CRIMINAL JUSTICE BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial Memorandum has been prepared by the Department of Justice in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

2. The Memorandum needs to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill, so where a clause or part of a clause or Schedule does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

Sex offender notification

3. The Sex Offenders Act 1997 introduced notification requirements for sex offenders, which became widely known as 'signing the sex offender register'. The legislation allowed the police to hold information on the whereabouts of convicted sex offenders in the interests of the prevention and detection of sexual offences. These provisions were further developed in the Criminal Justice and Court Services Act 2000, which reduced the initial time allowed to give the required information to the police from 14 to 3 days.

4. Part 2 of the Sexual Offences Act 2003 (the 2003 Act) replaced the previous legislation and consolidated and expanded the requirements further. The 2003 Act prescribes the periods of notification which attach to an offender based on the length and type of disposal. The period begins on the date of conviction or caution. The shortest period of 2 years is in respect of a caution. All other non-custodial disposals attract 5 years. Custodial sentences of up to 6 months attract 7 years, up to 30 months 10 years and over 30 months an indefinite period.

5. The notification requirements are not part of the court order on conviction but are a statutory obligation placed on the offender as a consequence of conviction. It is an offence to fail without reasonable excuse to comply with the notification requirements. The offence is punishable on indictment by imprisonment for up to 5 years and on summary conviction by imprisonment for up to 6 months or a fine.

6. In 2008, the Divisional Court in England granted claims for judicial review made by two sex offenders, one a juvenile when convicted, that the absence of a right of review of the indefinite nature of their notification requirements breached their right to privacy protected by Article 8 of the European Convention on Human Rights.

7. The Divisional Court made a declaration that s. 82(1) of the Sexual Offences Act 2003 was incompatible with Article 8. The Court of Appeal dismissed an appeal by the Home Secretary, who then appealed to the Supreme Court. That appeal was turned down in April 2010 and the court held unanimously that the absence of a review mechanism under the Sexual Offences Act 2003 does render the indefinite notification requirements incompatible with Article 8 of the ECHR. In the absence of any evidence to demonstrate that it was not possible to identify at least some convicted sex offenders who pose no significant risk of re-offending, the lack of a review mechanism was disproportionate. The court also noted that almost all similar registration systems in other jurisdictions contain a review mechanism; however, it is open to the legislature to impose an appropriately high threshold for review.

8. Following the judgment, all UK jurisdictions looked at options to address the ruling. Scotland introduced remedial legislation in January 2011 and England and Wales followed in July 2012. All jurisdictions consulted with each other to ensure that the broad principles of their respective review mechanisms were consistent.

9. Proposals for Northern Ireland were also put before the Assembly at Consideration Stage of a previous Justice Bill in February 2011 and again at Further Consideration Stage in March of the same year but failed to attract cross-community support and were withdrawn by the Justice Minister. The Minister, at that stage, said that similar proposals would have to be brought back to the Assembly after the May 2011 elections. The provisions in the Bill represent that undertaking.

10. The Bill is also being used to make several other changes to the law on sex offender notification. One is a minor consequential change to allow for removal of notification requirements in respect of some offences which no longer exist in law. Others strengthen the law by introducing provisions to make notification requirements more effective and to adjust the scope of sexual offences prevention orders.

Human Trafficking provisions

11. On Friday 23 March 2011, the Home Secretary signed the Council of Europe Convention on Action against Trafficking in Human Beings CETS No.: 197. The Department of Justice in Northern Ireland is now required to legislate to amend the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 to introduce new offences to comply with the Directive.

12. Trafficking is criminalised in the United Kingdom pursuant to a number of criminal offences. These are set out in the Sexual Offences Act 2003 (the 2003 Act) where a person is trafficked for the purpose of sexual exploitation, and the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (the 2004 Act) where a person is trafficked for the purpose of labour exploitation and certain other types of exploitation.

13. In order to comply with the Directive, Northern Ireland now needs to create an offence where a UK resident (who has not previously been trafficked into the UK) is trafficked within the UK e.g. from London to Belfast, for the purposes of non-sexual exploitation; this is already an offence in relation to trafficking for sexual exploitation. A further change is needed in order to create an offence to allow for the prosecution of a UK

national who has trafficked someone anywhere outside the UK either for sexual or non-sexual exploitation, e.g. if a UK national trafficked a person from Mexico to Brazil.

14. Given the serious nature of these offences, the opportunity is also being taken to remove the existing provision for summary conviction of human trafficking offences to make human trafficking offences triable on indictment only. This will ensure that, from commencement, all future offences of human trafficking, for any form of exploitation, will be triable on indictment in the Crown Court, attracting, essentially, a maximum sentence of 14 years imprisonment.

The retention of fingerprints, samples etc

15. The existing framework for the taking, retention and destruction of fingerprints, DNA samples and the profiles derived from such samples is set out in Part VI of the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACENI). A DNA sample is a sample taken for analysis, such as a mouth swab, plucked hair roots or blood, which contains the DNA of the individual. The DNA profile derived from the sample is the pattern of DNA characteristics used to distinguish individuals and is stored on the database as a numeric code. etc.

16. The amendments to PACENI made by the Police (Amendment)(Northern Ireland) Order 1995 enabled DNA samples to be taken from anyone charged with, reported for or convicted of a recordable offence, and allowed profiles obtained from such samples to be retained and checked for matches against other profiles obtained from victims or scenes of crime. If the person was acquitted, samples and profiles had to be destroyed.

17. The Criminal Justice and Police Act 2001 further amended PACENI so as to remove the obligation to destroy fingerprints, DNA samples or profiles when a suspect was not prosecuted for, or was acquitted of, the offence with which he or she was charged. The power to take and retain fingerprints, DNA samples and profiles was further widened by the Criminal Justice Act 2003, which allowed a DNA sample to be taken from any person arrested for a recordable offence and detained in a police station, whether or not they were subsequently charged. Any such sample, and the profile derived from it, could be retained indefinitely.

18. In December 2008, in the case of *S and Marper v United Kingdom* [2008] ECHR 1581, the European Court of Human Rights ("ECtHR") ruled that the provisions in the Police and Criminal Evidence Act 1984 ("PACE") for England and Wales, permitting the indefinite retention of DNA and fingerprints from unconvicted individuals, violated Article 8 (right to privacy) of the European Convention on Human Rights. Northern Ireland has equivalent provisions in PACENI.

19. In particular, the Court was struck by the 'blanket and indiscriminate' nature of the power to retain material irrespective of the nature or gravity of the offence with which the individual was originally suspected or the age of the suspected offender. The Court found that retention was not time limited and there existed only limited possibilities for an acquitted individual to have the data removed from the database or materials destroyed. The Court pointed to the current retention policy in Scotland as a model which, in relation to unconvicted persons, discriminated between different kinds of

cases and applied strictly defined storage periods for data, even in more serious cases. The equivalent legislation in Scotland is contained in sections 18 to 20 of the Criminal Procedure (Scotland) Act 1995 (as amended).

20. Since then, a number of proposals have been brought forward to remedy the incompatibility with Convention rights identified by the ECtHR. The overarching objective throughout the policy development process has been to put in place a retention framework which has the support and confidence of the public and achieves a proportionate balance between the rights of the individual and the protection of the public.

Release on licence of child convicted of serious offence

21. Children found guilty of particularly serious offences may be sentenced to a period of determinate detention. Under Articles 45(2) and 46 of the Criminal Justice (Children) (NI) Order 1998 it is a matter for the Minister of Justice to decide when within the sentence period a child should be released, under what licence conditions and under what circumstances the child should be recalled to custody. This process has been declared incompatible with Article 5 of the ECHR because it lacks judicial or judicial-style independence. The new provisions introduce this require element by transferring the powers currently held by the Minister to the sentencing judge and the Parole Commissioners for Northern Ireland.

Examination of accused through intermediary

22. Intermediaries are intended to facilitate those with significant communication difficulties by ensuring that effective questioning is facilitated and best evidence is provided to the court. Limiting the scope of commencement in respect of Article 17 of the Criminal Evidence (Northern Ireland) Order 1999 (Examination of witness through intermediary) is provided for by Article 6 (Special measures available to eligible witnesses) of that Order. This Article requires that a statutory notice is issued before a court can give an "intermediary" direction and provides for the withdrawal of that notice. However, in drafting Article 21BA (inserted by section 12 of the Justice Act (Northern Ireland) 2011), which provides for examination of the accused through an intermediary, it omitted to provide for a similar requirement. New clause 11 corrects that omission. It therefore provides legislative consistency between the provisions for witnesses (in Article 17 of the 1999 Order) and the accused (in Article 21BA of that Order) in relation to the issue and withdrawal of statutory notices.

Abolition of scandalising the judiciary as a form of contempt of court

23. Scandalising the Judiciary (also referred to as scandalising the court or scandalising judges) is defined as 'any act done or writing published which is calculated to bring a court or a judge into contempt or lower his authority' and is a common law offence. A call to abolish the offence arose when, in March 2012, the Attorney General of Northern Ireland obtained leave to prosecute the Rt Hon Peter Hain MP following comments made in his autobiography about a High Court judge. Although the proceedings were withdrawn, the proposed use of the offence attracted considerable media and political attention, with some perceiving it as an attack on free speech.

24. In England and Wales, an amendment to abolish the offence was brought forward in the Crime and Courts Bill. Given that this related to a devolved matter, the Department of Justice considered that it would be appropriate for it to be looked at separately in the Northern Ireland Assembly. The Department had intended that to consult on the matter before taking any decision on how the matter should be dealt with.

25. The Committee for Justice considered, however, that the Criminal Justice Bill represented an opportunity to repeal the offence and brought an amendment to do so.

CONSULTATION

Consultation on sex offender notification and violent offender orders

26. Consultation on changes to the law on sex offender notification and the introduction of violent offender orders began on 6 July 2011 and closed on 5 October 2011. A total of 13 responses were received.

27. The consultation document sought views on a number of proposed changes to the law on notification requirements for sex offenders and on measures to better protect the public from the risk posed by violent offenders.

28. The changes consulted on were the introduction of a mechanism to allow offenders subject to notification for an indefinite period to apply for a review after a certain amount of time in the community; strengthening public protection through additional notification requirements; amending the law to allow for removal of notification where offences have been abolished, and introduction of orders to more effectively manage risk from violent offenders.

29. The consultation document and summary of responses can be found at:

    http://www.dojni.gov.uk/index/public-consultations/archive-consultations/consultation-on-sex-offender-notification-and-violent-offender-orders.htm

Consultation on human trafficking provisions

30. The Department of Justice launched a consultation on the proposed new offences on 5 April 2012, for a period of eight weeks.

31. The consultation concluded on 31 May. At that date 43 comments had been received, none of them negative.

32. A number of the responses highlighted the importance of sentencing as a deterrent and the legislative amendment, removing the provision for summary conviction, was included in the Bill as a result. Stakeholders, including members of the OCTF's Immigration and Human Trafficking (IHT) Subgroup, were also consulted and signalled their support for the amendment.

Consultation on the retention of fingerprints, samples etc.

33. Following the ECtHR judgment, in May 2009 the UK Government issued a consultation paper entitled 'Keeping the right people on the DNA Database'. This contained a range of proposals aimed at replacing the 'blanket' retention policy with a framework which would discriminate between different kinds of case and apply strictly-defined storage periods for data. As the judgment applied equally to the legislative position in Northern Ireland, a joint public consultation exercise was carried out on the policy proposals in England, Wales and Northern Ireland.

34. Two sets of legislative proposals prepared following the consultation were subsequently abandoned and, following the devolution of justice to the Assembly and the General Election in May 2010, the current proposals for England and Wales were published in what is now the Protection of Freedoms Act 2012. The Department of Justice proceeded with public consultation on proposals based largely on the framework described in that Act. Overall, the proposed framework was viewed favourably by most respondents as a proportionate and balanced approach to replacing the current indefinite retention policy. As expected, given the subject matter, a wide range of views was expressed on various aspects of the policy proposals.

OPTIONS CONSIDERED

Sex offender notification

35. The changes to sex offender notification include the introduction of a mechanism to allow offenders subject to notification for an indefinite period to apply for a review after a certain amount of time in the community. This change is related to a Supreme Court ruling on compliance with human rights obligations.

36. **Options considered**: The draft legislation is needed to comply with ECHR obligations. Therefore the policy options were limited. However some of the detail was open to consideration. For example, the judgment did not specify the length of time before a review should be possible. Options were considered in relation to the periods until the first review and any further review.

37. The review is only available for those offenders given an indefinite period of notification. The changes do not affect the fixed notification periods already in operation for sentences up to 30 months. These fixed periods are up to ten years. It would be inappropriate to have an offender subject to a longer sentence for a more serious crime able to apply for removal of the notification requirements before a fixed period for a lesser sentence has expired. In that regard, 15 years from the date of leaving prison is a fair and appropriate period to expect an offender to be in the community, which will also allow for more accuracy in the risk assessment process. It also mirrors the review period in the rest of the UK.

38. Following consideration of the period before a further review can be requested the period was extended from five years to eight years, which is broadly the same starting point as in the other jurisdictions, although they have the power to extend further.

39. Options were also considered in relation to the determination of the application and who should be responsible for the decision to discharge or continue the requirements. Consideration was given to whether or not there should be a right of review by the courts or other independent body, or whether such a body should make the initial determination. All UK jurisdictions have opted for the police to make the initial decision as the most appropriate agency, supported by other agencies involved in risk assessment and public protection. The Bill also allows for a right of review by the Crown Court.

40. Policy options relating to the other provisions to make notification more effective were considered in terms of the detail surrounding the practical operation of the proposals and ensuring they were ECHR compliant.

Human trafficking provisions

41. As clauses 6 and 7 are required in order to comply with the EU Directive on trafficking in Human Beings, there is very little scope to deviate from the terms of the Directive. This was the only option considered.

42. Following analysis of the responses to the consultation on human trafficking, the amendment which removes the provision for summary conviction was included. This is an additional measure, not required to comply with the EU Directive. The option of not including this provision was also considered. However it was felt that this provision would strengthen Northern Ireland's human trafficking legislation and act as a deterrent to potential perpetrators of human trafficking offences.

Retention of fingerprints, samples etc

43. Following the issue of the consultation paper 'Keeping the right people on the DNA Database', the UK Government introduced legislative provisions within the Policing and Crime Bill to give effect to the proposals, but these were withdrawn due to parliamentary opposition.

44. New legislative provisions for England, Wales and Northern Ireland were enacted in sections 14 to 23 of the Crime and Security Act 2010 which, amongst other things, were to allow for the retention for 6 years of fingerprints and DNA profiles of persons arrested for, but not convicted of, an offence. However, those provisions were not commenced before the General Election in May 2010, by which time responsibility in Northern Ireland for most of the subject matter had been devolved to the Assembly.

45. The new UK Government announced its intention to replace, for England and Wales, the Crime and Security Act provisions with others broadly modelled on the arrangements in Scotland. This Bill replaces the Northern Ireland provisions within that Act with others broadly equivalent to those being introduced for England and Wales in the Protection of Freedoms Act 2012.

Examination of accused through intermediary

46. As this provision is needed to provide legislative consistency in relation to the issue and withdrawal of statutory notices no other option was considered.

OVERVIEW

47. The Bill has 15 clauses and 4 schedules.

48. Clauses 1 to 5 and Schedule 1 relate to sex offender notification and make changes to Part 2 of the Sexual Offences Act 2003 ("the 2003 Act"). The principle aim of these clauses is to increase public safety whilst complying with the human rights of offenders subject to notification requirements for sexual offences. The clauses and Schedule provide for a mechanism to review indefinite notification requirements, require offenders to notify the police if they intend to leave their home address to travel within the UK, end notification requirements for acts which are no longer criminal offences, ensure relevant sexual offenders coming to Northern Ireland with convictions from countries outside of the United Kingdom are subject to the notification requirements and increase the scope of sexual offences prevention orders to allow courts to order offenders to take positive actions as well as place restrictions on their behaviour.

49. Clauses 6 and 7 create new human trafficking offences. Clause 6 amends the Sexual Offences Act 2003 to create an offence in Northern Ireland of trafficking for the purposes of sexual exploitation which takes place wholly outside the UK. Clause 7 amends the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 to allow prosecution for trafficking someone for exploitation anywhere outside the UK, and to ensure that an offence will have been committed where a person who has not previously been trafficked into the United Kingdom is trafficked within the United Kingdom for the purposes of labour or other non-sexual exploitation. The creation of these offences will ensure that the legislative framework to tackle human trafficking in Northern Ireland complies with the requirements of the EU Directive.

50. Clause 8 amends the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Offenders) Act 2004, to remove the existing provision for summary conviction of human trafficking offences in order to make human trafficking offences triable on indictment only.

51. Clause 9 and Schedules 2 and 3 insert into PACENI the new retention framework for fingerprints and samples, etc. and make consequential amendments. The key proposals are as follows.

Non-convicted persons

Immediate destruction of fingerprints and DNA profile from persons—

- arrested for or charged with, but not convicted of, a minor offence; or
- arrested for, but not charged with, a serious offence (unless prescribed circumstances apply).

Retention of fingerprints and DNA profile from persons—

- arrested for, but not charged with, a serious offence (if prescribed circumstances apply); or
- charged with, but not convicted of, a serious offence,

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

On first conviction for a minor offence, retention of fingerprints and DNA profiles for—

- five years, if the sentence is non-custodial; or
- five years plus length of sentence (if given a custodial sentence of less than five years).

Indefinite retention of fingerprints and DNA profiles—

- where a custodial sentence of five years or more is imposed;
- on conviction for a serious offence; or
- on a second conviction.

DNA samples

Destruction of all DNA samples taken from persons on arrest, whether the individual goes on to be convicted or not. Samples to be retained for only as long as necessary to create a DNA profile and, in any event, for no longer than six months, with an exception for temporary retention where the sample is likely to be needed in proceedings.

Statutory grounds for early deletion

Statutory requirement for Chief Constable to destroy fingerprints and DNA in cases where the taking of the samples was unlawful or the arrest of the person was unlawful or based on mistaken identity, with an exception for temporary retention where the material has evidential value, subject to its admittance by a court.

Searches

Relevant databases to be searched for a match against all fingerprints and DNA before destruction.

Biometric Commissioner

Cases involving prescribed circumstances to require independent approval.

52. Clause 10 removes the power of the Minister of Justice to determine matters relating to the release, setting of licence conditions and recall to custody for a child subject to determinate detention orders and, instead, provide for these to be determined by the sentencing court and the Parole Commissioners for Northern Ireland.

53. Clause 11 provides that a statutory notice is issued before a court can give an intermediary direction and also provides for the withdrawal of that notice

54. Clause 12 abolishes the common law offence of scandalising the judiciary as a form of contempt of court.

55. Clause 13 and Schedule 4 make repeals.

COMMENTARY ON CLAUSES

Clause 1: Review of indefinite offender notification requirements

This clause inserts a new Schedule 3A into Part 2 of the Sexual Offences Act 2003 ('the 2003 Act'). This Schedule provides for the review and discharge of indefinite sex offender notification requirements. The 2003 Act places requirements on sex offenders convicted of 'relevant' offences, as set out in the Act, to notify the police of certain personal details. If they do not comply with these requirements they are committing a criminal offence with a maximum sentence of 5 years imprisonment. The most serious offenders (with custodial sentences of 30 months or more) have to notify for an indefinite period with currently no right of review. The shortest period is for 2 years (for those who have been cautioned).

As a result of a UK Supreme Court judgment of incompatibility with Article 8 of the European Convention on Human Rights (ECHR), the law has been changed, in the rest of the UK, to allow offenders who are subject to an indefinite period of notification under Part 2 of the 2003 Act to apply to have the requirements lifted. The Schedule inserted into the 2003 Act addresses the Supreme Court judgement by introducing a similar review mechanism in this jurisdiction for indefinite notification.

Clause 2: Notification requirements: absence from notified residence

This clause adds an additional piece of information which must be provided to the police by sex offenders subject to notification. The provision requires them to notify the police in advance if they intend to leave their registered home address for more than three days to travel elsewhere in the UK, but are not residing at another address which has been, or must be, registered under existing provisions in the Sexual Offences Act 2003.

Clause 3: Ending notification requirement for acts which are no longer offences

This clause makes a consequential adjustment to section 93 of and Schedule 4 to the 2003 Act in its application to Northern Ireland, to amend the scope of the procedure for ending notification for abolished homosexual offences.

Section 93 of and Schedule 4 to the 2003 Act currently provide a procedure which allows certain offenders to make administrative application to have their notification requirements lifted for offences which have been abolished since the original notification requirement was attached. The only applicable offences in the 2003 Act are homosexual offences.

The Sexual Offences (Northern Ireland) Order 2008 ('the 2008 Order') changed the age at which the law in Northern Ireland recognised consent to sexual activity from 17 to 16, both heterosexual and homosexual. This change to the 'age of consent' means a consequential amendment is required to Schedule 4 to the 2003 Act, as it applies in Northern Ireland, to allow for applications for ending notification requirements in

respect of consensual offences where the other party had been 16 instead of 17, or where the offender held an honest belief, established in court, that the other party was 16. The abolished offences also now include unlawful carnal knowledge of a girl under 17 where the other party to the act was 16.

Clause 4: Offences committed in a country outside the United Kingdom

This clause inserts into Part 2 of the 2003 Act new sections 96A and 96B which make offenders who come to Northern Ireland with convictions (or cautions, etc.) from other jurisdictions statutorily subject to the notification requirements of the 2003 Act, that is, without the need for the police to make an application to the courts for a notification order.

The change to notification procedures is in respect of offenders coming to Northern Ireland with a conviction from another country for a relevant offence, within the specified time, as set out in the 2003 Act. A relevant offence is one listed in Schedule 3 to the 2003 Act. It removes the need for the police to apply to the court for a notification order and instead makes the individual offender liable to notify after three days once he or she has stayed for a qualifying period. The qualifying period is the first seven days (including where two or more periods in one year together amount to seven days) that a person, who does not normally reside in Northern Ireland, is in Northern Ireland. Offenders with convictions from states which are not members of the Council of Europe will have a right to apply to the High Court for an order to remove notification, if the court is satisfied that the conviction which led to notification was obtained by human rights abuses.

Clause 5: Sexual offences prevention orders

This clause amends Part 2 of the 2003 Act so that a person subject to a sexual offences prevention order can be required to undertake a particular action. The current orders only allow the court to prohibit an offender from doing anything described in the order. This change will allow for greater flexibility in how risk of serious sexual harm is managed in the community.

Clause 6: Trafficking people for sexual exploitation

Clause 6 inserts section 58A into the Sexual Offences Act 2003. Section 58A will create an offence where a person is trafficked for sexual exploitation into, within and out of countries outside the UK e.g. if a person arranged for an individual to be trafficked across Spain. The offence will deal with the abuse of trafficked victims at all stages of their journey or ongoing travel outside the UK, and may be committed by British citizens, habitual residents of Northern Ireland and bodies incorporated under the law of any part of the United Kingdom. A person guilty of the offence is liable, on conviction on indictment, to a term of imprisonment not exceeding 14 years. The offence is added to the Criminal Justice (Northern Ireland) Order 2008 as referable to the Court of Appeal.

Clause 7: Trafficking people for other exploitation

Clause 7 amends section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, and inserts new subsections (3A) and (4A). The amendments, in a similar manner to section 58A mentioned above, will create an offence to allow for the prosecution of a person who has trafficked someone anywhere outside the UK e.g. if a person trafficked an individual from Mexico to Brazil. Again, the offence will deal with the abuse of trafficked victims at all stages of their journey or ongoing travel, and will apply to British citizens, habitual residents of Northern Ireland and bodies incorporated under the law of a part of the United Kingdom. A person guilty of the offence is liable, on conviction on indictment, to a term of imprisonment not exceeding 14 years. The amendments include a reference to the Human Tissue Act 2004 in relation to the meaning of "exploitation". The offence will be referable to the Court of Appeal without the need for an amendment.

Clause 7 also amends section 4(2) so that trafficking a person within the United Kingdom for the purposes of labour or other exploitation will be an offence even if the person was not trafficked into the United Kingdom in the first place, e.g. it will be an offence if a person who has always resided in the United Kingdom is trafficked from, say, London to Belfast for the purpose of labour exploitation; this is already an offence in relation to trafficking for sexual exploitation.

Clause 8: Trafficking offences to be triable only on indictment

Clause 8 amends sections 57, 58 and 59 of the Sexual Offences Act 2003 and section 4 of the Asylum and Immigration (Treatment of Offenders) Act 2004, to remove the existing provision for summary conviction of human trafficking offences. Currently, a trial may be directed either to the Magistrates' Court, where the maximum term of imprisonment is six months, or to the Crown Court, where the maximum term available is, essentially, 14 years. Clause 8 will ensure that, from commencement, all future offences of human trafficking, whether for sexual exploitation or other forms of exploitation, will be triable on indictment only.

Clause 9: Retention of fingerprints, DNA profiles, etc.

Clause 9 gives effect to Schedules 2 and 3 to the Bill, which insert the new retention framework in PACENI and make consequential amendments.

It also requires the Department of Justice to make an order (subject to the negative resolution procedure) containing transitional or saving provisions associated with the coming into force of that Clause, and the repeals in Part 2 of Schedule 4. In particular, the Department must provide for the destruction or retention of biometric material already in existence at the point this legislation comes into operation.

This will enable the Department to ensure that the retention and destruction regime set out in the Bill is applied to existing material, while recognising that this exercise may take some time to complete.

Clause 10: Release on licence of child convicted of serious offence

Clause 10 addresses an ECHR-incompatibility issue that has arisen with the use of determinate detention orders for children found guilty of serious offending. The amended provisions removes the power of the Minister of Justice to determine matters relating to the release, setting of licence conditions and recall to custody for a child subject to such an order and, instead, provide for these to be determined by the sentencing court and the Parole Commissioners for Northern Ireland. This introduces the necessary element of judicial or judicial-style independence for compliance with the ECHR and brings the detention order into line with all other custodial orders that involve release under licence.

Clause 11: Examination of accused through intermediary

New clause 11 inserts into Article 21BA of the Criminal Evidence (Northern Ireland) Order 1999 a requirement that a court may not give a direction under paragraph 3 of Article 21BA unless it has been notified by the Department of Justice that arrangements for implementing such a direction have been made in relation to that court and that the notice has not been withdrawn.

Clause 12: Abolition of scandalising the judiciary as form of contempt of court

Clause 12(1) abolishes the common law offence of scandalising the judiciary (also referred to as scandalising the court or scandalising judges) as a form of contempt of court in Northern Ireland. Subsection (2) clarifies that conduct which is a contempt of court (such as abuse of a judge in the face of the court or that otherwise interferes with particular proceedings) and which would also have been scandalising the judiciary, remains contempt of court.

Clause 13: Repeals

Clause 14: Commencement and transitional, etc. provisions

Clause 14 provides that the Bill's provisions will commence on the day after Royal Assent, with the exception of those sections and Schedules listed in paragraph 2, which will be commenced by order of the Department of Justice. Paragraph 3 provides that such an order may contain such transitional or saving provisions as the Department thinks appropriate (except an order bringing section 9 or the repeals in Part 3 of Schedule 4 into operation).

Schedules

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

This Schedule provides for the review and discharge of indefinite notification requirements.

Paragraph 1: Introductory

This paragraph outlines that the provisions of the Schedule apply to a person who is subject to notification requirements for an indefinite period on or after the commencement of clause 1 of this Bill. It also defines some of the terms used in this Schedule.

Paragraph 2: Initial review: applications

This paragraph sets out the period which must elapse from the start of their notification requirements before an offender can apply in writing to the Chief Constable to discharge them from the notification requirements. An offender cannot apply if they are subject to a sexual offences prevention order or an interim sexual offences prevention order or notification requirements for a fixed period which has not expired. Otherwise an offender can apply to be reviewed eight years after the beginning of the notification period if the offender was under 18 at the time of conviction or after 15 years if the offender was an adult. The paragraph also ensures that any period spent in prison for a relevant event after the date of notification is disregarded.

Paragraph 3: Initial review: determination of application

This paragraph specifies the test for discharging the notification requirements and sets out the matters the Chief Constable must take into account when deciding whether to discharge the notification requirements.

Paragraph 4: Initial review: notice of decision

This paragraph requires the Chief Constable to inform the offender of a decision within 12 weeks of the date of application. If the Chief Constable discharges the notification requirements, the offender ceases to be subject to them from that date. If the Chief Constable decides not to discharge, he must inform the offender of the reasons for the decision.

Paragraph 5: Initial review: application to Crown Court

This paragraph allows the offender to apply to the Crown Court to have their notification requirements discharged if the Chief Constable does not do so, or fails to respond within the 12 week period. It also sets out that the Crown Court must review and determine the application on the same basis as the police.

Paragraph 6: Further reviews

This paragraph sets out the period which must elapse between applications to the Chief Constable for discharge from the notification requirements. An offender cannot apply if they are subject to a sexual offences prevention order or an interim sexual offences prevention order or notification requirements for a fixed period which has not expired. Otherwise an offender can apply to be reviewed four years after the previous decision by the Chief Constable or the Crown Court if the offender was under 18 at the time of the offence or after 8 years if the offender was an adult.

Paragraph 7: Guidance

This paragraph places a duty on the Department of Justice to issue guidance on the making, and determination by the Chief Constable, of applications. The provision allows for the guidance to be revised and requires the Department to make arrangements for it to be published.

Paragraph 8: **Discharge in Great Britain**

This paragraph outlines that an offender who is discharged from notification requirements from corresponding legislation in England and Wales or Scotland is also discharged from the notification requirements as they apply in Northern Ireland.

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

This Schedule inserts seventeen new Articles after Article 63A of PACENI to replace the existing framework governing the retention and destruction of fingerprints, DNA samples and profiles and other samples (referred to generally as "biometric material") taken from a person under the powers in Part VI of PACENI or in cases where such material is provided voluntarily.

In relation to the retention framework, the following definitions are relevant.

A '**qualifying offence**' is an offence listed in Article 53A of PACENI (to be inserted by section 13 of the Crime and Security Act 2010). In general, the list broadly covers serious violent, sexual or terrorist offences. The concept is used to distinguish between serious and less serious offences for the purposes of the retention regime.

A '**recordable offence'** is one punishable by imprisonment or otherwise listed in regulation 2 of the Northern Ireland Criminal Records (Recordable Offences) Regulations 1989 (S.R. 1989 No. 442).

An '**excluded offence**' is defined in Article 63D(14) as a recordable offence which—

- is not a qualifying offence;
- is the only recordable offence of which the person has been convicted;
- was committed when under the age of 18 years; and
- did not incur a custodial sentence of 5 years or more.

The new provisions are as follows.

Article 63B – Destruction of fingerprints and DNA profiles: basic rule

This Article sets out the basic rules governing the destruction of fingerprints and DNA profiles (collectively referred to as Article 63B material) taken under the powers in Part VI of PACENI or taken with consent during the investigation of an offence. Article 63B(2) requires the destruction of such material if it appears that the taking of the material was unlawful or the arrest was unlawful or based on a case of mistaken

identity, unless of potential evidential value in which case it may be retained for the duration of the associated investigation or proceedings, and its admissibility as evidence considered by the court. In any other case, Article 63B material must be destroyed unless new Articles 63C to 63M detailed below allow for its retention, in which case the Article which delivers the longest retention period will determine the period for which material may be kept. Article 63B(5) enables a person's fingerprints and DNA profile, which would otherwise fall to be destroyed under Article 63B, to be retained until a search of the relevant databases has been carried out.

Article 63C – Retention of Article 63B material pending investigation or proceedings

This Article enables Article 63B material taken from a person in connection with the investigation of an offence to be retained until the chief constable determines that it is of no evidential value in relation to the investigation or, where legal proceedings are instituted against a person, until the conclusion of those proceedings (e.g. the point that charges are dropped or at the outcome of a trial).

Article 63D – Retention of material: persons arrested for or charged with a qualifying offence

This Article provides for the further retention of material taken from persons (both adults and juveniles) arrested for or charged with, but not convicted of, a qualifying offence. Where such a person has previously been convicted of a recordable offence which is not an excluded offence, his or her fingerprints and DNA profile may be retained indefinitely (Article 63D(2)).

Where such a person has no previous conviction for a recordable offence and is—

- charged with, but not convicted of, a qualifying offence; or
- arrested for, but not charged with, a qualifying offence, and prescribed circumstances apply,

the fingerprints and DNA profile may be retained for three years from the date the material was taken (Article 63D(3) – (6)). The three year period may be extended by court order made on application by the Chief Constable to a District Judge (Magistrate's Courts) for an additional two years (Article 63D(9)). An application can only be made within the three month period before the date the material is due to be destroyed. The retention period cannot be further extended under this process. Either party may appeal to the county court against an order for extension or a refusal to make an order (Article 63D(10)).

The Article also provides for the Department of Justice to appoint a Biometric Commissioner (Article 63D(11)). The Chief Constable must apply to the Commissioner if he wishes to retain biometric material falling within Article 63(D)(5) on grounds of prescribed circumstances, and the Commissioner may consent to the retention of that material if he considers it appropriate (Article 63D(13)).

The prescribed circumstances are to be set out in an order under Article 63(D)(5)(c), which may also make provision about the procedure to be followed in relation to any application to the Commissioner (Article 63D(13)).

Article 63E – Retention of material: persons arrested for or charged with a recordable offence other than a qualifying offence

This Article provides that the fingerprints and DNA profile of a person arrested for or charged with, but not convicted of, a recordable offence other than a qualifying offence may be retained indefinitely if the person has been convicted previously of a recordable offence, unless that earlier recordable offence was an excluded offence. If the person has no previous convictions the material will fall to be destroyed under Article 63B unless it can be retained under one of the other retention powers in the Bill.

Article 63F – Retention of material: persons convicted of a recordable offence

This Article provides that a person's fingerprints or DNA profile may be retained indefinitely if convicted of a recordable offence (Article 63F(2)) except where a person under the age of 18 years at the time of the offence is convicted of a non-qualifying offence and has no previous convictions. In such a case the retention periods in new Article 63H will apply (Article 63F(3)).

Article 63G – Retention of material: persons convicted of an offence outside Northern Ireland

This Article provides that fingerprints or a DNA profile derived from a DNA sample may be retained indefinitely if taken in connection with a conviction for an offence under the law of any country or territory outside Northern Ireland. The existing Articles 61 to 63 of PACENI (as amended by section 9 of the Crime and Security Act 2010) include provisions to take fingerprints and DNA samples from persons convicted of a qualifying offence outside Northern Ireland. Article 63G(3) provides that material obtained under those provisions may be retained indefinitely.

Article 63H – Retention of Article 63B material: exception for persons under 18 convicted of first minor offence

This Article makes provision for the retention of fingerprints and DNA profiles of persons convicted of a minor offence (a recordable offence that is not a qualifying offence) committed while under the age of 18. In such cases, the retention period will be determined by the length and nature of the sentence for that offence. Where a person is given a custodial sentence of less than 5 years (i.e. where the offence is an excluded offence as defined in Article 63D(14)), the retention period will be 5 years plus the term of the sentence (Article 63H(2)). For a person receiving a custodial sentence of 5 years or more, the material may be retained indefinitely (Article 63H(3)). In the case of a person convicted of a minor offence not attracting a custodial sentence, the retention period will be 5 years from the date the material was taken (Article 63H(4)). Persons subject to a further conviction will have their material retained indefinitely (Article 63H(5)).

Article 63I - Retention of Article 63B material: persons under 18 given a caution

This Article makes provision for the retention of a DNA profile and fingerprints taken from a person who has been issued with a caution in connection with a recordable

offence committed while under the age of 18. In such cases the material may be retained for a period of five years.

Article 63J - Retention of Article 63B material: persons completing diversionary youth conference process

This Article makes provision for the retention of a DNA profile and fingerprints taken from a person who completes a diversionary youth conference process in connection with a recordable offence. In such cases the material may be retained for a period of five years.

Article 63K - Retention of Article 63B material: persons given a penalty notice

This Article makes provision for the retention of a DNA profile and fingerprints taken from a person who is given a penalty notice under section 60 of the Justice Act (Northern Ireland) 2011. In such cases material may be retained for a period of two years.

Article 63L – Retention of material given voluntarily

This Article contains provision for fingerprints or a DNA profile taken with consent to be destroyed after it has fulfilled the purpose for which it was taken or derived (Article 63L(2)) unless the person is previously or subsequently convicted of a recordable offence, in which case the material can be retained indefinitely (unless the previous conviction is for a recordable offence other than a qualifying offence committed while under the age of 18) (Article 63L(3)).

Article 63M – Retention of Article 63B material with consent

This Article makes provision for Article 63B material to remain on the relevant database if the person from whom it is taken specifically consents in writing to its continued retention (Article 63M(2)). This provision applies both to material taken in accordance with the powers in PACENI and to material given voluntarily. The Article allows for a person to withdraw his or her consent at any time (Article 63M(3)).

Article 63N – Material obtained for one purpose and used for another

This Article makes provision where a person arrested for one offence is subsequently arrested for, charged with or convicted of a second unrelated offence. The retention of that person's fingerprints and DNA profile in connection with the first offence will be governed by the rules applicable to the second offence for which the person was arrested, charged and/or convicted.

Article 63O – Destruction of copies

This Article requires that if fingerprints are required to be destroyed under the retention framework then any copies must also be destroyed. Similarly, if a DNA profile is to be destroyed, no copy may be kept except in a form that does not identify the person to whom the profile relates.

Article 63P – Destruction of samples

This Article requires DNA samples to be destroyed as soon as a DNA profile has been derived from the sample, and no later than 6 months from the date on which it was taken (Article 63P(4)), with an exception for temporary retention where the sample is likely to be needed in proceedings. Any other sample, for example, dental or skin impressions, must also be destroyed within 6 months of being taken (Article 63P(5)). The time within which material is to be destroyed will be subject to the time required to carry out a search against the material (Article 63P(6)).

Article 63Q – Use of retained material

This Article restricts the use to which fingerprints, DNA and other samples, and DNA profiles may be put during the period in which they are retained. Such material may only be used for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution or for identification purposes (including of a deceased person) (Article 63Q(1)). Article 63Q(2) makes clear that material which is required to be destroyed in accordance with Article 63B of PACENI must not at any time after it is required to be destroyed be used against the person to whom the material relates or for the purposes of the investigation of any offence.

Article 63R – Exclusion for certain regimes

This Article excludes from the general retention regime material taken from terrorist suspects and those in respect of whom a Terrorism Prevention and Investigation Measure (TPIM) notice has been imposed; those whose biometrics are held under immigration powers; and material taken in response to a request from the International Criminal Court for assistance in obtaining evidence of identity. These matters are excepted. It also excludes biological material that originates from one person but is recovered from another; and hard copies of material on case files, in order to ensure that it remains available for examination by defence experts and potentially the Criminal Cases Review Commission, in accordance with the disclosure requirements of the Criminal Procedure and Investigations Act 1996.

Schedule 3: Amendments: fingerprints, DNA profiles, etc.

Paragraph 1(2) adds definitions of 'Article 63B material, 'DNA profile', and 'DNA sample' to the interpretation of Part VI in Article 53(1) of PACENI.

Paragraph 1(3) inserts new paragraphs (3A) and (3B) into Article 53 of PACENI. Paragraph (3A) excludes the destruction of samples under Article 63P as grounds for police to take a fresh sample. New paragraph (3B) clarifies that the definition of persons who are 'charged with an offence' includes persons who are informed that they will be reported for an offence.

Paragraph 2 adds to the list of qualifying offences in Article 53A(2) of PACENI (as inserted by section 13 of the Crime and Security Act 2010) the offences of robbery and assault with intent to rob under section 8 of the Theft Act (Northern Ireland) 1969.

Paragraph 3 inserts a new Article 53B to PACENI to provide a number of interpretational provisions relevant to the application of the new retention framework.

Paragraphs 4, 6 and 7 are consequential amendments.

Paragraph 5 provides that the order to be made under Article 63D(5)(c) will be subject to the negative resolution procedure.

Schedule 4: Repeals

This Schedule sets out consequential repeals.

FINANCIAL EFFECTS OF THE BILL

56. Implementation of the DNA and fingerprint provisions in the Bill will incur costs, principally associated with the retrospective destruction of existing material. It is estimated that the destruction process will cost the Police Service of Northern Ireland in the region of £2.5m. This funding will be sought from within existing resources for the 2013/14 financial year. There are no financial implications of the sex offender proposals that will not be met within existing resources. Similarly, the costs of any investigations or prosecutions under the human trafficking provisions will be met from existing resources. It is envisaged that the financial costs associated with the intermediaries provision could be relatively small. A pilot is, however, being undertaken to more accurately determine this.

HUMAN RIGHTS ISSUES

57. All proposals have been screened and are considered to be compatible with Convention rights. The Bill makes provision to remedy incompatibilities with Convention rights identified by the ECtHR and the Supreme Court.

EQUALITY IMPACT ASSESSMENT

58. 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.

REGULATORY IMPACT ASSESSMENT

59. No direct costs will be created for the private or voluntary sectors.

LEGISLATIVE COMPETENCE

60. The Minister of Justice had made the following statement under section 9 of the Northern Ireland Act 1998:

"In my view the Criminal Justice Bill would be within the legislative competence of the Northern Ireland Assembly."

SECRETARY OF STATE CONSENT

61. The Secretary of State had consented under section 8 of the Northern Ireland Act 1998 to the Assembly considering this Bill.