

CRIMINAL JUSTICE (EVIDENCE) (NORTHERN IRELAND) ORDER 2004

S.I. 2004 No. 1501 (N.I. 10)

EXPLANATORY MEMORANDUM

INTRODUCTION

1. The above Order was made under the Northern Ireland Act 2000 and the Criminal Justice Act 2003 on 10th June 2004. The Order is subject to negative resolution.
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 Criminal Justice Act 2003 gained Royal Assent on 20 November 2003. Although primarily an Act for England and Wales several provisions were also extended to Northern Ireland, either directly on the face of the Act or by means of negative resolution Order in Council.
4. This Order in Council is made only for purposes corresponding to the purposes of Part 11 of the Criminal Justice Act 2003. It amends the law in Northern Ireland relating to the admissibility of evidence of bad character, hearsay evidence, evidence given by way of video recording in criminal proceedings and the use of documents to refresh memory in such proceedings.

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 46 Articles and 2 Schedules and is divided into 5 Parts. Part I contains introductory provisions. Part II relates to evidence of bad character and Part III to hearsay evidence, whilst Part IV relates to other evidence. Part V relates to saving, supplementary and consequential provisions, orders, consequential amendments and repeals. Schedule 1 contains consequential amendments and Schedule 2 lists provisions to be repealed. Commentary is provided below.

COMMENTARY ON ARTICLES

Part II: Evidence of Bad Character

“Bad character”

7. Part II of the Order is concerned with evidence of Bad Character.

8. **Article 3** defines “evidence of bad character” for the purposes of Part II as “evidence of, or a disposition to, misconduct”. This does not include evidence to do with the alleged facts of the case, or of misconduct in connection with the investigation or prosecution of the offence.

Abolition of common law rules

9. **Article 4** abolishes the common law rules governing the admissibility of such evidence. This abolition does not extend to the rule that allows a person’s bad character to be proved by his reputation. This common law rule is preserved as a category of admissible hearsay in Article 22. However, the admissibility of a person’s bad character, where it was being proven by reputation, would fall to be determined under this Part of the Order. (Statutory repeals are dealt with in Schedule 2 of the Order).

Non-defendant’s bad character

10. **Article 5** sets out the circumstances in which, outside the alleged facts of the offence and its investigation and prosecution, evidence can be given of the misconduct of a person other than a defendant in the proceedings. This might be a witness in the case or a victim but extends to any other person as well.
11. Where the prosecution and defence agree that evidence should be admitted, the leave of the court is not required. In all other cases evidence of their bad character is not to be given without the permission of the court and must meet one of three conditions:
- That it is important explanatory evidence;
 - That it is of substantial probative value to a matter in issue and that issue is one of substantial importance in the case; or
 - That the prosecution and defence agree that the evidence should be admitted.

Defendant’s bad character

12. **Article 6** provides that evidence of a defendant’s bad character is admissible in the following circumstances:
- That all parties agree to it being given;
 - That the defendant introduces the evidence himself or it is given in response to a question put by the defendant or his counsel that is intended to elicit it;
 - That it is important explanatory evidence;
 - That it is relevant to an important matter in issue between the defendant and prosecution;
 - That it has substantial probative value in relation to an important issue between the defendant and co-defendant;
 - That it corrects a false impression given by the defendant about himself;
 - That the defendant has attacked the character of another person.
13. Where evidence has substantial probative value in relation to an important issue between the defendant and co-defendant, or where the defendant has attacked the character of another person, the admissibility of evidence is subject to an application by the defendant to have the evidence excluded if admitting it would have such an adverse effect on the fairness of the trial that it ought to be excluded.

“Important explanatory evidence”

14. **Article 7** defines what is meant by important explanatory evidence. The definition mirrors that used in the context of non-defendants (Article 5).

“Matter in issue between the defendant and the prosecution”

15. **Article 8** provides that matters in issue between the defendant and the prosecution include questions of whether the defendant has a propensity to commit offences of the kind with which he is charged, or a propensity to be untruthful.
16. It helps to define terms employed in Article 6.

“Matter in issue between a defendant and co-defendant”

17. The effect of **Article 9** is that where the defendant has undermined the co-defendant’s defence, the co-defendant may attack the defendant’s character in respect of his propensity to untruthfulness. It does not rely on the nature of the co-defendant’s defence, only on the fact that the defendant has attempted to undermine it in his own defence.

“Evidence to correct a false impression”

18. Paragraph (1) of **Article 10** defines evidence giving a false impression.
19. Paragraph (2) sets out when a defendant shall be treated as responsible for giving a false impression.

“Attack on another person’s character”

20. **Article 11** deals with evidence that becomes admissible as a result of the defendant attacking another person’s character. A defendant attacks another person’s character if he gives evidence that they have committed an offence or have behaved in a reprehensible way.
21. A suggestion that a witness is mistaken is not intended to adduce this provision.
22. Where a defendant has attacked another person’s character evidence of his own bad character becomes admissible.

Stopping the case where evidence contaminated

23. **Article 12** deals with circumstances where bad character evidence has been admitted but it later emerges that the evidence is contaminated, that is, has been affected by an agreement with other witnesses or by hearing the views or evidence of other witnesses so that it is false or misleading.
24. In cases where a question has arisen, the current position is that the judge must draw that matter to the jury’s attention and warn them that, if they are not satisfied that the evidence can be relied on as free of collusion, then they cannot rely on it against the defendant. If it becomes apparent that the evidence is so contaminated that it cannot be reasonably accepted as free from collusion, the judge should direct the jury not to rely on the evidence for any purpose adverse to the defence. This will continue to be the case.
25. This Article builds on existing common law powers for the judge to withdraw a case from the jury at any time following the close of the prosecution case and confers a duty on the judge to stop the case if the contamination is such that, considering the importance of the evidence to the case, a conviction would be unsafe. This is intended to be a high test.
26. Having stopped the case the judge may consider if there is still sufficient uncontaminated evidence against the defendant to merit his retrial or may consider that the prosecution case has been so weakened that the defendant should be acquitted.

Offences committed by a defendant when a child

27. **Article 13** deals with the admissibility of certain juvenile convictions. The admissibility of evidence will fall under the general scheme for admitting evidence of bad character set out in this Part but will also have to satisfy two further requirements:
- That both of the offences are triable only on indictment; and
 - That the court is satisfied that the interests of justice require the evidence to be admissible.

Assumption of truth in assessment of relevance or probative value

28. **Article 14** requires a court, when considering the relevance or probative value of bad character evidence to assume the evidence is true. This reflects the difference between the roles of the judge and jury: it is for the jury to form a view on matters of fact, such as the reliability of the evidence, and for the judge to rule on issues of law.
29. In exceptional cases where the evidence is so unreliable that no reasonable jury could believe it was true, the judge does not have to assume the evidence is true.

Court's duty to give reasons for rulings

30. **Article 15** requires the court to give reasons for its rulings under these provisions. These must be given in open court and, in magistrates' courts, entered into the Order Book, ensuring that a record is kept.

Rules of court

31. **Article 16** makes provision for rules of court to be drawn up requiring the prosecution and co-defendant to give notice of their intention to adduce evidence of a defendant's bad character. In relation to prosecution evidence such rules *must* be made. Such rules may also include provision for the defendant to waive any notice requirement.
32. The court is empowered to take a failure to give the required notice into account in considering the exercise of its powers in respect of costs.

Interpretation of Part II

Part III: Hearsay Evidence

33. **Article 17** defines terms employed in this Part of the Order. Paragraph (2) makes it clear that where the defendant is charged with 2 or more offences the provisions of this Part refer to each Part as separate proceedings. This means that bad character evidence that is admissible in relation to one charge in the proceedings is not *automatically* admissible in relation to another charge in the same proceedings. Paragraph (3) makes it clear that nothing in this Part affects the exclusion of evidence on certain other grounds. These are:
- The rule in section 3 of the Criminal Procedure Act 1865 against a party impeaching the credit of his own witness by general evidence of bad character;
 - Under Article 28 of the Criminal Evidence (Northern Ireland) Order 1999 which places restrictions on evidence or questions about the complainant's sexual history; and
 - On grounds other than the fact that it is evidence of a person's bad character.

Admissibility of hearsay evidence

34. **Article 18** sets out the circumstances in which a statement which is not made in oral evidence during criminal proceedings can be used as evidence of the facts stated within it. The Article removes common law rules against hearsay evidence so that an out-of-

court statement will be admissible *provided* that it comes under one of the following heads:

- That it is admissible under a statutory provision;
- That it is admissible under a common law rule preserved by this Part of the Order;
- That the parties agree that it can go in; or
- That the court gives leave to admit the statement in the interests of justice.

35. The Article also lists some of the factors that the court must consider when deciding whether to grant leave to admit the statement.

Statements and matters stated

36. **Article 19** defines the type of statement which will be covered by Part III. A statement is one to which this Part applies if it is the purpose of the person making the statement to :
- cause the hearer to believe that the matter stated is true or to act on the basis that it is true; or
 - cause a machine to operate on the basis that the matter is as stated.
37. **Article 19** therefore, changes the common law position and will *not* prevent the admission of such implied assertions on the basis of the hearsay rule.

Cases where a witness is unavailable

38. **Article 20** sets out a series of categories under which first hand hearsay evidence, whether oral or documentary, will be admissible, provided that the witness is unavailable to testify for a specified reason.
39. The specified reasons are that the person is:
- Dead;
 - Unfit because of bodily or mental condition;
 - Absent abroad;
 - Disappeared; or
 - Unwilling to give evidence through fear.
40. A number of conditions apply to the admissibility of such evidence.

Business and other documents

41. **Article 21** provides for the admissibility of statements in documentary records provided certain conditions are met. These conditions are:
- That the document was created or received by a person in the course of a trade, business, profession or as the holder of a paid or unpaid office; and
 - That the person who *supplied* the information in the statement had or may reasonably be supposed to have had personal knowledge of the matters dealt with in the statement
 - That the evidence is oral evidence; and
 - That each person through whom the information was supplied received the information in the course of a trade, business, profession or as the holder of a paid / unpaid office.
42. In the case of documents prepared for the purpose of criminal investigations or proceedings the statement will only be admissible if the *supplier* of the information is unavailable or cannot reasonably be expected to recall any of the matters dealt with in the statement.

Preservation of certain common law rules in relation to hearsay

43. **Article 22** preserves a number of common law exceptions to the old rule against the admissibility of hearsay evidence. This means that in the specified circumstances, an out of court statement will be admissible as evidence of any matters stated in it. These are:
- “Public information”;
 - “Reputation as to character”;
 - “Reputation or family tradition”;
 - “Res gestae”;
 - “Confessions”;
 - “Admissions by agents”;
 - “common enterprise” is preserved;
 - “expert evidence” is preserved.

Inconsistent statements

44. **Article 23** clarifies the relationship between hearsay evidence and previous inconsistent statements. The Article provides that if a witness admits that he has made a previous inconsistent statement or it has been proved that he made such an inconsistent statement, it is *not only* evidence which undermines this ‘credibility’, but it is also evidence of the *truth* of its contents.

Other previous statements of witnesses

45. **Article 24** makes other previous statements admissible as evidence of the truth of their contents (not merely to bolster the credibility of the witness’s oral evidence) in certain specified circumstances.

Additional requirement for admissibility of multiple hearsay

46. **Article 25** sets out the approach which the courts should take to multiple hearsay. This is where information passes through more than one person before it is recorded. The Article provides that a hearsay statement is admissible to prove the fact that a statement was made in 3 circumstances:
- Where either of the statements is admissible under Articles 21 (business documents), 23 (inconsistent statements) or 24 (other previous statements of witness);
 - Where all parties to the proceedings agree; or
 - Where the court uses its discretion to admit the statement.

Documents produced as exhibits

47. **Article 26** provides that if a statement previously made by a witness is admitted in evidence and produced as an exhibit under Articles 23 or 24 the jury should not take the exhibit with them when they retire to the jury room, unless the court considers it appropriate or all parties agree that it should accompany them.

Capability to make statement

48. **Article 27** provides that an out of court statement cannot be admitted under Articles 20, 23 or 24 if the person who made the statement did not have the “required capability” for making a statement at the time the statement was made.
49. A statement may not be admitted under Article 21 if any person who supplied or received the information or created or received the document did not have the “required

capability”, or where that person cannot be identified, cannot reasonably be assumed to have had the required capability.

50. A person is understood to have the required capability if he can understand questions put to him and give answers which can be understood.

Credibility

51. **Article 28** makes provision for challenges to the credibility of the maker of a hearsay statement who does not give oral evidence in person in the proceedings. If such a hearsay statement is admitted as evidence of a matter stated, this Article provides certain rights for the person against whom hearsay evidence has been admitted, to produce, in specified circumstances, evidence to discredit the maker of the statement or to show that he has contradicted himself.

Stopping the case where evidence is unconvincing

52. **Article 29** imposes a duty on the court to stop a case and either direct the jury to acquit the defendant or discharge the jury, if the case against him or her is based wholly or partly on an out of court statement which is so unconvincing that, considering its importance to the case, a conviction would be unsafe. This issue only relates to jury trials and to service courts because in other cases the finders of fact would be found to dismiss a case in these circumstances or order a retrial if appropriate.
53. Paragraph (2) imposes a duty on the court to direct the jury to acquit any other offence not charged, of which they could convict by way of an alternative to the offence charged if the judge is satisfied that a conviction would be unsafe.

Court’s general discretion to exclude evidence

54. **Article 30** provides a further discretion to exclude superfluous out of court statements if the court is satisfied that the value of the evidence is substantially outweighed by the undue waste of time that its admission would cause.

Expert evidence: preparatory work

55. **Article 31** seeks to address the problem that arises where information relied upon by an expert witness is outside the personal experience of the expert (eg work undertaken by an assistant) and cannot be proved by other admissible evidence. The intention is that the rules about advanced notice of expert evidence will be amended to require the advanced notice of the name of any person who has prepared information on which the expert has relied.
56. The Article will in certain circumstances enable the expert witness to base his evidence on any information supplied by that assistant on matters of which that assistant had personal knowledge.
57. The Article applies if:
- The statement was prepared for the purpose of criminal proceedings;
 - The expert’s assistant had, or might reasonably be supposed to have had, personal knowledge of the matters stated; and
 - A notice has been given under the advance notice rules of the name of a person who has prepared a statement on which it is proposed that the expert witness should base any opinion or inference, and the nature of the matters stated.

Confessions

58. **Article 32** inserts a new Article 74A into the Police and Criminal Evidence (Northern Ireland) Order 1989 to apply the same rules to confession adduced by the co-defendant to those adduced by the prosecution under Article 74 of the Police and Criminal

Evidence (Northern Ireland) Order 1989 – ie. the confession will not be allowed if obtained by oppression or is rendered unreliable.

Representations other than by a person

59. **Article 33** provides that where a statement generated by a machine is based on information implanted into the machine by a human, the output of the device will only be admissible where it is proved that the information was accurate.

Evidence at retrial

60. **Article 34** provides that if a retrial is ordered by the Court of Appeal, evidence must be given orally if it was given that way at the original trial, except in certain defined situations, in which case a transcript of the original evidence may be used. The exceptions are:
- That all parties agree to the evidence being admitted;
 - That a witness is unavailable to give evidence in accordance with Article 20; or
 - That a witness is unavailable to give evidence for a reason other than those listed in Article 20 and his evidence is admitted under the residual discretion in Article 18(1)(d).

Rules of court

61. **Article 35** gives a power for making rules of court about the provisions in the Order. The intention is that rules of court will govern both the notice and the leave procedures under Part III.

Proof of statements in documents

62. **Article 36** provides that a statement in a document can be proved by producing either the original document or an authenticated copy. It is intended to cover all forms of copying, including the use of imaging technology.

Interpretation of Part III

63. **Article 37** defines terms employed in this Part of the Order.

Repeals

64. **Article 38** repeals existing legislation which is spent or superceded by this Order.

Part IV: Other Evidence

Evidence by video recording

65. **Article 39** permits a video recording of an interview with a witness (other than the defendant), or a part of such a recording, to be admitted as evidence in chief of the witness in a wider range of circumstances than is presently the case.
66. The court can authorise this provided that:
- The person claims to be a witness to the offence (or part of it) or to events closely connected to the offence;
 - The video recording of the statement was made at a time when events were fresh in the witness's memory; and
 - The alleged offence can only be tried in a Crown Court or is an either-way offence prescribed by Order of the Secretary of State.
67. If these requirements are satisfied the court may admit the recording *provided that*:

*This Explanatory Memorandum refers to the Criminal Justice
(Evidence) (Northern Ireland) Order 2004 No. 1501 (N.I. 10)*

- The witness's recollection of events is likely to be significantly better at the time he gave the recorded account than by the time of the trial; and
- It is in the interests of justice to admit it.

Video evidence: further provisions

68. **Article 40** provides that where a video recording (or part of one) is admitted under Article 39 the recording should be the final statement of any matters dealt with adequately within the recording for the purpose of the witness's evidence-in-chief.
69. The Article also allows video recordings to be edited if the interests of justice so require.

Use of documents to refresh memory

70. **Article 41** creates a presumption that a witness in criminal proceedings may refresh his memory from a document whilst giving evidence, providing that:
- He indicates that the document represents his recollection at the time he made it; and
 - His recollection was likely to be significantly better at the time the document was made (or verified).

Interpretation of Part IV

71. **Article 42** defines terms employed in this Part of the Order.

Part V: Final Provisions

Saving

72. **Article 43** provides that no provision under this Order has effect to criminal proceedings which begin before the commencement of that provision.

Supplementary and consequential provisions

73. **Article 44** 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.

Orders

74. **Article 45** sets out the Secretary of State's order making powers under this Order.

Consequential amendments and repeals

75. **Article 46** provides for a number of minor and consequential amendments to, and repeals of, existing legislation. The details are contained in Schedules 1 and 2.

COMMENCEMENT

76. **Part 1** and Articles 16, 35, 44 and 45 will commence on the expiration of one month from the day on which the Order is 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.