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Criminal Justice Bill

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This paper provides information on the clauses of the Criminal Justice Bill and policy proposals underpinning the Bill.

Key Points

- The Criminal Justice Bill was introduced in the Northern Ireland Assembly on 25 June 2012. The Second Stage Debate took place on the 3 July 2012;
- The Bill has ten clauses and four schedules and covers three discrete policy areas: sex offenders; human trafficking; and DNA and Fingerprint retention.
- The Department of Justice consulted on policy proposals relating to the three strands contained within the Bill;
- In relation to the Department's proposals on the review mechanism for sex offender notification requirements, the majority of respondents supported the proposal but some had concerns whether it was sufficiently rigorous, others suggested that the review period should be based on the level of risk rather than an arbitrary statutory period.
- During the consultation period and the second stage debate, concerns were expressed that the Department's proposals on human trafficking were minimalist and following the approach adopted in England and Wales. A number of recommendations were made by respondents to strengthen the proposals. In addition, Lord Morrow has recently published a consultation paper on a Human Trafficking and Exploitation Bill which he intends to introduce in the Assembly and which is intended to improve assistance and support to victims, addresses demand and investigations and prosecutions.
- In relation to the consultation proposals on DNA and Fingerprint retention, a majority of respondents favoured the approach taken as an improvement on the current indefinite retention policy. However a number of issues were raised. One concern regarded the retention of material in juveniles and compliance with international human rights law. During the second stage debate, concerns were raised about the erosion of the presumption of innocence principle.
- The Department has indicated that the proposals have been screened out as not having an adverse impact on section 75 groups. The proposals are considered compatible with the ECHR and remedy incompatibilities highlighted by the UK Supreme Court and ECtHR.

Executive Summary

Sex Offenders

The Bill provides for a review mechanism for sex offenders subject to indefinite notification requirements. The change in the law is required in order to comply with a UK Supreme Court ruling which held that the current policy of indefinite retention is incompatible with the European Convention on Human Rights. The Bill allows sex offenders subject to indefinite notification requirements to make an application for a review. The review period in the Bill is 15 years in adults and 8 years in under 18's, after the date of initial notification. These review periods are in line with other UK jurisdictions. The Bill also ends notification requirements for acts that are no longer offences and a requirement on sex offenders who commit an offence in an EEA State other than the United Kingdom to notify the police. Finally, the provisions allow Sexual Offences Prevention Orders to require a sex offender to perform a specified action for the purpose of protecting the public.

Human Trafficking

The Bill creates two new trafficking offences in order to meet the requirements of the EU Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims. The implementation deadline is 6 April 2013. Firstly the Bill makes provision that it will be an offence to traffick another person within the UK who was not already trafficked into the UK. The second allows for prosecution of a UK national or a person habitually resident in the UK who has trafficked someone anywhere outside the UK. The paper highlights concerns that the Department of Justice is taking a minimalist approach in complying with the Directive and a number of recommendations have been made to strengthen the proposals. Recommendations from respondents include: amendments to the Gangmasters' Licensing Act, increasing sentences in some areas, addressing the lack of a definition of trafficking, the treatment of victims in criminal proceedings (including protection from prosecution), the provision of a guardian or a representative for trafficked children and the creation of a national rapporteur. The Department indicated that these issues would be considered by the Organised Crime Task Force.

DNA and Fingerprint Retention

The Bill replaces the current framework on the retention of DNA and fingerprints in order to comply with a ruling by the European Court of Human Rights (ECtHR). The ECtHR ruled that the blanket and indiscriminate nature of retention violates Article 8 (the right to private life) of the ECHR. The ECtHR paid particular attention to the

Scottish model of retention in its ruling which the court found to be consistent with the Committee of Ministers' recommendation. The new retention framework contained within the Bill makes distinctions between those who are convicted and who are not convicted, adults and juveniles, serious offences and minor offences. The paper outlines concerns raised during the consultation period and the second stage debate. Concerns were raised during the consultation stage in relation to the retention of DNA and fingerprints of juveniles. Some respondents suggested that material should be destroyed on reaching the age of 18. Some suggested that the proposals do not fully engage with the UK's obligations under the United Nations Convention on the Rights of the Child (UNCRC), particularly Article 40 on the right to the presumed innocent until proven guilty. Some Members also raised concerns during the second stage debate that the presumption of innocence was being undermined.

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1 Introduction

The Criminal Justice Bill was introduced in the Northern Ireland Assembly on 25 June 2012. The Bill has ten clauses and four schedules which amend the current law. The first four clauses of the Bill deal with sex offender notification requirements in order to remedy a declaration of incompatibility ruling by the UK Supreme Court in 2010.¹ The clauses also introduce measures to increase public protection and strengthen the system of notification.² The second strand of the Bill introduces new offences to comply with the EU Directive on preventing and combating trafficking in human beings.³ The third strand of the Bill deals with legislative proposals to replace the current framework on DNA and Fingerprint Retention policy in Northern Ireland. This change is required in order to comply with a ruling by the European Court of Human Rights (ECtHR) which found that indefinite retention of DNA and fingerprints are incompatible with Article 8 of the European Convention on Human Rights (ECHR).⁴

The following sections will examine:

- The current legislative and policy framework background in each of the areas;
- The policy consultations underpinning the Bill conducted by the Department and issues raised by respondents;
- The proposed clauses of the Bill;
- Equality and human rights issues in relation to the Bill; and
- Financial implications associated with introducing the Bill.

2 Background to the Bill and Purpose of the Bill

2.1 Sex Offender Notification Requirements

The current legislation covering sex offender notification requirements in Northern Ireland is set out in the Sexual Offences Act (SOA) 2003. Part 2 of the legislation sets out the periods of notification which are attached to an offender which depends on the length and type of disposal given. The period of notification in the case of a person who receives a caution is two years.⁵ Custodial offences of up to 6 months attract 7 years, up to 30 months, 10 years and over 30 months, an indefinite period.⁶ All other disposals attract 5 years.¹ The initial time allowed to give the required information

¹ *R (F and Thompson) v Secretary of State for the Home Department* [2010] UKSC 17

² Official Record of the Northern Ireland Assembly, Second Stage of the Criminal Justice Bill, 3 July 2012

³ EU Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims

⁴ *S & Marper v UK*, 4 December 2008, (Applications nos. 30562/04 and 30566/04)

⁵ Sections 80 (1) (d) and 82 of the Sexual Offences Act 2003

⁶ Section 82 of the Sexual Offences Act 2003

specified to the police is 3 days.⁷ It is an offence to fail to comply with the notification requirements: on indictment, the offence is punishable by a term of imprisonment of up to 5 years; and on summary conviction, the offence carries a term of imprisonment of up to 6 months.

The law has to change as a result of a UK Supreme Court ruling which established that indefinite notification requirements in Section 82 of the Sexual Offences Act 2003 are incompatible with Article 8 of the European Convention of Human Rights (ECHR). The appeals heard by the Supreme Court related to two independent claims for judicial review.⁸ The first of the appeals was brought by an eleven year old boy who committed serious sexual offences including two offences of rape on a six year old boy. This applicant was convicted and sentenced to 30 months imprisonment on each count which brought the notification requirements into effect. The second applicant, Mr Thompson, was convicted of two counts of indecent assault on his daughter and sentenced to a 5 year term of imprisonment (to run concurrently). This sentence also brought the notification requirements into effect. In his judgement, Lord Philips highlighted that the issue was one of proportionality.⁹ He stated that notification requirements interfere with the offender's article 8 rights and that this interference is in accordance with the law. The issue is whether the notification requirements under the Sexual Offences Act 2003 without any right to a review are proportionate to that aim.¹⁰ Lord Phillips stated:

"If some of those who are subject to lifetime notification requirements no longer pose any significant risk of committing further sexual offences, and it is possible for them to demonstrate that this is the case, there is no point in subjecting them to supervision or management or to the interference with their article 8 rights involved in visits to their local police stations in order to provide information about their places of residence and their travel plans. Indeed subjecting them to these requirements can only impose an unnecessary and unproductive burden on the responsible authorities. We were informed that there are now some 24,000 ex-offenders subject to notification requirements and this number will inevitably grow."¹¹

The Supreme Court highlighted that statistics show that 75% of sex offenders who were monitored were not reconvicted. Furthermore a number of jurisdictions have registration requirements for sexual offenders including Ireland, France, Australia, South Africa and Canada and almost all of these have provisions for review.¹²

⁷ Section 83 of the Sexual Offences Act 2003

⁸ *R (F and Thompson) v Secretary of State for the Home Department* [2010] UKSC 17

⁹ Para 41

¹⁰ Para 41

¹¹ Para 51

¹² Para 57

The Criminal Justice Bill also makes minor amendments to allow for the removal of notification requirements for abolished sexual offences, to introduce provisions to make notification requirements more effective in respect of offenders coming to Northern Ireland and to make amendments to Sexual Offences Prevention Order provisions.¹³

2.2 Human Trafficking

The UK Government has opted into the EU Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims. The deadline for implementation is 6 April 2013. Article 2 of the EU Directive requires Member States to legislate to make the following acts punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Article 3 also requires Member States to ensure that incitement, aiding and abetting or attempting to commit an offence is punishable. Article 4 sets out maximum penalties that Member States are required to legislate for in cases of trafficking: i.e. at least five years imprisonment and at least 10 years where the offence involved a child victim. Article 8 provides that victims should not be subject to prosecution or penalties where they have been compelled to participate in criminal activities. Article 9 requires Member States to ensure that the prosecution or investigation of offences in the Directive are not dependent on the reporting by a victim and should continue should a victim withdraw their statement. Article 10 requires Member States to establish their jurisdiction over offences in the Directive where the offence is committed in whole or part of their territory or where the offender is one of their nationals. A Member State must also inform the Commission where it takes the decision to establish further jurisdiction over the offences committed outside their territory where the offence is committed against one of their nationals or habitual resident of their territory or the offence was committed for the benefit of legal person established in its territory. Article 11 provides for the assistance and support of trafficking victims. Member States are required to ensure victims have access to legal counselling and legal representation including for the purposes of claiming compensation (Article 12). Article 13- 16 makes provision for assistance, support and protection to child victims of trafficking, including unaccompanied child victims. Article 17 requires Member States to ensure victims have access to existing schemes of compensation to victims of violent crimes of intent. Article 18 requires Member States to prevent trafficking by taking appropriate

¹³ See Explanatory Memorandum of the Criminal Justice Bill , para 12 available at <http://www.niassembly.gov.uk/Documents/Legislation/Bills/Executive%20Bills/Session-2011-12/niabill-10-11-15-efm.pdf>

measures such as education and training to discourage trafficking. Member States are required to establish national rapporteurs or equivalent mechanisms to assess trends in trafficking and measuring results of anti-trafficking actions.

Northern Ireland is required to introduce new offences to comply with the EU Directive. These offences are set out in detail later sections of the paper.

2.3 DNA/ Fingerprint Retention Framework

The Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE) provides the legislative basis for police powers in Northern Ireland. Article 64 of PACE permits fingerprints or samples to be taken from a person in the investigation of an offence and that they may be retained after they have fulfilled the purposes for which they were taken.¹⁴ This in effect has allowed the police in NI to indefinitely retain fingerprints, DNA samples and DNA profiles obtained from persons arrested for any recordable offences, irrespective of whether or not it results in a conviction.¹⁵ A recordable offence is defined as those that are recorded in Northern Ireland Criminal Records convictions for offences punishable by imprisonment or for certain specified offences.¹⁶

The legislative change is required as a result of a European Court of Human Rights (ECtHR) ruling *S & Marper v UK* in 2008.¹⁷ The first applicant, Mr S was arrested at the age of eleven in 2001 and charged with attempted robbery. His fingerprint and DNA samples were taken. He was later acquitted. The second applicant Mr Marper was arrested in 2001 and charged with harassment of his partner. They would later reconcile and the charge was withdrawn. Both applicants asked for their fingerprint and DNA samples to be destroyed but in both cases the police refused. Their applications for judicial review of the decisions were rejected by the UK courts. The ECtHR agreed with the UK Government that the retention of DNA and fingerprint information pursues the legitimate aim of the detection and prevention of crime.¹⁸ The court however stated that the question was not whether the retention of cellular samples, DNA or fingerprints was justified under the convention but whether the retention of such information of the applicants who have been suspected but not convicted, was justified under Article 8 (the right to private and family life).¹⁹ The court, in ruling that there was a violation of Article 8, stated that it was struck with the blanket and indiscriminate nature of the

¹⁴ Article 64 (1A) of PACE (NI) Order 1989

¹⁵ Department of Justice Briefing Paper to the Justice Committee on DNA/ Fingerprints Retention Policy in Northern Ireland , 23 June 2011.

¹⁶ Northern Ireland Criminal Records (Recordable Offences) Regulations 1989, Regulation 2

¹⁷ *S & Marper v UK*, December 2008 (Applications nos. 30562/04 and 30566/04) available at [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"fulltext":\["S & Marper"\],"documentcollectionid":\["COMMITTEE","DECISIONS","COMMUNICATEDCASES","CLIN","ADVISORYOPINION S"\],"REPORTS","RESOLUTIONS"\],"itemid":\["001-90051"\]](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)

¹⁸ *S & Marper v UK*, December 2008, para 100

¹⁹ *S & Marper v UK*, December 2008, para 106

power of retention in England and Wales.²⁰ England and Wales and Northern Ireland appear to be the only jurisdictions in the Council of Europe that allowed the indefinite retention of fingerprint and DNA material of any person of any age suspected of a recordable offence.²¹ The court paid particular attention to the position in Scotland as it is part of the UK. Under the Criminal Procedure (Scotland) Act 1995, DNA samples and resulting profiles must be destroyed if the person is not convicted or is given an absolute discharge.²² The Court noted that the Scottish Parliament voted to allow the retention of DNA of unconvicted persons only in the case of adults charged with violent or sexual offences and only then for three years only with the possibility to keep a DNA sample for a further two year extension with the consent of a Sheriff.²³ Sheriffs deal with the majority of civil and criminal cases in Scotland.²⁴ The ECtHR found that the Scottish model is consistent with the Committee of Ministers' recommendation R(92)1 which stresses the need for an approach which discriminates between different kinds of cases and for the application of strictly defined storage periods for data.²⁵

3 Consultations on policy proposals underpinning the Criminal Justice Bill.

3.1 Sex Offenders Notification Requirements

The Department of Justice consulted on its proposals for legislation in respect of sex offender notification requirements in July 2011. The consultation covered a number of areas including:

- **Review Mechanism for Notification Requirements-** The Department proposed to allow sex offenders who were on the register indefinitely to apply to the police to come off the register after they have been on it for 15 years after leaving prison. The offender can appeal the police decision to the Crown Court;
- **Removal of notification for abolished sexual offences-**The Department proposed to change the law to remove the notification requirement where the relevant offence is no longer a criminal offence, for example abolished homosexual offences;
- **Notification of all foreign travel-** The Department proposed to require sex offenders who are on the sex offender register to inform the police every time they intend to travel outside the UK, including travel to Ireland;

²⁰ *S & Marper v UK*, December 2008, para 119

²¹ *S & Marper v UK*, December 2008, para 110

²² *S & Marper v UK*, December 2008, para 36

²³ *S & Marper v UK*, December 2008, para 109

²⁴ <http://www.scotland-judiciary.org.uk/36/0/Sheriffs>

²⁵ *S & Marper v UK*, December 2008, para 110

- **Arrangements for offenders where they have no fixed abode-** The Department proposed that any sex offender subject to notification requirements who has no fixed abode would have to notify the police every week where the offender could regularly be found over the next seven days, instead of annually;
- **Offenders living in a household where there is a child under 18-**The Department proposed that notified sex offenders would be required to inform police if they are staying in a house where there is a child or children under the age of 18 to allow the police to assess risk of harm and take preventative action;
- **Offenders to notify personal details-** The Department proposed that sex offenders would be required to give the police information about their passports, bank accounts and credit cards and produce some form of identification at every notification. This would enable the police to trace sex offenders who do not comply with notification requirements;
- **Provisions for sexual offences prevention orders (SOPOs) to include positive actions** - The Department proposed to allow the courts to include in a SOPO a requirement for a sex offender to take some specified action for the purpose of protecting the public from serious sexual harm, for example requiring a sex offender to provide information or to reside somewhere;
- **Travel within the UK-** Offenders would be required subject to notification to notify the police of intended travel within the UK of more than three days. The police would have to be notified in advance of their travel plans;
- **Notification for offenders convicted outside the UK-** An offender who has been convicted of a sex offence outside the UK and comes to stay in NI would be required to inform the police of where they are living and provide other personal details in the same way as convicted sex offenders from NI;
- **Violent Offender Orders:** This proposal allows the police to ask the court to make an order which places conditions on the behaviour of a violent offender in the community to manage the risk the person poses to the public. This is like the SOPO and the person would be subject to similar notification requirements as sex offenders.

The Department highlighted that there would unlikely be any major resource implications for the police as it is anticipated that applications as a result of the review mechanism would be no more than 20 per year. The Department also suggested that no equality issues have been identified and an initial pre-policy equality screening has not identified any other section 75 impacts.²⁶ The Equality Screening Form

²⁶ Department of Justice "Sex Offender Notification and Violent Offender Order: Proposals for Legislation, a Consultation Paper" July 2011, 45.

acknowledged that the vast majority of sex offenders are men.²⁷ However the Department concluded that it would not conduct an Equality Impact Assessment as the policy only impacts on the perpetrators of sexual crimes and that there is no bearing on equality between certain groups.²⁸

The Department published a summary of responses to the consultation. The following are some of the key issues raised.

Review Mechanism

The PSNI supported the framework. A large majority of respondents supported the overall proposal but a number had concerns whether it was sufficiently rigorous. Some made specific proposals to tighten the procedure such as providing for no right of appeal. PBNI made a number of suggestions including an ability to reapply requirements should risk levels change and to include victim information in the assessment. NIACRO supported the decision to introduce a review system but felt that it minimally complied with the spirit of the judgment and that the review period should be based on the level of risk of the individual rather than an arbitrary period set out in legislation.²⁹

The Department's response was that it would consider whether it would be beneficial to highlight additional criteria (victim information and convictions or findings made by a court in offences other than sexual offences) more explicitly in legislation.³⁰ The Department agreed to further consider the wording of the precise test in the light of comments received.³¹ The Department explained that the reasons for having an appeal to a court were valid. The Department also responded to the point made regarding the reattachment of notification if the level of risk increased. The Department suggested that in these instances the police would apply for a SOPO.³² In respect of the proposed time period, the Department believed that a period of 15 years from the date of leaving prison is a fair and appropriate period.³³

Notification of all foreign travel

The police accepted the Department's proposals under this headings but some other respondents wanted reassurance that the proposals would be as stringent as the rest of the UK in relation to travel outside the island of Ireland. However the Department reported that all acknowledged the difficulties of following this course for cross border

²⁷ Department of Justice Equality Screening Form, Sex Offender Notification, 10

²⁸ Department of Justice Equality Screening Form, Sex Offender Notification, 19

²⁹ Department of Justice "Sex Offender Notification and Violent Offender Order" Summary of representations made, October 2011, 3

³⁰ Department of Justice "Sex Offender Notification and Violent Offender Order" Summary of representations made, October 2011, 4.

³¹ Ibid.

³² Ibid, 5

³³ Ibid, 6

travel. The Department responded that it would consider how stringent this provision would be without it becoming unworkable.³⁴

Offenders with no fixed abode

One respondent suggested that offenders with no fixed abode should be made to live in a hostel. In response, the Department highlighted that only offenders with conditions attached to their release or a court order can be required to live at a particular location. The NSPCC commented that any procedure for weekly reporting should not interfere with the provision of detailed information. The Department responded that the details of how to manage weekly notification will be dealt with in guidance.³⁵

Living in a household with a child

The responses seem to broadly welcome this proposal except for one response which said that the requirement should be applied where risk demanded it. EXTERN and NSPCC made suggestions as to how the requirement could be strengthened. EXTERN suggested that any change in the number of under 18s in a household should be provided. NSPCC recommended that information should be provided to the police as soon as circumstances dictated. The Department indicated that it would continue with the proposal that is in line with the England and Wales proposals but would give consideration to the issues raised by EXTERN and NSPCC.³⁶

Additional personal details/identification

This proposal was broadly welcomed by respondents but respondents made further suggestions to enhance proposals. The police suggested there should be a requirement to provide mobile phone, internet provider and email addresses. EXTERN suggested an additional safeguard of spot checking against retained finger printed information. The Department responded that police already have powers under the SOA 2003 to check fingerprint data at periodic notification. Other respondents highlighted that there could be difficulties where an offender had multiple bank accounts or where someone had dual nationalities. The Department responded that it would proceed with its proposal but would consider the police suggestions for additional information to be added.³⁷

Travel within the UK

This proposal was welcomed by the police as it addressed a gap in current arrangements as an offender can use multiple addresses for up to six days anywhere

³⁴ Department of Justice "Sex Offender Notification and Violent Offender Order" Summary of representations made, October 2011, 7.

³⁵ Ibid, 7

³⁶ Ibid, 8

³⁷ Ibid, 9

in the UK without notifying the police. The Department said it would continue to explore this proposal.³⁸

Offenders convicted outside the UK

This proposal was welcomed by the police who highlighted that it would be beneficial for example where a sex offender from the Republic of Ireland would travel to NI. The Department indicated it would continue with this proposal which is not being dealt with in other UK jurisdictions as there are no other land borders.³⁹

Sexual Offences Prevention Orders Provisions

Respondents were broadly supportive of the proposal. The police said the provisions would strengthen risk management opportunities for example when a sex offender is no longer subject to licence conditions but is still exhibiting behaviour that needs to be addressed. Some respondents suggested that there may be resource issues and the Department responded that this will be further explored. The Northern Health and Social Care Trust commented that there may be issues with treatment programmes and the Department indicated that it would possibly deal with this in guidance but would explore this further.⁴⁰

Violent Offender Orders

A number of issues were raised in relation to this proposal. The police highlighted that the sentence thresholds in England and Wales were too high. However, they could be a useful tool in managing serial domestic abusers who move from partner to partner. EXTERN suggested that the orders would enhance public protection arrangements and act as a preventative measure. EXTERN recommended that the criteria for orders should be offence based and not sentence based to prevent more serious offenders falling through the net. The Department responded that it intended to pursue the introduction of these orders in the Strategy Bill proposed for next year.⁴¹

In its briefing to the Justice Committee, the Department indicated that four of the consultation proposals would be included in the Criminal Justice Bill. These included: the review mechanism for indefinite periods of notification; ending notification for abolished sexual offences; notification of offenders convicted outside of the UK; and sexual offences prevention orders. The other proposals will be dealt with by affirmative secondary legislation or primary legislation through the planned Strategy Bill.⁴²

Second Stage Debate

³⁸ Ibid, 9

³⁹ Ibid, 9 & 10

⁴⁰ Ibid, 26 & 27

⁴¹ Ibid, 10

⁴² Department of Justice "Briefing to the Justice Committee on Sex Offender Notification: Final Policy Proposals" 11 November 2011.

During the second stage debate of the Bill, Mr Dickson MLA (Alliance) highlighted that concerns were raised in the Committee about the status of the police as first level decision makers and whether all cases should be dealt with by the courts. Mr Dickson argued that having a court process in all cases would undermine the Minister's efforts to speed up the justice system, would be time consuming and out of line with other UK jurisdictions.⁴³ Mr Maginness MLA (SDLP) indicated that the Minister was 'on the right lines' with the proposals on sex offender notification requirements and welcomed 'the Minister's initiative even though it may be repackaged from a previous occasion.'⁴⁴

3.1.1 Position in other UK jurisdictions

Scotland

Scotland introduced remedial legislation in 2011 to remove the incompatibility of the Section 82 provisions of the SOA 2003 with the ECHR.⁴⁵ The legislation provides a mechanism for periodic review of the justification for the continuing the requirements in individual cases. An offender who is aged 18 years of age or over at the time of the crime and is subject to indefinite notification, the date of discharge will be 15 years from the date of conviction. In the cases of offenders under 18 years of age at the time the offence was committed, the discharge period is 8 years.⁴⁶ The relevant chief constable has to decide before the expiry of the 15 year or 8 year review period, whether a sex offender should continue to be subject to the notification requirements. If the sex offender should cease to be subject to the notification requirements, they will cease to be subject to the requirements from the date of discharge. If the relevant chief constable is satisfied that the offender should continue to be subject to notification requirements due to a risk of sexual harm, then a notification continuation order will be made specifying how long the offender has to notify before a period of review. The notification continuation order can be made for a fixed period of up to 15 years.⁴⁷ The decision of the relevant chief constable to impose a notification continuation order can be appealed to a Sheriff. The decision of the Sheriff to grant or refuse an appeal can be appealed to the Sheriff Principal whose decision is final.⁴⁸ If a relevant chief constable has not reviewed a notification period by the required date, the offender can make an application to the Sheriff court to be no longer subject to the notification requirements. A Sheriff can impose a notification continuation order for a fixed period of no more than 15 years: the test will be that used by the relevant chief constable, whether the offender

⁴³ Official Report of the Northern Ireland Assembly, Second Stage Debate of the Criminal Justice Bill, 3 July 2012

⁴⁴ Ibid

⁴⁵ Sexual Offences Act 2003 (Remedial) (Scotland) Order 2011

⁴⁶ Section 88B of the Sexual Offences Act 2003 as amended by Article 3 of the Sexual Offences Act 2003 (Remedial) (Scotland) Order 2011

⁴⁷ Section 88C of the Sexual Offences Act 2003, as amended

⁴⁸ Section 88G of the Sexual Offences Act 2003, as amended.

poses a risk of sexual harm.⁴⁹ An appeal of any decision must be brought within 21 days of the date of the decision.⁵⁰

England and Wales

A draft Order was been laid before Parliament in England and Wales on 6 March 2012 in order to remedy the declaration of incompatibility in relation to the SOA 2003.⁵¹ The provisions insert new sections in the SOA to enable an offender to apply to the police for a review of the requirement that the relevant offender remains subject to the indefinite notification requirements which apply under section 82 of the SOA 2003.⁵² Unlike the Scottish provisions, the offender is responsible for initiating the review. Section 91A makes provision for a relevant sex offender to apply to a relevant Chief of Police to make a determination that the qualifying relevant offender remains subject to notification requirements. Section 91B sets out the relevant qualifying time periods for review. The qualifying periods are after a period of 15 years from the date of initial notification and 8 years if the offender was under 18 on the relevant date. Section 91B also sets out the process that must be followed: the relevant chief police officer must within 14 days of receiving the application give the offender acknowledgement of receipt and may inform a responsible body that an application has been made. A responsible body includes the local probation board or provider of probation services, and a Minister exercising functions in relation to prisons and other bodies set out in section 325 of the Criminal Justice Act 2003, including youth offending teams, housing authorities and NHS Trusts. If the responsible body holds relevant information, this must be provided within 28 days of being notified of the application. The offender must satisfy the relevant chief police officer that it is not necessary for the purpose of protecting the public from sexual harm for the offender to remain subject to the notification requirements.⁵³ If the police decide that the offender should remain subject to the notification requirements, the notice of the determination must contain a statement of reasons and inform the offender that he may appeal the decision.⁵⁴ The draft Order makes provision for a further qualifying date for review if the police determine that notification requirements remain in place. The further qualifying date for review is the day after the 8 year period beginning with the day the police make a determination that the offender should continue to be subject to notification requirements but gives the police a power to require the police to be subject to notification requirements for a period no longer than 15 years.⁵⁵ The police can only

⁴⁹ Section 88F of the Sexual Offences Act 2003, as amended.

⁵⁰ Section 88G of the Sexual Offences Act 2003, as amended.

⁵¹ Draft Sexual Offences (Remedial) Order 2012

⁵² Draft 91A to 91G of the Sexual Offences Act 2003

⁵³ Draft section 91C of the Sexual Offences Act 2003

⁵⁴ Draft Section 91C of the Sexual Offences Act 2003

⁵⁵ Draft Section 91B of the Sexual Offences Act 2003

exercise this power if the police determine that the risk is sufficient to justify the continuation of notification requirements after the end of the 8 year period.⁵⁶

A previous draft remedial Order did not contain a provision for review by an independent and impartial tribunal which caused concern to the Joint Committee on Human Rights at Westminster.⁵⁷ The revised draft Order contains provision for an appeal to the magistrates' court within 21 days of the decision being made. If the magistrates' court makes a determination that the offender should cease to be subject to the indefinite notification requirement, this will cease on the date of the order.⁵⁸

In its first report on the draft order, the Joint Committee on Human Rights (JCHR) highlighted concern that the Government's earlier proposal was insufficient to remedy the incompatibility due to a lack of provision for review by an independent and impartial tribunal.⁵⁹ The JCHR in its second report on the Draft Order concluded that the order was now sufficient to remedy the incompatibility with Article 8 that exists. The Committee stated:

"The draft order provides for a right of appeal to the magistrates' court from the determination by the police. Although this is not the same as a right of appeal to a higher court, as we preferred in our first Report, we accept that it is sufficient to remove the incompatibility identified by the Supreme Court in *F and Thompson*."⁶⁰

The JCHR indicated however that there were a small number of areas where the Order could be improved.⁶¹ The JCHR highlighted that there needed to be clarification that the right of appeal to the magistrates' courts extended to cases where the police made a determination to postpone the further review after the 8 year further qualifying date. The JCHR also suggested that it was not clear what powers the court has on such an appeal. The JCHR recommended that the Minister makes it clear that the courts have the power to quash a determination that the offender's next review be postponed beyond the eight year period and to substitute with a shorter period if appropriate.⁶² An area considered was the duty to notify victims. The committee noted that the draft Order requires the police to take account of submissions or evidence of victims giving rise to indefinite notification requirements. However there was no requirement on the police to notify victims when an application for review of the notification requirements have has been met. Therefore victims may not know that an application has been

⁵⁶ See explanatory memorandum of the Sexual Offences Act 2003 (Remedial) Order 2012.

⁵⁷ Draft Sexual Offences Act 2003 (Remedial) Order 2011

⁵⁸ Draft Section 91E of the Sexual Offences Act 2003 (try and find the original report)

⁵⁹ Draft Sexual Offences Act 2003 (Remedial) Order 2012-Second Report, Human Rights Joint Committee, 28 May 2012, Para 10, 14, available at <http://www.publications.parliament.uk/pa/it201213/itselect/jtrights/8/805.htm>

⁶⁰ Draft Sexual Offences Act 2003 (Remedial) Order 2012-Second Report, Human Rights Joint Committee, 28 May 2012, Para 15, available at <http://www.publications.parliament.uk/pa/it201213/itselect/jtrights/8/805.htm>

⁶¹ Draft Sexual Offences Act 2003 (Remedial) Order 2012-Second Report, Human Rights Joint Committee, 28 May 2012, Para 18, available at <http://www.publications.parliament.uk/pa/it201213/itselect/jtrights/8/805.htm>

⁶² *Ibid*, at para 22

made. The JCHR recommended that the Minister makes it clear that the chief officer of police should be expected to notify the victim that such an application has been made.⁶³ In relation to the provision that the police may notify responsible bodies when an application has been made, the JCHR was not clear why this was discretionary rather than a requirement. The JCHR recommended that the Minister make it clear that the expectation would be that the chief police officer would notify responsible bodies as a matter of course.⁶⁴ The Committee noted that the Order defines the risk of sexual harm to include psychological harm to the public which is a very broad definition. The Committee stated that it looked forward to clarification from the Minister on the meaning of psychological harm to the public.⁶⁵ In relation to the appeal mechanism in the draft Order, the JCHR noted that the right of appeal to the magistrates' court comes under its civil jurisdiction and therefore this will give rise to legal costs for the applicant. The Committee noted that this would give rise to questions regarding practical and effective access to court for those who do have sufficient means. The Committee called for clarification as to whether legal aid would be made available and whether costs would be recoverable from central funds if an appeal was successful.⁶⁶ Finally the JCHR noted that the order requires the Secretary of State to issue guidance to police as to how they should go about the determination of applications for review. However there is no requirement for consultation or for the guidance to be laid before Parliament. It was therefore recommended that guidance should be subject to consultation and parliamentary involvement commensurate with significance.⁶⁷

In its briefing to the NI Assembly Justice Committee, the Department has indicated that it needs to consider issues as a result of the JCHR report.⁶⁸ Although the Department acknowledges the report does not apply to NI, it is important to consider its conclusions. It would appear the Department has taken into account the JCHR's preference for an appeal to the Crown Court.

3.2 Human Trafficking

The Department of Justice consulted in April 2012 on legislative proposals to amend the Sexual Offences Act 2003 (which deals with persons who are trafficked for sexual exploitation) and the Asylum and Immigration (Treatment of Claimants) Act 2004 (which deals with persons who are trafficked for the purpose of exploitation). In order to comply with Article 10 of the EU Directive, Northern Ireland has to create two new offences:

⁶³ Ibid, at para22

⁶⁴ Draft Sexual Offences Act 2003 (Remedial) Order 2012-Second Report, Human Rights Joint Committee, 28 May 2012, Para 23

⁶⁵ Ibid at para 24

⁶⁶ Ibid at para 25

⁶⁷ Ibid at para 26

⁶⁸ DoJ Briefing to the Justice Committee, "Sex Offender Notification: Final Policy Proposals", 11 November 2011, para 6.

- To create an offence where D trafficks another person (V) within the UK who was not already trafficked into the UK (for example from London to Belfast)
- To create an offence when a UK national (D), or a person who is habitually resident in the UK trafficks V anywhere outside the UK (for example, if the UK national trafficked someone from Mexico to Brazil.)

Sections 109 and 110 of the Protection of Freedoms Act 2012 created the same two offences in order to comply with the EU Directive on Human Trafficking.⁶⁹ These sections apply only to England and Wales.

The Department received 49 responses on the legislative amendments and the respondents raised a number of broader issues.⁷⁰ The Legal Services Commission highlighted that they would wish to see a full Legal Aid Impact Assessment carried out. The Department responded that legal aid was considered prior to consultation and that there would be limited impact. The Public Prosecution Service suggested that the Department should consider extending the proposed offence for prosecution of a UK national who has trafficked someone outside the UK to allow the prosecution of a person who is resident in the UK but is not a UK national and has trafficked someone outside the UK. The Department responded that this is already covered by the proposal. QUB School of Law Organised Crime Project suggested that the Department should use the opportunity to amend other relevant legislation to strengthen the law on human trafficking and reduce demand. QUB's suggestions included increasing sentences in some areas, amendments to the Gangmasters' Licensing Act and protection from prosecution for victims. The Northern Ireland Evangelical Alliance (NIEA) also raised the issue of increased sentences taking the view that a fine of punishment for trafficking sentences is not appropriate. The NIEA suggested that the principle of prison for convicted traffickers would provide a consistent and firm policy framework. The QUB Ad Hoc Working Group on Human Trafficking recommended that the definition of a habitual resident should be set down in legislation. A number of respondents suggested that the Department was following the approach taken in England and Wales and was taking a minimalist approach in implementing the EU Directive. Some other suggestions were offered including:⁷¹

- addressing the lack of an adequate definition of trafficking;
- the treatment of victims in criminal proceedings, including protection from prosecution for victims
- the provision of a guardian or representative for trafficked children; and
- the creation of a national rapporteur;

⁶⁹ See Sections 109 and 110 of the Protection of Freedoms Act 2012, available at <http://www.legislation.gov.uk/ukpga/2012/9/section/110/enacted>

⁷⁰ Department of Justice briefing paper to the Justice Committee, 12 June 2012.

- specifically including forced begging and exploitation of criminal activities as forms of exploitation.

The Department highlighted that it intended to compile the issues and refer them to the Organised Crime Task Force Immigration and Human Trafficking sub group.

In relation to equality issues, the Department has highlighted that, in its view, the proposals would have no adverse impact on groups specified under Section 75 of the Northern Ireland Act 1998. The Department indicated that the proposals could potentially increase the number of arrests and convictions of those involved in human trafficking, reducing the risk to victims. The Department concluded that an Equality Impact Assessment was not required.⁷²

Second Stage Debate

During the second stage debate of the Criminal Justice Bill, the Chairperson of the Justice Committee, Mr Givan (DUP) highlighted the concerns raised by consultees on the minimalist approach taken by the Department. Mr Givan stated

*“the Committee will no doubt wish to explore that during Committee Stage and I am sure that all Members will want to ensure that the legislation is technically compliant with the EU Directive.”*⁷³

Similarly Lord Morrow, MLA (DUP) raised concerns about the minimalist approach taken in the Bill and asked a number of questions for the Minister to consider. Firstly he asked whether the Minister had considered extending the Asylum Act further to ensure forced begging and exploitation of criminal activities are included under the definition of exploitation to bring NI into line with the Directive. Secondly, Lord Morrow also asked the Minister whether the aggravating factors listed in Article 4 of the Directive would be taken into account in sentencing in trafficking offences. Thirdly, Lord Morrow raised the issue of special measures and highlighted that the Bill was an opportunity to ensure similar legal provisions for victims of labour and other forms of exploitation. Lord Morrow highlighted that the PPS intend to take into account the fact that a person has been trafficked if the person commits a crime for the purposes of exploitation. Lord Morrow stated that this was a policy statement of good intent and that this issue needs to be considered further to remove any doubt from the minds of the victim, and referred Members to Articles in the EU Directive on non- prosecution or non-application of penalties to the victim. Finally Lord Morrow called on the Minister to introduce legislation to ensure that prosecution of human trafficking is not dependent on reporting by the victim or that proceedings will continue if the victim withdraws their statement.⁷⁴

⁷² Department of Justice “Amendment to the Sexual Offences Act 2003 and Asylum and Immigration Act (Treatment of Claimants) Act 2004, see also DOJ Screening Form, Amendment of the Sexual Offences Act 2003 & the Asylum and Immigration (Treatment of Claimants Act etc) 2004, 20.

⁷³ Official Report of the Northern Ireland Assembly, Second Stage Debate of the Criminal Justice Bill, 3 July 2012.

⁷⁴ Ibid

Mr McIlveen, MLA (DUP) suggested in the debate that whilst the Bill will comply with the Directive, the current reporting mechanism is not independent of government and would like to have seen an independent national rapporteur who can report to the public created under the Bill.⁷⁵

Mr McGlone MLA, (SDLP) highlighted in the debate that there were missed opportunities to comply with aspects of all parts of the Directive including areas such as penalties, investigations, prosecutions, assistance and support for victims and provisions for child victims.⁷⁶

The Justice Minister responded to some of the issues raised during the second stage debate. In relation to the creation of a national rapporteur, he highlighted he was aware of the concerns around the current arrangements but that the Home Office are determined that the inter-ministerial group is appropriate to carry the national rapporteur arrangements. The Minister stated that he and the Department will work as best they could to strengthen arrangements, whether through this Bill, or through other actions or legislation. The Minister also referred to Lord Morrow's intention to introduce a Private Members Bill.⁷⁷ Lord Morrow has published a consultation paper on proposed changes in the law to tackle human trafficking. Lord Morrow proposes a Private Members Bill which would.⁷⁸

- Allow courts to take aggravating factors into consideration when passing a sentence;
- Extend the definition of other exploitation to include forced begging;
- Bring in a new offence of paying for the sexual services of a prostitute;
- Ensure no prosecution is brought for a criminal offence committed by a trafficking victim as a consequence of being trafficked;
- Require training and investigative tools to be made available for police and prosecutors;
- Define a victim of trafficking;
- Set out what assistance and support is required for victims of trafficking;
- Set out what civil legal services should be made available to victims of trafficking;
- Require clear compensation procedures;
- Require each victim to have a legal advocate to support them through the criminal, immigration and compensation and ensure they receive suitable assistance;
- Provide special measures for trafficking victims if they act as witnesses;

⁷⁵ Official Report of the Northern Ireland Assembly, Second Stage Debate of the Criminal Justice Bill, 3 July 2012

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ Proposed Changes in the Law to Tackle Human Trafficking: A Consultation Paper, August 2012, pgs 5-6 available at <http://www.mydup.com/articles.asp?ArticleNewsID=4717>

- Require the Department of Justice to produce an annual strategy on raising awareness and reducing trafficking in victims.

Lord Morrow argues that “without this legislation, there is no guarantee that resources will be put into reducing human trafficking and caring for victims over the long term.”⁷⁹

3.3 DNA/ Fingerprint Retention

The Department consulted on policy proposals for the retention and destruction of fingerprints and DNA in Northern Ireland in June 2011. This was prompted by the need to amend the legislation to address the violation of the European Convention on Human Rights found in the case of *S & Marper v UK*. The key proposals were:⁸⁰

Non-Convicted Persons

- Immediate destruction of fingerprints and DNA profile from persons arrested for or charged, but not convicted of a minor offence;
- Immediate destruction of fingerprints and DNA profile for persons arrested for, but not charged, with a serious offence;
- Retention of fingerprints and DNA profile from persons charged but not convicted of a serious offence (e.g serious, violent or sexual) for a period of three years, with an extension of two years available on application to the courts.

Convicted Adults

- Indefinite retention of fingerprints and DNA profiles for all adults convicted of a recordable offence.

Convicted under 18s

- An exemption from indefinite retention for under 18s convicted of a minor offence on one occasion only;
- Retention of fingerprint and DNA profiles from under 18s on first conviction of a minor offence:
 - 5 years if the sentence is non- custodial;
 - 5 years plus length of sentence (if given a custodial sentence of less than 5 years)
- Indefinite retention where a custodial sentence of five years or more is imposed;

⁷⁹ Proposed Changes in the Law to Tackle Human Trafficking: A Consultation Paper, August 2012, pg 6. Available at <http://www.mydup.com/articles.asp?ArticleNewsID=4717>

⁸⁰ Department of Justice “Consultation on Proposals for the Retention and Destruction of Fingerprints and DNA in Northern Ireland”, March 2011, pg 8-9.

- Indefinite retention of fingerprints and DNA profiles from under 18s convicted of a serious offence;
- Indefinite retention of fingerprints and DNA profiles from under 18s on a second conviction.

The Department proposed that all DNA samples taken from persons on arrest would be destroyed regardless of whether the person goes on to be convicted or not. DNA samples would only be retained for as long as needed in order to obtain a DNA profile and for no longer than six months. There would also be a requirement for the Chief Constable to destroy fingerprints and DNA in cases of unlawful arrest or mistaken identity. Fingerprints and DNA may be subject to a speculative search against the relevant databases before destruction. The Chief Constable would also be able to extend retention of any material obtained under PACE and terrorism legislation by periods of two years for the purposes of national security but this provision would be taken forward in the Protection of Freedoms Bill, as national security is an excepted matter (now the Protection of Freedoms Act 2012). The proposals would apply to new material and to fingerprints and DNA currently retained.⁸¹ The consultation indicated that like England and Wales, Northern Ireland proposals were that fingerprints and DNA from non-convicted persons may only be retained in very limited circumstances, for example when a person is charged but not convicted of a serious, violent or sexual offence. In these cases the material may only be retained for three years with a possible extension of two years on application to court. Another proposal related to persons who are arrested for but not charged with serious, violent or sexual offences; for this category the fingerprints and DNA samples must be destroyed immediately unless one of more prescribed circumstance apply and retention is subject to authorisation. Prescribed circumstances could include where a young person or vulnerable adult is the victim of the alleged offence or the victim is not willing to come forward to give evidence.⁸²

The Department also proposed to consider whether the remit of the Biometric Commissioner appointed under the Protection of Freedoms Act 2012 should extend to Northern Ireland, or whether there should be separate appointment.⁸³

In terms of photographs, the Department highlighted that the *S & Marper v UK* case did not involve an application for the destruction of photographs and had no plans to change the retention policy (a policy of indefinite retention). However the Department noted that there was a case before the UK Supreme Court (*GC and C v Commissioner of the Police of the Metropolis*) and would await with interest the judgment. This case involves whether the police retention of DNA, fingerprints and a photograph of GC and DNA fingerprints, DNA and information on the national computer of C violates Article 8

⁸¹ Department of Justice "Consultation on Proposals for the Retention and Destruction of Fingerprints and DNA in Northern Ireland", March 2011 pg 9.

⁸² Ibid pg 11

⁸³ Ibid, pg 12.

(the right to private and family life) of the ECHR.⁸⁴ It should be noted that since the consultation the Supreme Court has issued its judgment. The Supreme Court decided it should express no opinion on the issue of retention of photographs but to leave the point to be determined if and when it is raised properly in another case. The Supreme Court noted the judgment from the Divisional Court that ruled that the issue of retention of photographs was raised as ‘a passing reference in the claim form’.⁸⁵

The Department indicated in the consultation document that, following a screening of the policy proposals, it was determined that no section 75 groups should be adversely impacted by the proposals and that they did not need to be subject to a full Equality Impact Assessment. The Department stated that it welcomed views on the implication of policy proposals on equality of opportunity of all groups specified under section 75 of the Northern Ireland Act 1998.⁸⁶

3.4 Position in other jurisdictions

The Department of Justice indicated that the proposed framework for Northern Ireland is broadly similar to that legislated for in England and Wales, which is closely aligned to Scotland. It therefore may be useful to consider the legislative provisions in those jurisdictions.⁸⁷ A comparative table is available at **Annex A** of this paper.

England and Wales

The Protection of Freedoms Act 2012 amended the framework set out in the Police and Criminal Evidence Act (PACE) 1984 on the retention of DNA profiles and fingerprints in England and Wales.⁸⁸ The explanatory memorandum makes reference to the Programme for Government which states “the Government will adopt the protections of the Scottish Model for the DNA database.”⁸⁹ Section 1 of the 2012 Act inserts a new provision (section 63D) into PACE. New Section 63 D (2) of PACE requires the destruction of a fingerprint and DNA profile taken from a DNA sample, if they were taken unlawfully or if the arrest was unlawful or a case of mistaken identity. Furthermore, section 63 allows such material, which would be destroyed, to be retained for a short period until a speculative search of the databases is carried out. The new provisions allow for the police to retain material until the conclusion of the investigation

⁸⁴ Department of Justice “Consultation on Proposals for the Retention and Destruction of Fingerprints and DNA in Northern Ireland”, March 2011, pg 9-10.

⁸⁵ See Lord Dyson’s judgment in paragraphs 50, 51, *R on the Application of GC v Commissioner of the Police of the Metropolis and R on the Application of C v Commissioner of the Police of the Metropolis* [2011] UKSC 21

⁸⁶ Department of Justice “Consultation on Proposals for the Retention and Destruction of Fingerprints and DNA in Northern Ireland”, March 2011, pg 13

⁸⁷ Department of Justice “Consultation on Proposals for the Retention and Destruction of Fingerprints and DNA in Northern Ireland”, March 2011, pg 11.

⁸⁸ <http://www.legislation.gov.uk/ukpga/2012/9/section/1/enacted>

⁸⁹ See explanatory memorandum of the Protection and Freedoms Act 2012, available at <http://www.legislation.gov.uk/ukpga/2012/9/notes/division/3/1/1>

of an offence or the conclusion of legal proceedings instituted against that person.⁹⁰ Section 3 of the 2012 Act deals with persons who have been arrested for or charged with a qualifying offence and inserts a new section 63F into PACE 1984. Where a person has been arrested but not convicted of a qualifying offence but has previously been convicted of a recordable offence, their DNA and fingerprints may be retained indefinitely. However, this does not apply to excluded offences which are those offences which were committed when the person was under 18 years of age and a sentence of less than five years imprisonment or equivalent was imposed.⁹¹ Where a person is charged but not convicted of a qualifying offence (i.e. a serious, violent or sexual offence) and has no previous convictions, their DNA and fingerprints may be retained for three years.⁹² Where a person who has no previous convictions is arrested for a qualifying offence but is not subsequently charged or convicted, their DNA and fingerprints may be retained for three years if a successful application is made to the Independent Commissioner for the Retention and Use of Biometric Material.⁹³ The legislation also makes provision for the appointment of the Commissioner.⁹⁴ The standard three year retention period may be extended on a case by case basis with the approval of a district judge for a period of two years. The retention period cannot be extended for a period of more than five years in total. The police may appeal to the Crown Court against the refusal of a District Judge to grant such an order. Furthermore, the person from whom the material was taken may appeal to the Crown Court on the making of such an order.⁹⁵ The legislation makes provision for the procedure for the police to follow when making an application to the Independent Commission to retain material from a person with no previous convictions but who has been arrested for a qualifying offence, but is not subsequently charged or convicted. Applications may be made on the basis that the victim was under the age of 18, is a vulnerable adult or is associated with the person to whom the material relates. Applications may also be made where the retention of material is necessary to assist in the prevention or detection of crime.⁹⁶

Section 4 of the Protection of Freedoms Act 2012 makes provisions relating to persons who have been arrested for or charged with a minor offence. This section inserts a new Section 63H into PACE. Where a person, who has previously been convicted of a recordable offence that is not an excludable offence, has subsequently been arrested for or charged with a minor offence and is not subsequently convicted, their fingerprints or DNA profiles may be retained indefinitely. An excluded offence in this section is the same as an excluded offence under section 3, i.e. an offence committed where the

⁹⁰ Section 63E of the Police and Criminal Evidence Act (PACE) 1984 as amended by section 2 of the Protection of Freedoms Act 2012.

⁹¹ Section 63 (1) and(2)

⁹² Section 63F (3),(4) and (6).

⁹³ Section 63G

⁹⁴ Section 63F (5)

⁹⁵ Section 63F(7) (8) (9) and (10)

⁹⁶ Section 63G

person was under 18 and the sentence of less than five years imprisonment was imposed.

Section 5 of the Protection of Freedoms Act 2012 makes provision relating to retention period where a person has been convicted of a recordable offence. Where an adult has been convicted of a recordable offence, their DNA profiles and fingerprints may be retained indefinitely.⁹⁷ Section 7 of the Protection of Freedoms Act 2012 inserts a new section 63K into PACE which makes provision in relation to persons under 18 years of age convicted of a first minor offence. Where a custodial sentence of five years or more is imposed, the person's fingerprints and DNA profile may be retained indefinitely.⁹⁸ Where a custodial sentence of less than five years is imposed, the person's DNA and fingerprints may be retained for the duration of the sentence which includes the time spent in custody and period of sentence served in the community plus a further five years.⁹⁹ Where a person is given a non-custodial sentence on conviction of his or her offence, their DNA profile and fingerprints may be retained for five years from the date the material was taken.¹⁰⁰

Scotland

The ECtHR judgment made specific reference to the Scottish model for DNA and fingerprint retention. This system allows for the retention of fingerprints and DNA fingerprints or persons who have been charged but not convicted of serious crime for a period of three years plus possible two year extension(s) by a court.¹⁰¹ The system also allows for indefinite retention in cases where an offence has resulted in conviction, in both adults and under 18s. Retention is not permissible under the Scottish system where a person has been arrested but not charged or convicted of a serious crime or in non-conviction in minor crimes. The Department of Justice highlighted that there are aspects of the proposed framework for Northern Ireland which goes further than the Scottish System in liberalising the regime and conversely there are aspects which are stronger.¹⁰² In Northern Ireland, the Department propose to provide for a single two year extension for the retention of DNA and fingerprints of those charged but not convicted of a qualifying offence. In Scotland, the system allows for extensions on a rolling basis¹⁰³. The Northern Ireland proposals allow for the indefinite retention of material from those charged but not convicted of a minor offence if the person has a

⁹⁷ Section 63I PACE 1984 as amended by section 5 of the Protection of Freedoms Act 2012

⁹⁸ Section 63K(3)

⁹⁹ Section 63K(2)

¹⁰⁰ Section 63K(4)

¹⁰¹ For ease of reference, a summary of information on the Scottish System can be found in a comparative table in Annex B of the Explanatory Memorandum of the Protection of Freedoms Act 2012, available at http://www.legislation.gov.uk/ukpga/2012/9/pdfs/ukpgaen_20120009_en.pdf

¹⁰² Committee for Justice "Official Report on Final Legislative Proposals for the Retention and Destruction of DNA and Fingerprints in Northern Ireland" 8 September 2011

¹⁰³ Committee for Justice "Official Report on Final Legislative Proposals for the Retention and Destruction of DNA and Fingerprints in Northern Ireland" 8 September 2011

previous conviction for a recordable offence (unless the conviction was for a single minor under 18 offence). Officials pointed out to the Committee that in the Scottish system, such material is destroyed regardless of previous convictions.¹⁰⁴ The Officials also highlighted that the Northern Ireland proposals differ from the Scottish system in that they differentiate between those who are convicted and those who are not, between minor and serious offences and between adults and juveniles.¹⁰⁵

Republic of Ireland

The issue of DNA retention policy was the subject of legislative proposals in the Republic of Ireland. Section 77 of the Criminal Justice (Forensic Evidence and DNA Database system) Bill 2011 applied default destruction periods of three years to bodily samples. This section applies to persons who have been acquitted of an offence or where proceedings are discontinued. Section 78 applied default removal periods of 10 years relating to adults and 5 years for children of DNA profiles entered into the system.¹⁰⁶ This section also applies to persons who have been acquitted of an offence or where proceedings are discontinued. The Bill did not complete the legislative process before dissolution of the Oireachtas of 1st February 2011.¹⁰⁷

Responses to the Department of Justice Consultation

The Justice Committee was briefed on the outcome of the consultation on the legislative proposals in June 2011. The Department indicated that the proposals outlined in the consultation were viewed favourably by respondents as an improvement on the current indefinite retention policy.¹⁰⁸ However, a number of key points were raised by respondents.¹⁰⁹ On a general note, the Northern Ireland Human Rights Commission expressed concern that no interim measures have been put in place to give effect to the judgment prior to the introduction of the legislation. The PSNI indicated that they did not support the proposal that material be retained only in cases where persons were charged but not convicted of serious offences unless prescribed circumstances apply. The PSNI suggested that the appropriate threshold for retention is the arrest for a serious offence. The Law Centre for Northern Ireland also called for clarity as to whether 5 years is the maximum permissible for the retention of biometric material for persons charged but not convicted of a serious offence.

¹⁰⁴ Committee for Justice "Official Report on Final Legislative Proposals for the Retention and Destruction of DNA and Fingerprints in Northern Ireland" 8 September 2011

¹⁰⁵ *Ibid*

¹⁰⁶ <http://www.oireachtas.ie/documents/bills28/bills/2010/0210/b0210d.pdf>

¹⁰⁷ <http://www.oireachtas.ie/viewdoc.asp?DocID=13886&&CatID=59>

¹⁰⁸ Department of Justice Briefing Paper on DNA/Fingerprints Retention Policy in Northern Ireland, 23 June 2011

¹⁰⁹ The summary of comments can be found in Annex C of the Department of Justice Briefing Paper on DNA/Fingerprints Retention Policy in Northern Ireland, 23 June 2011

A number of concerns were raised by respondents in relation to proposals relating to juveniles. The Northern Ireland Commissioner for Children and Young People (NICCY) welcomed the proposal of immediate destruction of material from persons not convicted of a minor offence or arrested and not charged with a serious offence. However, NICCY highlighted opposition to the retention of material from under 18s convicted of a minor crime. NICCY argued that material from under 18s convicted of a serious minor offence should not be retained indefinitely and suggested that material should be destroyed on reaching the age of 18. In the same vein, the Committee on Administration of Justice (CAJ) argued that the proposals in respect of convicted children do not go far enough and that destruction should take place at the age of 18 or at the end of sentence, whichever comes first. CAJ suggested that the proposals on children do not fully engage with the UK's obligations under the United Nations Convention on the Rights of the Child (UNCRC). British Irish Rights Watch (BIRW) suggested that there should be a presumption that material obtained from children should be removed from the database unless compelling reasons exist to retain it. BIRW stated that it would be wrong that a child cautioned on two occasions for shoplifting would have material retained indefinitely. The Children's Law Centre (CLC) expressed grave concerns about the taking, collation and retention of DNA from children and young people as young as 10 to 18 and recommend it should be ceased immediately. The CLC stated it was firmly opposed to proposals to retain the material of under 18s not convicted of an offence, which CLC argued is in breach of Article 40 of the UNCRC (the right to be presumed innocent until proven guilty).

There was some difference of opinion as to whether oversight arrangements should be local or UK wide. NICCY indicated it would welcome the appointment of an Independent Commissioner to oversee all aspects of the retention framework. The CAJ advocates a separate Commissioner to ensure a local level of accountability. However, the PSNI advocates one Biometric Commissioner covering the whole of the UK. Genewatch stated it was a matter for NI if it wanted to have its own Biometric Commissioner.

Officials from the Department of Justice in a briefing to the Justice Committee on 8 September 2011 responded to some of the concerns raised in the consultation.¹¹⁰ In response to the PSNI concerns that the threshold on charge is too high and should be on arrest, the Department indicated that the Minister has considered these concerns and is minded to keep the threshold at charge to keep Northern Ireland in sync with other UK jurisdictions. However, the Minister has agreed to look at the widening range of circumstances in which the threshold may be set aside.¹¹¹ The Department indicated that some of the prescribed circumstances that might apply include: offences under the Sexual Offences Act 2003 and the Sexual Offences (Northern Ireland) Order 2008, and

¹¹⁰ Committee for Justice Official Report "Final Legislative Proposals for the Retention and Destruction of DNA and Fingerprints in Northern Ireland" 8 September 2011.

¹¹¹ *Ibid.* pg 4.

violent offences such as domestic assaults or assaults on children. The Department intend that the Bill will contain an Order making power to set out the prescribed range of circumstances in subordinate legislation.¹¹²

The Committee were informed that the Minister had also given consideration to the current practice of indefinitely retaining photographs. The Department concluded however that photographs would not form part of the proposed framework unless there was an authoritative judicial ruling on the issue in order to maintain parity with England and Wales.¹¹³

The Committee were also briefed that the Minister had considered the proposed retention regime for the conviction of under18s which differs from the Scottish system in the treatment of those convicted of a single minor offence. The Minister concluded that the framework should maintain the distinction which responds to the spirit of the ECHR judgment which criticises a system which takes no account of age.¹¹⁴

Officials also discussed the proposal to allow for a single two year extension for the retention of DNA or fingerprints of those charged but not convicted of a qualifying offence. Officials were advised by officials in the Scottish government that since the provisions were introduced in Scotland, no extensions had been applied for. Whilst this could indicate that a mechanism for extensions is not required, the Department concluded that it would still proceed with this proposal as there may be unforeseen circumstances in which it may be necessary to retain material for a further two years.¹¹⁵

Concerns were raised in relation to equality and human rights issues in response to the Departments proposals.¹¹⁶ CAJ highlighted that there was a lack of equality monitoring system in the proposals. The Children's Law Centre was critical of the Department's screening exercise and argued that there was a need for a full, thorough and comprehensive screening exercise and equality impact assessment, including direct consultation with children and young people. The Department in its briefing paper to the Justice Committee in June 2011 indicated that constituent parts of the policy have been screened out as not having any adverse impact on section 75 groups in the Northern Ireland Act 1998.¹¹⁷ The screening exercise conducted by the Department concluded that an Equality Impact Assessment is not required on this basis. The screening form highlighted that the policy includes limited mitigation in favour of children and young people whose first conviction was a minor offence by replacing

¹¹² Committee for Justice Official Report "Final Legislative Proposals for the Retention and Destruction of DNA and Fingerprints in Northern Ireland" 8 September 2011.pg 4

¹¹³ Ibid.pg 4

¹¹⁴ Ibid.pg 4

¹¹⁵ Ibid, pg 5.

¹¹⁶ See Annex C of the Department of Justice Briefing Paper to the Justice Committee on DNA and Fingerprint Retention Policy in Northern Ireland, 23 June 2012.

¹¹⁷ Annex C of the Department of Justice Briefing Paper to the Justice Committee on DNA and Fingerprint Retention Policy in Northern Ireland, 23 June 2011.

indefinite retention with a time bound period depending on whether a custodial sentence was imposed.¹¹⁸ The Department stated that the proposals were convention compliant.¹¹⁹

Second Stage Debate

The Deputy Chairperson of the Justice Committee, Mr McCartney MLA (Sinn Fein), highlighted some of the issues that needed to be addressed at Committee Stage during the Bill's second stage debate.¹²⁰ These included fingerprint and DNA retention and a disproportionate build-up of the database. Mr McCartney argued that pro rata the database is 10 times bigger than the United States and 10 times bigger than the European average. The Deputy Chairperson also indicated that the presumption of innocence was being undermined and there is a divergence from the ECHR. He highlighted that it is estimated that perhaps one in five people whose profile is on the database is not convicted and that profiles are being kept because a person might in the future commit an offence. Mr McGlone MLA, (SDLP) argued that the Bill does not treat someone as innocent if, at the conclusion of an investigation, charges are not initiated.¹²¹

Mr McCartney also raised the issue of the retention of photographs and argued that there was an opportunity in the Bill to ensure that there were not 'unnecessary' legal challenges. The final issue raised by Mr McCartney related to the introduction of the Biometric Commissioner and he suggested that the courts should be the third party arbiter in the retention of DNA and fingerprints.¹²² Mr Hussey MLA, (Ulster Unionist Party) highlighted the issue of remuneration and indicated that further details of what the Minister has planned for the Commissioner would be welcome.¹²³ Mr Dickson MLA (Alliance) addressed the issue of retention of DNA of minors arguing that the legislation correctly made provision for ensuring that the DNA of first time offenders is not indefinitely retained. However, he thought the legislation rightly makes provision for indefinite retention following conviction of a serious offence or second conviction, striking an important balance.¹²⁴

¹¹⁸ DoJ Equality Screening Form, Proposals for the Retention and Destruction of Fingerprints and DNA IN Northern Ireland, 16, 20

¹¹⁹ See Annex C of the Department of Justice Briefing Paper to the Justice Committee on DNA and Fingerprint Retention Policy in Northern Ireland, 23 June 2011. para 13. See also briefing paper from the Department of Justice to the Justice Committee on DNA/ Fingerprints retention policy dated 1 September 2011, para 12.

¹²⁰ Official Report of the Northern Ireland Assembly, Second Stage Debate of the Criminal Justice Bill, 3 July 2012.

¹²¹ Ibid

¹²² Official Report of the Northern Ireland Assembly, Second Stage Debate of the Criminal Justice Bill, 3 July 2012.

¹²³ Ibid.

¹²⁴ Ibid

The Justice Minister responded to some of the issues raised in relation to DNA and fingerprint retention during the second stage debate. In relation to the issue of the erosion of the principle the presumption of innocence, the Minister referred to research which indicated that those arrested but not convicted of an offence have a significantly higher risk of being convicted of a future offence than individuals not previously arrested. Furthermore, the risk does not become the same as the general population until a period of three to four and three quarter years has elapsed. It is on this basis that the Department proposed the retention period of three years with a possible extension of two years for individuals arrested but not convicted of serious, violent or sexual offences.¹²⁵

4 Content of the Bill

This section of the paper provides an overview of the contents of the criminal Justice Bill. It is divided as follows:

- Provisions of the Bill relating to sex offenders
- Provisions of the Bill relating to trafficking people for exploitation
- Provisions of the Bill relating to retention of fingerprints, DNA profiles etc
- Supplementary provisions of the Bill
- Schedules of the Bill

4.1 Provisions Relating to Sex Offenders

Clause 1: Review of indefinite notification requirements

Clause 1(1) specifies that the following subsections amend Part 2 of the Sexual Offences Act 2003

Clause 1(2) inserts a new schedule 3A into Part 2 of the Sexual Offences Act 2003 which provides for the review and discharge of indefinite notification requirements

Clause 1 (3) specifies that after Schedule 3, insert the Schedule set out in Schedule 1 of the Criminal Justice Bill. This schedule sets the review and discharge of indefinite notification requirements.

Commentary

The Sexual Offences Act 2003 places requirements on relevant sex offenders to notify the police of certain details and specifies notification periods. For the most serious offenders with custodial sentences of 30 months or more, there is an indefinite

¹²⁵ Ibid

notification period and currently there is no right of review. The Schedule inserted into the 2003 Act by Clause 1 addresses this issue and provides for a review and discharge of notification requirements in order to comply with the UK Supreme Court judgement of incompatibility with Article 8 of the ECHR.

Clause 2: Ending notification requirements for acts which are no longer offences

Clause 2 (1) specifies that the following subsections amend part 2 of the Sexual Offences Act 2003

Clause 2 (2) amends section 93 of the Sexual Offences Act 2003 by substituting the heading “Acts which are no longer offences”

Clause 2 (3) amends section 93 of the Sexual Offences Act 2003 by substituting “acts which are no longer offences” in the place of abolished homosexual offences

Clause 2 (4) substitutes the heading and paragraph 1 of Schedule 4 of the 2003 Act (Procedures for ending notification requirements for abolished homosexual offences) for “Procedure for Ending Notification Requirements for Acts Which Are No Longer Offences”.

Commentary

Clause 2 of the Criminal Justice Bill makes consequential amendments to section 93 and Schedule 4 of the Sexual Offences Act 2003 to amend the scope of the procedure for ending notification for abolished homosexual offences. Section 93 and schedule 4 of the 2003 Act sets out the procedure for certain offenders to have their notification requirements discharged in respect of offences which have been abolished since the initial notification was attached. However, these clauses in the 2003 Act only apply to homosexual offences. The law on the age of consent changed from age 17 to 16 as a result of the Sexual Offences (Northern Ireland) Order 2008 and therefore the procedure for ending notifications requirements to include offences involving consensual offences where the other party had been 16 instead of 17 and where the offender was convicted or sentenced on the basis where they had an honest belief the other party was 16.

Clause 3: Offences committed in an EEA State other than the United Kingdom

Clause 3 (1) specifies that the following subsections amend Part 2 of the Sexual Offences Act 2003.

Clause 3 (2) inserts a new section 96A into the 2003 Act in relation to Offences Committed in an EEA State other than the United Kingdom

Commentary

Clause 3 requires offenders convicted of a relevant offence from EEA State outside the United Kingdom who come to Northern Ireland to notify the police. A relevant offence is set out in Schedule 3 of the 2003 Act. The offender must notify the police and provide them with certain information after three days once they have stayed in Northern Ireland for a qualifying period. The qualifying period is seven days (or two or more periods in any period of 12 months which taken together amount to seven days) that the person is in Northern Ireland.

Clause 4: Sex Offender Prevention Orders

Clause 4(1) specifies that the following subsections amend Part 2 of the Sexual Offences Act 2003

Clause 4(2) (a) inserts “requires the defendant to anything in the order (or both)” after “order” in subsection 1(a) in section 107 of the Sexual Offences Act 2003 (effect of sexual offences prevention orders). Clause 4 (2) (b) amends subsection 2 of the Section 107 of the Sexual Offences Act 2003 by inserting “requirements” after “prohibitions.”

Clause 4(3) amends section 108 (5) of the 2003 Order by inserting “or requirements” after “prohibitions”

Clause 4 (4) amends section 109 (interim orders) in the 2003 by inserting “or requiring the defendant to anything described in the order (or both)” at the end of subsection 3.

Clause 4 (5) amends section 113 (Offences) in the 2003 Order by inserting a new subsection 1A which states “A person commits an offence if without reasonable excuse he fails to do anything which he is required to do by a sexual offences prevention order or an interim sexual offences prevention order”.

Commentary

The effect of Clause 4 is to amend Part 2 of the 2003 Act so that an offender subject to a sexual offences prevention order can be required to undertake a specified action in order to protect the public as well as prohibiting the offender from doing something described in the Order. Currently the orders can only enable the court to prohibit a person from doing anything described in a sexual offences prevention order. The clause also specifies that it is an offence to fail to undertake a particular action described in the order.

4.2 Provisions relating to human trafficking

Clause 5: Trafficking people for exploitation

Clause 5 (1) inserts a new section 58A after section 58 in the Sexual Offences Act 2003 on “Trafficking outside the UK for sexual exploitation. The new Section 58A (1) states that a person commits an offence if they intentionally arrange or facilitate the arrival in or entry into a country other than the United Kingdom of another person. The section also makes it an offence for a person to intentionally arrange or facilitate the departure of another person from a country other than the United Kingdom or the travel of another person within a country other than the United Kingdom. New section 58A(2) applies to a British citizen, a British national, a British overseas territories citizen by virtue of a connection with Gibraltar, a person who was habitually resident in Northern Ireland at the time of the offence or a body incorporated under the law of any part of the United Kingdom. The new section 58A (3) sets out the penalties. A person guilty of an offence is liable: on summary conviction to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both; on conviction on indictment, to imprisonment for a term not exceeding 14 years.

Clause 5 (2) omits paragraph (c) from section 60 (1) (relevant offence) of the Sexual Offences Act 2003. Section 60 (1) (c) sets out that a relevant offence is an offence listed in schedule 1 to the Criminal Justice (Children) (Northern Ireland) Order 1998.

Clause 5 (3) (a) amends Schedule 1, paragraph 28 of the Criminal Justice (Northern Ireland) Order 2008 by inserting “section 58A (trafficking outside the UK for sexual exploitation), or” after the entry relating to section 58. Clause 5(3) (b) amends Part 2 of Schedule 2, paragraph 13 (sentencing of dangerous offenders: specified sexual offences) by inserting references to section 58A (trafficking outside the UK for the purposes of sexual exploitation) after the entry relating to section 58.

Commentary

Clause 5 inserts a new Section 58A into the Sexual Offences Act 2003, dealing with trafficking people for sexual exploitation. A person will commit an offence if they intentionally arrange or facilitate the entry of a person into, within or departure from countries outside the UK for the purpose of sexual exploitation. The offence may be committed by British Citizens, persons habitually resident in Northern Ireland or bodies incorporated under the law of any part of the United Kingdom. The section also sets out penalties in relation to the offence: on summary conviction, a term of imprisonment not exceeding six months or a fine not exceeding the statutory maximum. The new section 58A sets out the penalty for conviction on indictment- a term of imprisonment not exceeding 14 years.

It should be noted that the relevant provisions of the Protection of Freedoms Act 2012 which apply to England and Wales take a slightly different approach to the amendment of sections 57-59 of the Sexual Offences Act 2003. Rather than add a new section, as the Criminal Justice Bill will, the Protection of Freedoms Act replaces sections 57-59 with a new consolidated section 59A. The new section 59A (6) (a) inserted by the PFA

also provides that the maximum period of imprisonment following a summary conviction should be 12 months rather than 6 months. However 59A (7) provides that in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, the reference in subsection (6) (a) to 12 months is to be read as a reference to six months. Currently, s 154(1) of the Criminal Justice Act 2003 has not commenced. When asked for clarification as to whether penalties in NI could differ from England and Wales should the provisions of the Criminal Justice Act 2003 come into force, the Department explained:¹²⁶

“There is a general criminal law procedure difference between NI and E&W. When dealing with summary offences a NI District Judge has power under the Magistrates' Courts (Northern Ireland) Order 1981 ("the 1981 Order") to impose a fine up to the maximum of the statutory scale of £5,000 or six months in prison or both. The 1981 Order does provide that where an indictable offence can be heard in the magistrates' court and the sentence exceeds six months, the Defendant may opt for trial in the higher Crown Court and, where s/he, does not so opt, the District Judge in this situation can impose a sentence of imprisonment up to 12 months. The basic summary procedure imprisonment period is six months. Section 154 of the Criminal Justice Act 2003 made provision for E & W to increase the general limit on magistrates' court's powers to impose imprisonment in respect of any one offence (comparable to our six months powers) from six to twelve months.”

Clause 6: Trafficking people for other exploitation

Clause 6 (1) provides that the following subsections amend section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 Section 4 of the 2004 Act deals with Trafficking People for Exploitation.

Clause 6 (2) amends section 4, subsection 2 of the 2004 Act by omitting the words “in respect of whom he believes that an offence may have been committed.

Clause 6 (3) inserts a new section 3A into after subsection 3 of section 4 of the 2004 Act. New section 3A (a) (i)-(iii) of the 2004 Act provides that a person commits an offence if the person arranges or facilitates: the arrival in or entry into, travel within a country or departure of the passenger from a country other than the United Kingdom. New Section 3A(b) (i) and(ii) provides that a person commits an offence if that person intends to exploit the passenger or believes that another person is likely to exploit the passenger, wherever the exploitation is to occur.

¹²⁶ Information obtained from the Department of Justice via email on 8 August 2012.

Clause 6 (4) amends subsection 4 of Section 4 of the 2004 by substituting paragraph (b). The new paragraph (b) provides that a person for the purposes of subsection 4 is exploited if (and only if) he is encouraged, required or expected to anything that as a result of which he or another person would commit an offence under the Human Tissue Act 2004 as it extends to Northern Ireland.

Clause 6(5) inserts new subsections 4A and 4B into Section 4 the 2004 Act. Section 4A provides that subsections (1) to (3A) apply to anything done whether inside or outside the United Kingdom. New subsection 4B provides that subsection 3A applies to a British citizen, a British National, a person who is a British overseas territory citizen by virtue of a connection with Gibraltar, a person who was at the time of the offence habitually resident in NI and a body incorporated under the law of a part of the United Kingdom.

Commentary

Clause 6 of the Bill amends Section 4 of the Asylum and Immigration (Treatment of Claimants) Act 2004, dealing with trafficking people for other exploitation. Clause 6(2) omits the requirement that an alleged offender had to believe that an offence under section 4(1) may have been committed. Clause 6(3) inserts a new sub-section 3A into section 4 of the 2004 Act. The clause is similar to the clause 5 of the Bill in that it makes it an offence to traffic someone anywhere outside the United Kingdom. The clause applies again to British citizens, persons who are habitually resident in NI and bodies incorporated under law in a part of the United Kingdom. Clause 6 also makes reference to the Human Tissue Act 2004 in relation to the meaning of exploitation. Unlike the previous clause, there are no explicit references to penalties in clause 6. However the Explanatory and Financial Memorandum (EFM) corresponding to the Bill indicates the same penalties as those set out in Clause 5, i.e. on summary conviction, a term of imprisonment of six months or a fine not exceeding the statutory maximum and on conviction on indictment, a term of imprisonment not exceeding 14 years.

It should be noted that penalties are set out explicitly in section 4 (5) of the Asylum and Immigration Act 2004. Section 4 (5) states that a person guilty of an offence is liable on conviction on indictment, to a term of imprisonment not exceeding 14 years, to a fine or both; and on summary conviction to a term of imprisonment not exceeding 12 months, to a fine not exceeding the statutory maximum or both. Section 5(11) of the Asylum and Immigration Act 2004 provides that in relation to England and Wales, the reference to 12 months should be read as six months until the commencement of section 154 of the Criminal Justice Act 2003. Section 4(5) also has to be read in conjunction with section 5(13) which provides that in relation to Northern Ireland the reference to twelve months should be read as if it were a reference to six months.¹²⁷

¹²⁷ This was clarified by the Department of Justice via email obtained 8 August 2012.

4.3 Provisions of the Bill relating to retention of fingerprints, DNA profiles etc

Clause 7: Retention of fingerprints, DNA profiles etc.

Clause 7 (1) of the Bill inserts the Articles set out in schedule 2 after Article 63A of the Police and Criminal Evidence (Northern Ireland) Order 1989.

Clause 7 (2) provides that the statutory provisions set out in the Bill have effect subject to minor and consequential amendments specified in the schedule.

Clause 7 (3) requires the Department of Justice to make an order setting out the transitional, transitory or saving provisions in connections with the coming into operation of this section.

Clause 7(4) requires Department to provide for the destruction or retention of PACE material or in the case of DNA profile taken from a sample before the commencement day in connection with the investigation of an offence

Clause 7(5) provides that an order made under subsection (3) is subject to negative resolution

Clause 7(6) contains some definitions. "Commencement day" means the day on which this section comes into operation. PACE material means material that would have been material to which Article 63B or 63M of the Police and Criminal Evidence (Northern Ireland) Order 1989 applied of those provisions had been in operation when it was taken or derived.

Commentary

Clause 7 inserts new Articles set out in Schedule 2 and 3 of the Bill after article 63A of the Police and Criminal Evidence (Northern Ireland) Order 1989. The Articles in these Schedules replace the existing framework governing the retention and destruction of fingerprints and DNA profiles in order to comply with the ECHR ruling in *S & Marper v UK*. Clause 7 requires the Department to make an order setting out transitional or savings provisions involved in the commencement of this section. The order is subject to negative resolution. This clause also requires the Department to provide for the destruction or retention of DNA profiles and fingerprints taken before the commencement of the legislation. The EFM indicated that this will enable the Department to ensure that the retention and destruction regime applies to existing material but recognises that this exercise will take time to complete.¹²⁸

4.4 Supplementary Provisions

¹²⁸ Explanatory and Financial Memorandum of the Criminal Justice as introduced in the Northern Ireland Assembly on 25 June 2012, para 57.

Clause 8: Repeals

Clause 8 provides that the statutory provisions in schedule 4 of the Bill are repealed to the extent as set out in the second column of the schedule.

Clause 9: Commencement and transitional, etc provisions

Clause 9 (1) specifies that section 9 and sections 2 and 10 come into operation on the day after Royal Assent.

Clause 9 (2) provides that the other provisions in the Act may come into force on such day or days as the Department of Justice may by order appoint.

Clause 9 (3) provides that an order made under subsection 2 may contain transitional or savings provisions as the Department considers appropriate.

Clause 9 (4) provides that subsection 3 does not apply to an order bringing section 7 or the repeals in Part 2 of Schedule 4 into operation.

Clause 10: Short Title

Clause 10 states that the Act may be cited as the Criminal Justice Act (Northern Ireland) 2012

4.5 Schedules of the Bill

Schedule 1: Schedule 3A to the Sexual Offences Act 2003, as Inserted

This schedule has been inserted by Clause 1 of this Bill and provides detail on the review of indefinite notification requirements. The EFM sets out a number of relevant definitions for the purposes of this Schedule. A qualifying offence is an offence set out in Article 52A of PACE which covers serious violent, sexual or terrorist offences. A recordable offence is one punishable by imprisonment or otherwise set out in Regulation 2 of the Northern Ireland Criminal Records (Recordable Offences) Regulations 189.¹²⁹

Paragraph 1(1) provides that the schedule applies to a person who on or after the commencement of section 1 of the Criminal Justice Act (Northern Ireland) 2012 comes into operation is subject to indefinite notification requirements for an indefinite period. Paragraph 1 (2) states that the person to whom the schedule applies is referred to as

¹²⁹ Explanatory Memorandum on the Criminal Justice Bill introduced in the Northern Ireland Assembly on 25 June 2012, para 69.

an offender. Paragraph 1(3) sets out definitions used in the schedule such as risk of sexual harm, notifications requirements and the meaning of a relevant event.

Paragraph 2 makes provision for the process involved in initial review applications. Paragraph 2 (1) enables an offender at any time after the end of the initial review period to apply to the Chief Constable to discharge the offender from notification requirements. However the subparagraph does not apply if an offender is also subject to a sexual offences prevention order or an interim sexual offences prevention order or the offender is subject to notification requirements for a fixed period which has not expired.¹³⁰ The initial review period is 15 years beginning with the date of initial notification in the case of adult offenders and 8 years in the case of an offender under the age of 18.¹³¹ In the case where an offender is subject to notification requirements for an indefinite period as a result of two or more relevant events, the calculation is to be made with reference to the latest of the events.¹³² Paragraph 2 provides that any period during which the offender is in prison or detained in hospital is disregarded.¹³³ The offender has to make the application in writing and must include a number of details including their name, address, date of birth, the date of the relevant event and information the offender wishes to be taken into account by the Chief Constable.¹³⁴ The Chief Constable must acknowledge receipt of the application within 14 days.¹³⁵ The Chief Constable may request information from any body or person that he considers appropriate.¹³⁶

Paragraph 3 (1) of the Schedule relates to determination of the application and sets out the test that the Chief Constable shall use in making determinations. The Chief Constable shall discharge the notification requirements unless satisfied that the offender poses a risk of sexual and the risk is such as to justify the notification requirements continuing in the interests of the prevention or investigation of crime or public protection. In making a decision as to whether to continue notification requirements, the Chief Constable must take into account a number of matters including:¹³⁷

- seriousness of the offence;
- the period of time that has elapsed since the offender committed the offence;
- whether the offender committed any offence under section 3 of the Sex Offenders Act 1997 or under section 91 of the Sexual Offences Act 2003;¹³⁸
- the age of the offender at the time of the decision and the offence;
- the age of the victim;

¹³⁰ Schedule 1, paragraph 2(2) of the Criminal Justice Bill

¹³¹ Schedule 1, paragraph 2(3)

¹³² Schedule 1, paragraph 2(4) (a)

¹³³ Schedule 1, paragraph 2(4) (b)

¹³⁴ Schedule 1, paragraph 2(6)

¹³⁵ Schedule 1, paragraph 2(7)

¹³⁶ Schedule 1, paragraph 2(8)

¹³⁷ Schedule 1, paragraph 3(2)

¹³⁸ Offences under section 3 of the Sex Offenders Act 1997 are failure to comply with notification requirements or providing false information to the police. Section 91 of the Sexual Offences Act 2003 deals with offences relating to notification.

- the difference in age between offender and victim;
- any convictions or finding by a court in the UK or a country outside the UK;
- whether criminal proceedings for any offences listed in schedule 3 have been instituted against the offender but have not concluded
- an assessment on the risk of sexual harm posed by the offender made by agencies mentioned in Article 49(1) of the Criminal Justice (Northern Ireland) Order 2008;¹³⁹
- any other information relating to the risk of sexual harm posed by the offender; and
- any other matter the Chief Constable considers to be appropriate.

Paragraph 4 deals with notice of the decision. The Chief Constable is required to notify the offender of this decision within 12 weeks of receipt of the application.¹⁴⁰ If the Chief Constable discharges the notification requirements, notice must be served on the offender and the offender will cease to be subject to notification requirements on the date of service of the notice.¹⁴¹ If the Chief Constable decides not to discharge the notification requirements, notice must be served on the offender which must state the reasons for the decision.¹⁴²

Paragraph 5 (1) allows the offender to make an application to the Crown Court for an order discharging them from notification requirements if the Chief Constable decides not to discharge the notification requirements or fails to inform the offender of his decision within the 12 week period specified in Paragraph 4. An application to the Crown Court must be made within 21 days on the expiry of the 12 weeks period.¹⁴³ The Crown Court must take into account the same matters when making a decision to discharge notification requirements as those provided for in paragraph 2 in relation to the Chief Constable.¹⁴⁴ The paragraph enables the Chief Constable and the offender to appear or be represented at this hearing.¹⁴⁵ If the Crown Court makes or refuses to make an order discharging the offender from notification requirements, the Court must notify the offender and the Chief Constable.¹⁴⁶

Paragraph 6 (1) provides for a further review period where a decision has been taken by the Chief Constable or Crown Court to require the offender to continue with notification requirements. An offender may apply at the end of a further review period to the Chief Constable to discharge the offender from notification requirements. However paragraph 6 (1) does not apply at any time when an offender is subject to a sexual offences prevention order or interim order, or the offender is subject to notification

¹³⁹ Article 49 (of the Criminal Justice (Northern Ireland) Order 2008 specifies the following agencies: Police Service of Northern Ireland, Probation Board for Northern Ireland, Department of Education, Department of Employment and Learning, DHSSPS, Department of Social Development, Health Trusts and Boards, Education and Library Boards, the Northern Ireland Housing Executive and the NSPCC.

¹⁴⁰ Schedule 1, paragraph 4 (1) of the Criminal Justice Bill

¹⁴¹ Schedule 1, paragraph 4(2)

¹⁴² Schedule 1, paragraph 4(3)

¹⁴³ Schedule 1, paragraph 5(2)

¹⁴⁴ Schedule 1, paragraph 5(3)

¹⁴⁵ Schedule 1, paragraph 5(4)

¹⁴⁶ Schedule 1, paragraph 5(5)& (6)

requirements for a fixed period which has not expired.¹⁴⁷ The further review period is 4 years in the case of an offender under 18 and 8 years in the case of adult offenders.¹⁴⁸

Paragraph 7 (1) requires the Department of Justice to issue guidance on the making and determination by the Chief Constable of applications. Paragraph 7 (2) allows the Department to revise the guidance from time to time. The Department is required to making arrangements for guidance issued or revised to be published in a manner it considers appropriate.¹⁴⁹

Paragraph 8 (1) provides that an offender who is discharged from notification requirements in England and Wales, or Scotland, is discharged from the notification requirements as they apply in Northern Ireland.

Schedule 2: Articles 63B to 63O of the Police and Criminal Evidence (Northern Ireland) Order 1989, as inserted.

Schedule 2 of the Bill inserts 14 new articles after Article 63A of the Police and Criminal Evidence (Northern Ireland) Order 1989 and replaces the existing framework on the destruction and retention of DNA profiles and fingerprints.

Article 63B (1) provides for the basic rule in the destruction of fingerprints and DNA profiles. The article applies to fingerprints and DNA profile derived from a DNA sample. Article 63(B)(2) provides that fingerprints and DNA profiles must be destroyed unless the material is retained under any power conferred by Articles 63C to Article 63J. Article 63B (3) provides that DNA profiles and fingerprints must be destroyed unless it is not being retained under the power conferred under Article 63C and the taking of the fingerprints or the taking of sample from which a DNA profile was derived was unlawful or the arrest was unlawful or based on a case of mistaken identity. The Article also allows retention of the material until a speculative search of the databases is carried out.

Article 63C allows DNA profiles and fingerprints taken in connection with the investigation of an offence to be retained until the conclusion of the investigation of the offence or where proceedings are instituted, until the conclusion of those proceedings.

Article 63D applies to DNA profiles and fingerprints which relate to a person who is arrested for or charged with but not convicted of a qualifying offence. Article 63D (2) provides that where a person has been previously convicted of a recordable offence which is not an excluded offence, the material may be retained indefinitely. Otherwise Article 63(D) 6 stipulates that fingerprints and DNA profiles may be retained for three years from the date they were taken. The Chief Constable may apply to a District Judge for an order to extend the retention period for a further two years.¹⁵⁰ The Chief Constable or the person from whom the material was taken may appeal to the County

¹⁴⁷ Schedule 1, paragraph 6(2)

¹⁴⁸ Schedule 1, paragraph 6(3)

¹⁴⁹ Schedule 1 paragraph 7 (3) of the Criminal Justice Bill

¹⁵⁰ Article 63D (7) of the Police and Criminal Evidence (Northern Ireland) Order 1989

Court against an order or a refusal to make an order.¹⁵¹ The Department of Justice is required to appoint a Northern Ireland Commissioner for the Retention of Biometric Material.¹⁵² The Commissioner, may on application by the Chief Constable, consent to the retention of material under 63D(5) on the grounds that prescribed circumstances apply if the commissioner considers it appropriate to retain the material. An order may be made making provision for the procedure to be followed in relation to the making of an application to the commissioner.¹⁵³ Article 63D (14) sets out a number of meanings for the purposes of this article. Prescribed means prescribed made by order of the Department.

Article 63E applies to DNA profiles and fingerprints which relate to persons arrested for or charged with a recordable offence other than a qualifying offence. Article 63 (2) stipulates that if a person has previously been convicted of a recordable offence which is not an excluded offence, the material may be retained indefinitely. The EFM explains that where there is no previous conviction the material will be destroyed under Article 63B unless it can be retained under other retention powers provided for in the Bill.¹⁵⁴

Article 63F allows material to be retained indefinitely in relation to persons who have been convicted of a recordable offence. This Article does not apply to persons under 18 convicted of a first minor offence (i.e. a recordable offence other than a qualifying offence).¹⁵⁵ Article 63G allows for the indefinite retention of material in relation to a conviction of an offence outside Northern Ireland.

Article 63H deal with the retention of DNA profiles and fingerprints in persons under 18 convicted of a minor first offence. The provision applies to a person under 18 who is convicted of a recordable other than a qualifying offence and has no previous convictions.¹⁵⁶ Where the person is given a custodial sentence of less than five years, the material may be retained for five years plus the term of the sentence.¹⁵⁷ Where the person is given a custodial sentence of five years or more on relation to the offence, the material may be retained indefinitely.¹⁵⁸ Where the young person is given a sentence other than a custodial sentence, the retention period five years from the date the material was taken.¹⁵⁹ If the person is convicted of another recordable offence before the end of the retention period, the material may be retained indefinitely.¹⁶⁰

Article 63I makes provision for the retention of DNA profiles and fingerprints given voluntarily. Material may be retained until it has the fulfilled the purpose for which it was taken.¹⁶¹ However the material may be retained indefinitely if the person has

¹⁵¹ Article 63D(10) of the Police and Criminal Evidence (Northern Ireland) Order 1989, as amended

¹⁵² Article 63D (11)

¹⁵³ Article 63D(13)

¹⁵⁴ Explanatory Memorandum to the Criminal Justice Bill introduced in the Northern Ireland Assembly, 25 June 2012, para 77.

¹⁵⁵ Article 63 (F) (3) of the Police and Criminal Evidence (Northern Ireland) Order 1989, as amended

¹⁵⁶ Article 63H (1)

¹⁵⁷ Article 63 H (2)

¹⁵⁸ Article 63 H (3)

¹⁵⁹ Article 63(H)4

¹⁶⁰ Article 63(H) 5

¹⁶¹ Article 63I (2)

previously or subsequently been convicted of a recordable offence.¹⁶² The Article does exempt a conviction for a recordable offence if it was committed when the person is aged 18.¹⁶³

Article 63J deals with the retention of fingerprints and DNA profiles with consent. The material may be retained for as long as the person consents to it being retained.¹⁶⁴ Consent must be given in writing and may be withdrawn at any time.¹⁶⁵

Article 63K makes provision for material obtained for one purpose of an offence leads to a person being arrested, charged or convicted of an a second unrelated offence.¹⁶⁶ The Article provides that the retention of the persons fingerprints and DNA for the first offence will be dealt with by the rules governing the second offence for which the person was arrested or charged.¹⁶⁷

Article 63L(1) stipulates that where fingerprints are required to be destroyed by Article 63B, copies must also be destroyed. If a DNA profile is to be destroyed, no copy must be retained by police except in a form which does not include information which identifies the person to whom the profile relates.¹⁶⁸

Article 63M deals with the destruction of samples. The Article provides that samples must be destroyed as soon as a DNA profile has been derived from the sample and no later than six months from the date the sample was taken.¹⁶⁹ The Chief Constable may apply to a District Judge for an order to retain a sample beyond the date the sample would be otherwise destroyed if the sample was taken from a person in relation to an investigation of a qualifying offence or is likely to be needed in criminal proceedings.¹⁷⁰ Under Article 63M (7), the District Judge may make an order to allow the sample to be retained for a period of 12 months beginning with the date from which the sample would be destroyed and may be renewed on one or more occasions for a further period of 12 months from when the order would cease to have effect. An application for an order may be made without notice to the person from whom the sample was taken and may be heard in private in the absence of that person.¹⁷¹ A sample must not be used other than for the purposes of any proceedings in relation to any offence for which the sample was taken.¹⁷²

Article 63N(1) provides that fingerprints, DNA profiles and samples must not be used for purposes other than the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution or for the purpose of identification, including a deceased person. Article 63N (2) provides that such material cannot at any time after it

¹⁶² Article 63I (3)

¹⁶³ Article 63 I(4)

¹⁶⁴ Article 63J(2)

¹⁶⁵ Article 63J (3)

¹⁶⁶ Article 63K (1)

¹⁶⁷ Article 63K (2)

¹⁶⁸ Article 63L(2)

¹⁶⁹ Article 63 M (2) (b)

¹⁷⁰ Article 63 M (4) and (5)

¹⁷¹ Article 63M (8)

¹⁷² Article 63M (9)

is required by Article 63B or 63M to be destroyed be used as evidence against the person to whom the material relates or for investigative purposes.

Article 63O(1) provides that Articles 63B to 63N in this schedule do not apply to material to which paragraphs 20A to 20J of the Terrorism Act 2000 (destruction, retention and use of material from terrorist suspects) apply. Articles 63B to 63N also do not apply to material in relation to paragraph 8 of schedule 4 to the International Criminal Court Act 2001 (requirement to destroy material) or paragraph 6 of the Terrorism and Prevention Measures Act 2011 (requirement to destroy material). The EFM explains that these matters are excepted.¹⁷³ These Articles also do not apply to biological material which is taken from a person but relates to another person. Article 63B to 63L and 63N do not apply to material that may become disclosable under the Criminal Procedure and Investigations Act 1996.¹⁷⁴

Schedule 3: Amendments: Fingerprints, DNA, Profiles, etc

Paragraph 1 amends Article 53 (Interpretation of Part 6) of the Police and Criminal Evidence (Northern Ireland) (PACENI) Order 1989 to add definitions of 63B material, DNA profile and DNA sample. Paragraph 1 (3) of the Schedule inserts new paragraphs 3A and 3B in Article 53 of the 1989 Order. New paragraph 3A excludes the destruction of samples under Article 63M as grounds to take a new sample. New paragraph 3B provides that references to a person being charged with an offence includes persons who are informed that they will be reported for an offence.

Paragraph 2 of schedule 3 adds to the list of qualifying offences, the robbery and intent to rob under section 8 of the Theft Act (Northern Ireland) 1969. Paragraph 3 adds a new Article 53B into PACENI which amends the interpretation of persons convicted of an offence. Paragraphs 4, 6 and 7 are consequential amendments. Paragraph 5 provides that an order made under Article 63D(5) (c) is subject to negative resolution.

Schedule 4: Repeals

Schedule 4 sets out the consequential repeals. Part 1 sets out the repeals in relation to Human Trafficking and Part 2 sets out the repeals in relation to Fingerprints, DNA Profiles, etc..

5 Human Rights and Equality Issues

The EFM corresponding to the Bill states that all proposals have been screened and are considered to be compatible with the ECHR. Furthermore the EFM emphasises that the Bill contains provisions which remedy incompatibilities with the ECHR that were highlighted by the European Court of Human Rights and the UK Supreme Court.

¹⁷³ Explanatory memorandum of the Criminal Justice Bill as introduced in the Northern Ireland Assembly, 25 June 2012

¹⁷⁴ Article 63O (5) of the Police and Criminal Evidence (Northern Ireland) Order 1989

The EFM also highlights that the policy proposals within the Bill have been screened out as not having an adverse impact on any of the Section 75 categories in the Northern Ireland Act 1998.

6 Financial and Regulatory Impact

The EFM indicates that the implementation of the DNA and fingerprint retention provisions in the Bill will incur costs particularly in relation to the retrospective destruction of existing material. It has been estimated this will cost the PSNI in the region of £2.5m. The funding will be sought from within existing resources for the 2013/2014 financial year. The EFM states that the financial implications for the sex offender and human trafficking provisions will be met within existing resources. In relation to the Regulatory Impact Assessment, the EFM states that there will be no direct costs created for the private or voluntary sectors.¹⁷⁵

¹⁷⁵ Explanatory memorandum of the Criminal Justice Bill as introduced in the Northern Ireland Assembly, 25 June 2012, para 95, 98

Annex A- Comparative Table on DNA/ Fingerprint Retention Policies¹⁷⁶

Occurrence	Scottish System	England and Wales Protection of Freedoms Act 2012	Northern Ireland proposals
Adult- Conviction- All Crimes	Indefinite	Indefinite	Indefinite
Adult Charged but not convicted – Serious Crime	3 years + possible 2 year extension(s) on application to court	3 years + single 2 year extension on application to court	3 years + single 2 year extension on application to court
Adult arrested but not charged-serious crime	Immediate Destruction	Immediate destruction (unless prescribed circumstances apply then 3 years retention +possible single two year extension on application to court)	Immediate destruction (unless prescribed circumstances apply then 3 years retention +possible single two year extension on application to court)
Adult-non conviction- Minor Crime	Immediate Destruction	Immediate Destruction	Immediate Destruction
Under 18- Conviction-serious crime	Indefinite	Indefinite	Indefinite
Under 18- Conviction- Minor	Indefinite	1 st Conviction- 5 years (for non-	1 st Conviction- 5 years (for non-

¹⁷⁶ Information obtained from Department of Justice Briefing paper to the Committee on DNA/Fingerprints retention policy in NI, 1 September 2011 and Annex B of Explanatory Memorandum of the Protection of Freedoms Act 2012

Crime		custodial sentence) or length of sentence+ 5 years (for custodial sentence) If custodial sentence over 5 years-indefinite 2 nd Conviction-indefinite	custodial sentence) or length of sentence+ 5 years (for custodial sentence) If custodial sentence over 5 years-indefinite 2 nd Conviction-indefinite
Under 18- Charged but not convicted-serious crime	3 years + two year extension(s) on application to court	3 years + single two year extension on application to court	3 years + single two year extension on application to court
Under 18- arrested but not charged-serious crime	Immediate Destruction	Immediate destruction unless prescribed circumstances apply - 3 years retention +possible single two year extension on application to court	Immediate destruction unless prescribed circumstances apply - 3 years retention +possible single two year extension on application to court
Under 18- non-conviction-Minor crime	Immediate Destruction	Immediate Destruction	Immediate Destruction