

EXPLANATORY MEMORANDUM TO
THE CRIMINAL JUSTICE ORDER (NORTHERN IRELAND) 2008
2008 No. 1216 (N.I. 1)

1. This Explanatory Memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of Her Majesty.

This Memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Description**

2.1 The Criminal Justice (Northern Ireland) Order 2008 introduces new sentencing powers; risk management arrangements for sexual and violent offenders; road traffic offences; and miscellaneous provisions including provisions on alcohol purchase and consumption, and increased penalties for knife offences in Northern Ireland.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None

4. **Legislative Background**

4.1 This Order is made by the Order in Council procedure under Section 85 of the Northern Ireland Act 1998 and was subject to affirmative resolution. As required by the Act, the draft Order was laid along with a statement of the representations made during consultation, a report on the draft proposal by the Northern Ireland Assembly, and a statement containing details of changes made after consultation.

4.2 The sentencing provisions in the Order build on existing sentencing legislation for Northern Ireland by way of the Criminal Justice (NI) Order 1996; the Life Sentences (NI) Order 2001; and the Treatment of Offenders Act (NI) 1968. Road traffic powers update the Road Traffic (NI) Order 1995 and Road Traffic Offenders (NI) Order 1996. A range of other underpinning legislation is updated including the Prison Act (NI) 1953 and the Licensing (NI) Order 1996. Most of the powers are based on similar provisions in England and Wales.

5. **Territorial Extent and Application**

5.1 This instrument extends to Northern Ireland only.

6. European Convention on Human Rights

6.1 The Minister, Paul Goggins, made the following statement regarding human rights:

“In my view the provisions of the draft Criminal Justice (Northern Ireland) Order 2008 are compatible with the Convention rights”

7. Policy background

Background

7.1 The Review of the Criminal Justice System in Northern Ireland, which reported in 2000, set a strategic template for the criminal justice system in Northern Ireland for the following years across a range of key issues: the Courts, the Prosecution Service, community safety, juvenile justice to name a few. While the Criminal Justice Act 2003 was then under development, the Government’s view was that any changes to sentencing powers needed to be reviewed separately in Northern Ireland, particularly so that they could be subject to full, local public consultation. Northern Ireland already had its own established sentencing framework based around the Criminal Justice (NI) Order 1996.

7.2 In March 2005, a policy consultation was therefore held on a Review of the Sentencing Framework for Northern Ireland, built around much of what was contained in the Criminal Justice Act 2003. The consultation sought views on sentences and sentencing; dealing with dangerous offenders; discretionary release and post-release supervision; electronic monitoring and fine default amongst other topics. That Review and consultation identified a need for additional provisions in Northern Ireland for the management of dangerous violent and sexual offenders. Other provisions in the Order were subject to separate consultation exercises. The road traffic powers were consulted upon from 20 November 2006 to 15 January 2007 and proposed changes to knife crime laws were consulted on from 19 July to 13 October 2006. Prior to the restoration of the Northern Ireland Assembly, the Department of Social Development carried out a consultation on powers to deal with drinking in public.

7.3 Following the announcement of the sentencing policy package (announced by Written Ministerial Statement by the then Minister of State, David Hanson, on 5 December 2006) there was considerable public support for the proposals. A major campaign to improve sentencing powers resulted in a petition of around 35,000 signatures along with widespread local community and media support for the proposals.

Consultation

7.4 A proposal for a draft Order was prepared; referred to the Northern Ireland Assembly under Section 85(4) of the Northern Ireland Act 1998; and put out to public consultation on 8 November 2007. The Assembly produced a formal Report on the draft Order on 28 January 2008, which contained a number of recommendations while being broadly supportive of the proposals. The consultation period formally ended on 31 January 2008, with a total of 54 responses received.

7.5 The Assembly welcomed the draft proposals referring to them as timely and relevant to the protection and safety of communities. The emphasis on public protection was welcomed by all respondents as were the proposals to put violent and sex offender risk management arrangements on a statutory footing. Providing for supervision and rehabilitation of offenders was equally welcomed. The majority of responses were supportive of the sentencing proposals.

7.6 A number of provisions were changed in light of the representations made. These were detailed in a Statement laid before Parliament with the draft Order, a copy of the Assembly's Report and a Statement and Summary of Representations.

The Order

7.7 The Criminal Justice (Northern Ireland) Order 2008 provides new sentencing powers for dangerous sexual and violent offenders; establishes post-release supervision on release from prison; removes automatic remission (currently 50% in Northern Ireland) for sentenced prisoners; and creates new powers to manage the risk posed by certain sexual and violent offenders in the community. It also contains road traffic powers, powers to combat alcohol-related disorder and increased penalties for offences relating to knives; and a range of other matters are also provided.

7.8 The Order has a number of policy purposes. It is designed to increase public protection from dangerous offenders and to respond to issues of particular community concern. By adjusting curfew powers, introducing electronic monitoring, and providing a community alternative to custody for fine default, the proposals are also aimed at ensuring that custody is only used for those offenders who merit it. Other provisions are designed to improve the operational efficiency of the criminal justice system and in certain matters to allow Northern Ireland to keep pace with developments in other jurisdictions.

Overview of the Order

7.9 The Criminal Justice (Northern Ireland) Order 2008 has six Parts, the main elements of which are new sentencing powers (Part 2); risk assessment and management of certain offenders in the community (Part 3); a series of road traffic offences and penalties (Part 4); and a range of miscellaneous matters to enhance the law in a number of areas (Part 5). These are supplemented by 6 Schedules.

7.10 Part 1 is introductory dealing with commencement and interpretation. Part 2 provides changes to the range of sentences available to the courts particularly in relation to dangerous offenders. It creates new sentences for dangerous sexual and violent offenders and establishes post-release supervision on release from prison. Other powers provide for the management of low-risk offenders in the community by way of electronic monitoring; the expansion of curfew orders; and the creation of a non-custodial alternative for fine default.

7.11 Part 3 strengthens arrangements to more effectively manage the risk posed by certain offenders in the community by a multi-agency risk management approach. Parts 4 and 5 deal with a range of other criminal justice matters. They contain road traffic powers; powers to combat alcohol-related disorder; increased penalties for offences relating to knives; and a range of other matters. Part 6 provides Supplementary provisions.

The Provisions

7.12 Within Part 1 provisions are created to allow commencement of powers at different times. The Interpretation Act (Northern Ireland) is applied to the Order.

7.13 In Part 2, interpretation and definitions are set out for the purposes of the sentencing powers being created (Articles 3 and 4); sentencing principles for custodial sentences are established (Articles 5-8); and requirements defined around procedures and court reports (Articles 9-11). Article 8 specifies that for fixed term prison sentences dealing with offences committed after commencement, current law on remission will not apply and 50% remission will therefore not be available.

7.14 *Chapter 3*, Articles 12-15 provide for the introduction of new measures for the sentencing and assessment of dangerous violent and sexual offenders convicted of specified offences. Dangerousness is assessed as whether there is a significant risk of serious harm to members of the public. Serious harm means death or serious personal injury whether physical or psychological. Dangerousness assessments will be based on reports specifically prepared for that purpose by specialists including probation officers, psychiatrists or psychologists.

7.15 If an offender has been assessed as dangerous and has been convicted of a serious sexual or violent offence specified in Schedule 1 committed after commencement with a maximum penalty of 10 years or more, he will receive either a discretionary life sentence, an indeterminate custodial sentence (an “ICS”), or an extended custodial sentence (an “ECS”). The offender would only receive an ICS if the court considers that an extended sentence would not be adequate to protect the public from serious harm and will specify a minimum term or “tariff” which the offender is required to serve in custody before becoming eligible for release. The “tariff” must be at least two years. If released, the licence remains in force for life, unless revoked.

7.16 A dangerous offender who has been convicted of a sexual or violent offence specified in Schedule 2 for which the maximum penalty is less than 10 years will be given an ECS. This sentence will be a determinate sentence with a custodial part of at least one year and offenders will become eligible for consideration for release on licence at the half way point. In addition to the custodial part, courts will set extended supervision periods of up to five years for violent offenders and eight years for sexual offenders. Remission will not apply.

7.17 *Chapter 4* provides new powers for the release of prisoners on licence; recall to prison following breach of licence requirements; and further re-release. Release following ICS and ECS sentences will involve referral of cases by the Secretary of State (Article 18) to a new independent body of Parole Commissioners for Northern Ireland. On completion of the ICS tariff, the offender is risk assessed by the Parole Commissioners. The prisoner can be released or required to remain in prison until the Parole Commissioners consider the risk has sufficiently diminished to allow release and supervision in the community. For an ECS, release would be possible during the second half of the custodial part of the sentence based on the Parole Commissioners risk assessment. If not released at that point, the person must be released at the end of the custodial part.

7.18 Articles 19 and 20 allow the Secretary of State to release prisoners ahead of their release date in appropriate circumstances. For certain fixed term prisoners, subject to sentence lengths and period served, release can be within the last 4 ½ months of their sentence; they must always be subject to a curfew; and can be electronically monitored (Article 26). Powers are also created to allow compassionate release of prisoners on licence (Article 20).

7.19 Following release, all ICS and ECS prisoners will be on licence and under supervision. For the ICS sentence that could be in place for life (Article 22). For other prisoners, licence conditions are recommended by the court when sentencing for 12 months or more (Article 23) – to be set by the Secretary of State on release. Licence conditions are set by the court for sentences of less than 12 months (Article 24). Standard licence conditions will be prescribed by the Secretary of State by rules.

7.20 Article 26 deals with the curfew conditions which must be applied to prisoners being released ahead of their release date. A curfew cannot be for more than 9 hours in a day; can include electronic monitoring; and cannot be carried through into a post-release licence – though it can be re-imposed separately as part of that licence.

7.21 Articles 28-31 provide for prisoners to be recalled to custody by the Secretary of State for breach of conditions. The Secretary of State can seek a recommendation on recall from the Parole Commissioners or recall directly in appropriate circumstances. Reasons are given for recall. With the exception of those recalled from an Article 19 licence – who will have been in breach during the course of the custody part of their sentence - recalls are referred to the Parole Commissioners for review (Articles 28 and 30).

7.22 Article 29 provides the further release after recall procedure to be followed for non-dangerous offenders. It allows the Parole Commissioners to direct the release of the prisoner; to refuse release and set a future review; or to set a future release date. In the latter case, the Secretary of State can make an application to have the future date reviewed.

7.23 Article 34 replaces current powers to sanction sex offenders for breach of licence conditions under Article 26 of the Criminal Justice (NI) Order 1996 – commonly known as a “sex offender licence”. Under current law, a fine of £1000 can be imposed or the licence can be suspended for a maximum period of 6 months. The new provisions allow for a fine at the same level, suspension of the licence for a period set by the court or the licence can be revoked entirely..

7.24 Chapter 5 allows increased use of curfews and the use of electronic monitoring as conditions of bail; as conditions or requirements attached to certain non-custodial sentences including sex offender licences, probation and youth conference orders as well as the non-custodial elements of custody probation, combination and juvenile justice centre orders; and as conditions of a licence on release from custody of life prisoners, ICS, ECS and fixed term prisoners (Articles 35 and 36). Articles 37 and 38 restrict curfew requirements to between two and twelve hours per day (with a power for the Secretary of State to adjust those levels by order). Curfew requirements must avoid conflict or interference with religious beliefs, work or school commitments.

7.25 Articles 39-44 provide powers for establishing systems of electronic monitoring. They define an electronic monitoring requirement and require that, if the co-operation of a third person is necessary to secure monitoring, his consent must be obtained. The person responsible for the monitoring must notify the offender and any person whose consent has been sought. A court cannot impose an electronic monitoring requirement unless suitable arrangements are in place in the area (as determined by the Secretary of State) and the court must also be satisfied that the necessary provision can be made. Copies of the electronic monitoring requirement must be given to relevant parties. Article 44 provides for rules to be made to regulate electronic monitoring.

7.26 *Chapter 6* (Article 45 along with Schedule 3) creates the Supervised Activity Order (SAO) available to the court as an alternative to committal to custody for fine default. Rather than sending offenders to prison for non-payment of a fine, courts will be able to impose a community-based alternative. The SAO will be available for fines up to £500 and will have a minimum of 10 hours and maximum of 100 hours activity requirement. Activities will be set and supervised by a supervising officer – a probation officer assigned according to rules. Part payment of a fine before the coming into force of the SAO will reduce the number of hours required.

7.27 Schedule 3 creates the procedural aspects; including giving of copies of the order and explanations; reporting for supervision; and adjusting the order. Failure to comply can result in a longer prison sentence than would have been the case had a custodial period been set in the first instance.

7.28 *Chapter 7* (Article 46 and Schedule 4) creates a body of independent Parole Commissioners for Northern Ireland to assess dangerous offenders’ suitability for release into the community and to review decisions recalling licensed prisoners to custody. The current Life Sentence Review Commissioners are renamed and their role extended to include these functions.

7.29 By way of Schedule 4, the Parole Commissioners provisions largely replicate and replace those already in law by way of the Life Sentences (NI) Order 2001. It sets out the arrangements for the appointment of Commissioners. It describes their tenure, remuneration and allowances. It provides for the Secretary of State to appoint a Chief and deputy Chief Commissioner as well as providing the Commissioners with staff, premises and facilities. The Chief Commissioner is required to prepare an annual report at the end of each financial year and lay it before both Houses of Parliament. It also provides the power for the Secretary of State to make supporting Rules prescribing the procedure to be followed in relation to proceedings of the Commissioners.

7.30 *Chapter 8* (Articles 47 and 48) are provisions to allow certain community penalties to be referred more readily to the Crown Court when breach has occurred. Currently, when originally imposed by a Crown Court, breach of probation, community service, reparation, community responsibility and youth conference orders must go through a Magistrates Court before referral upwards. To prevent delay and provide more efficient procedures breaches of these orders can be brought back more readily to the original court that imposed them.

7.31 Part 3 (Articles 49-51) creates new powers for risk assessment and management. It creates a duty on a number of criminal justice agencies and others to assess and manage the risk posed by certain persons in the community, where that risk can best be managed by agencies sharing information and working together. The agencies that will be operating the guidance are specified and include the police, probation service, the prison service, the Youth Justice Agency, the NSPCC, and relevant Government Departments or agencies. Guidance, prepared by the agencies and approved by the Secretary of State, will provide the detail of how the arrangements will operate in practice. An annual report must be prepared.

7.32 Part 4 creates new road traffic provisions and contains new powers to address three areas of road traffic law.

7.33 Building on similar powers in England and Wales, “bad driving” is addressed by a new offence of “causing death, or grievous bodily injury by careless driving” (Article 52); more severe penalties are provided for unlicensed, disqualified or uninsured drivers who cause death by driving (Article 53); and a new definition of “careless driving” is given (Article 62). An alternative verdict for unsuccessful manslaughter prosecution is also provided (Article 64). “Drink driving” is addressed including police powers to require breath specimens (Article 59); and regulations regarding ‘alcohol ignition interlock’ programmes. The draft Order also provides a series of powers to allow police to seize vehicles causing alarm, distress or annoyance; and to regulate the use of devices used by some motorists to avoid speed detection. New penalties are provided for driving without insurance (Article 55) and driving whilst disqualified (Article 56).

7.34 Part 5 creates a series of miscellaneous and supplementary powers.

7.35 Articles 67-72 create new powers around the purchase and consumption of alcohol - again built around existing provisions in England and Wales. A “test purchase” power is to be created by Article 67 to allow police officers to identify bars and off-licences selling alcohol to under 18s. The test purchase power can only be used under the direction of a police constable; with both the young person’s and parental consent; and with a requirement to avoid any risk to the welfare of the minor. Detailed guidance on its operation will be published.

7.36 Powers are also created to deal with the consumption or possession of alcohol in designated public places where there is a problem of anti-social behaviour associated with drinking alcohol (Articles 68-72). An offence would be committed when a person failed to comply with a constable’s request not to drink alcohol, or with his request to surrender alcohol. Public places would be designated by district councils by order (Article 70). The maximum penalty on conviction of the new offence would be a fine of up to £500 and fixed financial penalties of up to a quarter of that level would be available as an alternative to prosecution.

7.37 The Secretary of State is to make regulations for the procedure by which councils should designate the public places covered by the new offence. This will include consulting with the police before designation. Article 71 allows the new powers to be progressively introduced to replace current bye-laws.

7.38 Articles 73-78 amend prison legislation including changes concerning medical officer appointment and amendments to better control, regulate and modernise prison security. Amendments to the laws on assisting a prisoner to escape and conveyance of prohibited articles into or out of prison including drugs, weapons, mobile phones, satellite phones and cameras are also provided, with increased penalties.

7.39 Articles 79-83 make a number of provisions designed to consolidate the law on and increase the use of live links and replicate equivalent powers in England and Wales. Live link facilities are already in use for prison remand purposes and have the benefit of providing a cost-effective and secure means for prisoners to participate in remand hearings without having to be transported to court. The new powers will expand the use of links in Courts to include, in certain circumstances: preliminary hearings, sentencing hearings, evidence of vulnerable accused, and appeals under the Criminal Appeal Act.

7.40 Articles 84 and 85 make two technical amendments in relation to legal aid provision. These amendments are to the Access to Justice (Northern Ireland) Order 2003 and relate to legal aid for proceedings relating to anti-social behaviour orders and to proceedings under the Proceeds of Crime Act 2002.

7.41 Amendments to the Police and Criminal Evidence (Northern Ireland) Order 1989 (“PACE”) are made by Articles 86-89. They alter the police authorisation level required for certain procedures (88 and 89); introduce trigger powers for entry into premises in particular circumstances (Article 86); and create new powers to allow police to attach conditions to bail before charge (Article 87). Again these bring NI law up to date with England and Wales.

7.42 New sentencing powers to extend the maximum penalties available to the courts for certain offences relating to knives (though they also include crossbows and other offensive weapons) are created by Article 90. Broadly the new penalties will relate to offences of possession, manufacture and sale. The provisions introduce a standard set of maxima – 12 months’ imprisonment and/or a £5000 fine where a person is convicted in a magistrates’ court; 4 years and/or an unlimited fine for convictions in the Crown Court.

7.43 Article 91 creates a power for NI, as in England and Wales for courts to impose a driving disqualification for any offence. This is designed to allow courts to disqualify from driving individuals convicted of offences which might involve vehicles but are not ‘motoring’ offences *per se*. An example might be “kerb crawling”.

7.44 Article 92 creates new provisions to enable a wider range of magistrates’ courts to hear the proving of the execution of arrest warrants. In appropriate circumstances an arrest warrant issued in one County Court Division could be proven in the Division of arrest or in a County Court Division which adjoins the Division of arrest. The transport of defendants across court divisions would be reduced providing a more effective and efficient procedure.

7.45 Two adjustments are made in relation to legislation relating to anti-social behaviour orders (Articles 93 and 94). These allow existing interim ASBO order powers to operate more effectively and on a similar basis to England and Wales permitting applications to be made without notice in urgent circumstances. A technical amendment is also included to enable rules of court to be made to allow special measures provisions for witnesses to be available in ASBO cases.

7.46 A number of provisions are included relating to youth justice legislation. Rehabilitation periods for youth conference orders, reparation orders and community responsibility orders are clarified (Article 95). Powers are also created to allow children aged 17 who require custody to be accommodated in a juvenile justice centre if no suitable accommodation is available in a young offenders centre (Article 96); removing the requirement for a care order to be suspended whilst a child is serving a juvenile justice centre order (Article 97); clarifying the period a youth conference order remains in force (Article 98); and the powers of the youth court to notify the appropriate authority where it has concerns regarding the welfare of a child are extended (Article 99).

7.47 Part 6 provides for the statutory procedures for regulation, order or rule making powers by the Secretary of State; the making of incidental or consequential provisions and any transitory transitional or savings provisions; amendments and repeals.

8. Impact

8.1 A Regulatory Impact Assessment was completed on the sentencing provisions of the Criminal Justice Order. The Order does not create additional burdens for business, charities or voluntary bodies nor will they have an adverse impact upon competition or on small firms.

8.2 Impact on the public sector will fall primarily on the Northern Ireland Prison Service, the Probation Board for Northern Ireland and other agencies within the criminal justice system. Resources will be made available to ensure effective implementation of the provisions

9. Contact

9.1 Andrew Lavery at the Northern Ireland Office Tel: 02890 527442 or email: Andrew.Lavery@nio.x.gsi.gov.uk can answer any queries regarding the instrument.

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