSUES**

5. The provisions of the Order are compatible with the Convention on Human Rights.

### **MAIN ELEMENTS OF THE ORDER**

6. The Order contains 36 Articles and 3 Schedules and is divided into 5 Parts. Part I (Articles 1 and 2) makes introductory provisions. Part II (Articles 3 to 9) amends PACE. Part III (Articles 10 to 15) relates to the use of live links in certain criminal proceedings, whilst Part IV (Article 16 to 33) relates to the prosecution right to appeal to the Court of Appeal in trials on indictment.
7. Part V (Articles 34 to 36) contains supplementary provisions and relate to Orders, repeals and supplementary and consequential amendments. Commentary is provided, below, on Articles 3 to 36. Schedule 1 contains amendments related to Part II, Schedule 2 sets out qualifying offences for the purposes of Article 21 and Schedule 3 lists provisions to be repealed.

## **COMMENTARY ON ARTICLES**

### **Part II - Amendments of PACE**

#### **Extension of powers to stop and search**

8. **Article 3** extends the definition of prohibited articles under Article 3 of PACE to include articles made, adapted or intended for use in causing criminal damage. The effect is to give police powers to stop and search where they have reasonable suspicion that a person is carrying such an article.

#### **Bail elsewhere than at a police station**

9. **Article 4** enables police officers to grant bail to persons following their arrest without the need to take them to a police station (“street bail”) where there is no immediate need to deal with the arrested person at a police station. It gives police the discretion to decide when and where an arrested person should attend a police station for interview.

#### **Limits on periods of detention without charge**

10. **Article 5** extends the scope for an officer of at least superintendent rank to authorise detention without charge up to a maximum of 36 hours. The Article allows detention to be extended for up to an overall period of 36 hours where the relevant offence is an arrestable offence, provided the other conditions are satisfied. Previously this power to detain was only authorised in respect of serious arrestable offences.
11. This broadening capacity for extended detention without charge will assist police in dealing effectively with a range of offences, e.g., robbery, where it will sometimes be extremely difficult or impossible to complete the necessary investigatory processes within 24 hours.

#### **Property of detained persons**

12. **Article 6** removes the requirement on the custody officer to record or cause to be recorded everything a detained person has with him on entering custody. He will still be under a duty to ascertain what the person has with him but the nature and detail of any recording will be at the custody officer’s discretion.
13. This seeks to reduce the serious burden on officers which can rise from recording large volumes of property. It will still be necessary to make records but it will now be open to the police to make judgements about how to balance the need for recording against the amount of administrative work.

#### **Taking fingerprints without consent**

14. **Article 7** extends the circumstances in which police may take a person’s fingerprints without consent to include taking fingerprints from a person arrested for a recordable offence and detained in a police station.
15. The existing requirement to give a person whose fingerprints are taken without consent reasons for doing so and for recording the reason as soon as practical applies to the new power.
16. Speculative searches of fingerprint records will prevent persons who come into police custody and who may be wanted on a warrant or for questioning on other matters from avoiding detection by giving a false name and address. The police will be able to confirm a person’s identity whilst he is still in police detention if his fingerprints have been taken previously.
17. It will also assist in enabling violent people to be identified more quickly and dealt with more effectively.

### **Taking non-intimate samples without consent**

18. **Article 8** extends the circumstances in which the police may take without consent a non-intimate sample from a person in police detention to include taking such a sample from a person arrested for a recordable offence. The new power is available whether or not the sample is required for the investigation of an offence in which the person is suspected of being involved.
19. The existing requirement to give a person from whom a non intimate sample is taken without consent the reason for doing so and for recording the reason as soon as practical applies to the new power.
20. The amendments do not affect the existing powers to take samples from persons held in custody by the police on the authority of a court.

### **Amendments related to Part II**

21. **Article 9** introduces Schedule 1 which deals with amendments related to this Part of the Order.

### **Part III - Live links in criminal proceedings**

#### **Live links in criminal proceedings**

22. **Article 10** enables a court to authorise witnesses, other than the defendant, to give evidence through a live link in certain criminal proceedings. “Live link” is defined in Article 15(2) and will usually mean a television link, but could apply to any technology with the same effect such as video conferencing facilities or the internet. The criminal proceedings in which these may be authorised are broadly those proceedings in which there is the possibility of a witness giving contested evidence in respect of the facts of the offence.
23. Sub-paragraphs 4(a) and (b) provide that a court may only authorise the use of a live link if:
  - It is in the interests of the efficient or effective administration of justice for the witness to give evidence by way of a live link (eg. from his place of work in a different part of the UK, rather than travelling to court); and
  - The court has been notified by the Secretary of State that suitable facilities are available in the area where the proceedings are to take place: this will allow for the phased implementation of the facilities required for live links.
24. The responsibility for ensuring that there are facilities in the remote location from which the witness intends to give evidence falls to the parties and is not covered by this Article.

#### **Effect of, and rescission of, direction**

25. **Article 11** provides that where a direction for a live link has been given, the witness must give all their evidence through a live link, making it clear that any cross-examination of the witness is also to be given by live link, although the court can rescind a direction if it seems to be in the interests of justice.
26. A party may only apply for the direction to be rescinded if there has been a material change in circumstances since the decision was made (for example if problems with the technology arise after a direction has been given).

#### **Magistrates’ courts permitted to sit at other locations**

27. Lack of facilities in particular areas or courts should, as far as possible, not frustrate the aims of this Part, therefore **Article 12** allows a magistrates’ court to move temporarily to a different location where the necessary live link facilities are available.

### **Warning to jury**

28. **Article 13** allows the judge to give directions to the jury, if necessary, to ensure that they give the same weight to evidence given through a live link as they would, had the evidence been given by the witness in person in court.

### **Rules of court**

29. **Article 14** provides for a rule making power which will enable rules of court to be made governing the procedure to be followed when an application is made for evidence to be given through a live link. Such rules may also make provision as to the arrangements which must be put in place in connection with the operation of live links.

### **Interpretation of Part III**

30. **Article 15** makes clear that the provisions of this Part of the Order are not intended to effect the inherent discretion of the court to authorise evidence to be heard by live link in circumstances other than those covered by Article 10. Live links under this Part must be capable of being seen by the defendant, the judge and jury, legal representatives acting in the proceedings and any interpreter or other person appointed by the court to assist the witness.

## **Part IV - Prosecution appeals**

### **Introduction**

31. **Article 16** sets out basic criteria for a prosecution appeal under this Part of the Order. The right of appeal arises only in trials on indictment and lies to the Court of Appeal.
32. **Paragraph 2** prohibits the prosecution from appealing rulings on discharge of the jury and those rulings that may be appealed by the prosecution under other legislation, (eg. appeals from preparatory hearings against rulings on admissibility of evidence and other points of law).
33. **Paragraph 4** provides that the prosecution must obtain leave to appeal, either from the judge of the court of trial or the Court of Appeal.

### **General right of appeal in respect of rulings**

34. **Article 17** sets out the procedure that must be followed when the prosecution wishes to appeal against a terminating ruling made by the judge. It covers rulings which are both terminating and that are de facto terminating in that sense that they are so fatal to the prosecution case that, in the absence of a right of appeal, the prosecution would offer no or no further evidence.
35. Where the prosecution fails to obtain leave to appeal or abandons the appeal, the prosecution must agree that an acquittal follow.

### **Expedited and non-expedited appeals**

36. **Article 18** provides 2 alternative appeal routes, an expedited (fast) route and a non-expedited (slower) route. The judge must determine which route the appeal will follow.
37. In the case of an expedited appeal the trial may be adjourned. In the case of a non-expedited appeal the judge may either adjourn the proceedings or discharge the jury (if one has been sworn).
38. Both the judge and the Court of Appeal have the power to reverse a decision to expedite an appeal and thus transfer it to the slower route, in which case the jury may be discharged.

### **Continuation of proceedings for offences not affected by ruling**

39. **Article 19** deals with cases where the trial involves more than one offence but the appeal does not apply to all those offences. It enables proceedings to continue in relation to any offence to which the appeal does not apply. A ruling may affect several offences and several defendants but the prosecutor may only wish to appeal against the ruling insofar as it affects one or more of those defendants or offences.
40. The Article enables proceedings to continue, at the discretion of the trial judge, against any offences affected by the ruling but not by the appeal.

### **Determination of appeal by Court of Appeal**

41. **Article 20** sets out the powers of the Court of Appeal when determining a prosecution appeal and should be read in conjunction with Article 26.

### **Right of appeal in respect of evidentiary rulings**

42. **Article 21** provides that the prosecution may appeal either a single or two or more evidentiary rulings. Like the right of appeal in Article 17, this right of appeal will only be available to the prosecution. An evidentiary ruling is a ruling which relates to the admissibility or exclusion of any prosecution evidence. The prosecution must inform the court that it intends to appeal an evidentiary ruling before the opening of the case for the defence. The right to appeal only arises in respect of certain qualifying offences. These offences are generally grave offences and are set out in Schedule 2.

### **Condition that evidentiary ruling significantly weakens prosecution case**

43. **Article 22** provides that leave to appeal a qualifying evidentiary ruling may not be given unless the judge or Court of Appeal is satisfied that the ruling (or 2 or more rulings taken together) significantly weakens the prosecution case in relation to the offence or offences that are the subject of the appeal.

### **Expedited and non-expedited appeals**

44. As in the case of appeals against terminating rulings **Article 23** provides 2 alternative appeal routes for appeals against evidentiary rulings, an expedited (fast) route and a non-expedited (slower) route.

### **Continuation of proceedings for offences not affected by ruling**

45. **Article 24** deals with cases where the trial involves more than one offence but the appeal does not apply to all of the offences. It enables proceedings to continue in relation to any offence to which the appeal does not apply.

### **Determination of appeal by Court of Appeal**

46. **Article 25** sets out the powers of the Court of Appeal when determining a prosecution appeal against an evidentiary ruling and should be read in conjunction with Article 26. The Court of Appeal may confirm, reverse or vary the ruling which was the subject of the appeal. It must then direct the next stage to take place in the proceedings.

### **Reversal of rulings**

47. **Article 26** sets out the criteria that have to be satisfied before the Court of Appeal can overturn a judge's ruling. This applies to both the general right of appeal and appeals against evidentiary rulings.

### **Appeals to the House of Lords**

48. **Article 27** amends the Criminal Appeal (Northern Ireland) Act 1980 to:

*This Explanatory Memorandum refers to the Criminal Justice (Northern Ireland) Order 2004 No. 1500 (N.I. 9)*

- give both the prosecution and defence a right of appeal to the House of Lords from a decision by the Court of Appeal on a prosecution appeal against a ruling made under this Part of the Order; and
- prevent the Court of Appeal from granting bail to a defendant who is appealing or applying for leave to appeal to the House of Lords from a Court of Appeal decision made under this Part of the Order. Bail will continue to be a matter for the trial court.

## **COSTS**

49. **Article 28** amends the Costs in Criminal Cases (Northern Ireland) Act 1968 to give the Court of Appeal power, on an appeal under this Part, to award costs to and against the defendant.

### *Effect on time limits in relation to preliminary stages*

50. **Article 29** amends Article 12 of the Criminal Justice (Northern Ireland) Order 2003 (NI 13) (power of Secretary of State to set time limits in relation to preliminary stages of criminal proceedings) to disapply the overall time limit for the period during which proceedings are adjourned pending a prosecution appeal under this Part of the Order. It also makes similar changes in respect of schedule offences under the Terrorism Act 2000 (c. 11).

### *Restrictions on reporting*

51. **Article 30** contains a general prohibition on the reporting of appeals arising under this Part of the Order, whilst giving the judge, the Court of Appeal and the House of Lords respectively, power to lift the reporting restriction either completely or to a certain extent. The prohibition is qualified by providing that the restriction ends at the conclusion of the trial and does not apply to various matters including details of the court, the defendant, witnesses, legal representatives and the offences at issue.

### *Offences in connection with reporting*

52. **Article 31** sets out the summary offences created by the new reporting restrictions under Article 30 and the penalties which may be imposed on conviction.

### *Rules of court*

53. **Article 32** makes provision for rules of court to be drawn up in respect of measures provided for under Part IV of the Order. In particular it refers to rules of court relating to:
- Time limits which are to apply in connection with any provisions under Part IV;
  - Procedures that are to be applied in connection with provisions under this Part; and
  - The powers of judges of the Court of Appeal to give leave to appeal under this Part or to exercise the power of the Court of Appeal under Article 17.

### *Interpretation of Part IV*

54. **Article 33** defines terms employed in this Part of the Order.

## **Part V - Supplementary**

### **Orders**

55. **Article 34** sets out the Secretary of State's order making powers under this Order.

### *Repeals*

56. **Article 35** introduces Schedule 3 which details a number of repeals of existing legislation.

***Supplementary and consequential provision, etc.***

57. **Article 36** provides that the Secretary of State may make an order to make any supplementary or consequential provisions which he deems necessary to give full effect to any provision in this Order.

**COMMENCEMENT**

58. **Part 1** and Articles 14, 15, 32, 33, 34 and 36 will commence on the expiration of one month from the day on which the Order is made. These provisions are either introductory, interpretative or provide for rule of court to be made. The remaining Articles will commence at a date to be determined and will be introduced by means of Order(s) by the Secretary of State.