



Northern Ireland Office
Criminal Law Branch
Criminal Justice Policy Division
Massey House
Belfast BT4 3SX

Criminal Justice Policy Division

28 January 2005

Dear Sir/ Madam,

The Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Categories of Offences) Order 2005

The Northern Ireland Office is currently undertaking a public consultation on proposed subordinate legislation related to revised rules of evidence which allow the disclosure of previous convictions where relevant. These 'bad character' provisions are contained in the Criminal Justice (Evidence) (Northern Ireland) Order 2004. The new subordinate legislation will provide guidance to judges as to whether a defendant's previous convictions in theft cases and cases of sexual offences against young people should be admissible as evidence in court. The draft Statutory Rule is enclosed along with an explanatory note and we invite you to consider the legislation.

Copies of the draft legislation may be obtained free of charge from the address below. They are also available on the Northern Ireland Office website: www.nio.gov.uk

The legislation can be made available on request from the address above in Cantonese, Hindi, Urdu, Arabic, Irish, Ulster-Scots, Braille, large type and audio tape. A text-phone facility is also available by phoning 028 90527668.

The consultation period will extend until **Friday 29 April 2005**. Comments on the proposed legislation should be sent to:

**Categories of Offences Consultation
Criminal Law Branch
Northern Ireland Office
Massey House
Stoney Road
Belfast
BT4 3SX**

Fax: 028 9052 7507

E-mail: clbranch@nio.x.gsi.gov.uk

The Northern Ireland Office is committed to publishing a list of those organisations that comment on these proposals and to making available, to anyone who asks for it, a copy of the comments and of our response to them. If you do not wish your comments to be published in this way, you must make this clear in any response you submit.

If you have any questions concerning the documentation or the consultation process itself please contact Criminal Law Branch who will be pleased to assist you.

If you have any concerns about the consultation process in Northern Ireland, you should contact the Northern Ireland Office's consultation co-ordinator, Dr. Jim Alford, on 02890 527015 or e-mail him at jim.alford@nio.x.gsi.gov.uk . Alternatively, you may wish to write to the address below:

Dr. Jim Alford
Central Management Unit
Northern Ireland Office
Stormont House
Stormont Estate
Belfast
BT4 3SH

Yours sincerely

David Withey
Criminal Law Branch

The Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Categories of Offences) Order 2005 – Explanatory Note

1. The Criminal Justice Act 2003 made a series of important changes to the law to ensure that criminal trials are run more effectively and to reduce the scope for abuse of the system. One of the aspects which it revised was in relation to rules of evidence to allow a defendant's previous convictions to be disclosed to the court where relevant. These revisions are in Part 11 of the Act and are known as the 'bad character' provisions. The aim of this change in the law is to ensure that all possible evidence is available to the court to enable it to reach a just verdict.
2. These provisions were extended to Northern Ireland by way of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 and are due to be commenced in the next few months. The attached draft Order will prescribe the first categories of offences which may be classified as 'similar'.

'Bad Character'

3. The 'bad character' provisions will enable the court to hear about a defendant's previous convictions and other misconduct, where these are relevant to the case. Their use is also subject to their value (in terms of throwing new light on the case) being greater than the risk that such evidence may unduly prejudice the trial. In other words, the court should only hear about a defendant's previous convictions if it is not likely to result in an unfair trial. The decision as to whether previous convictions should be disclosed lies with the judge in the case.
4. As part of the new legislation, the Secretary of State may prescribe categories of offences which are 'of the same type' for use as an indicator that a defendant has a propensity to commit offences of a certain type. This means that in a case where the defendant is accused of committing an offence contained in one of the categories *and* has a previous conviction for an offence in the same category then a case is created for this previous conviction to be used as evidence at his trial. The judge still retains the decision as to the disclosure.

The Order

5. The Order prescribes two categories of offences: 'theft' and 'sexual offences against young persons under 17'. Where a defendant has a previous conviction for an offence which is in the same category (as prescribed by the order) as that with which he is charged, this creates a presumption that the previous conviction should be admitted as evidence. It will still be possible for the defence to argue that such evidence would be prejudicial to the fairness of the trial and therefore should not be admitted.

The Categories

6. The categories contained in the Order cover areas of offending that are of particular concern.

Theft: the offences contained in the category are related directly to an interference with property or the taking of property that belongs to others.

Sexual offences against persons under the age of 17: the offences in this category cover any sexual activity committed in relation to children and young people under the legal age of consent.

7. The absence of categories for other types of offences **do not** prevent previous convictions of other types from being admitted if they demonstrate a propensity to commit a certain type of offence. Further guidance categories may be introduced at a later date.
8. The Northern Ireland Office invites you to consider the draft order and offer any comments on the proposed legislation. The closing date for the consultation is **Friday 29 April 2005**.

STATUTORY RULES OF NORTHERN IRELAND

2005 No.

CRIMINAL LAW

The Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Categories of Offences) Order 2005

Made

To be laid before Parliament

Coming into force

The Secretary of State, in exercise of the powers conferred upon him by Article 8(4)(b) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004¹, hereby makes the following Order.

1. This Order may be cited as the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Categories of Offences) Order 2005 and shall come into operation on -

2.-(1) The categories of offences set out in Parts 1 and 2 of the Schedule to this Order are hereby prescribed for the purposes of Article 8(4)(b) of the 2004 Order.

(2) Two offences are of the same category as each other if they are included in the same Part of the Schedule.

Northern Ireland Office

**One of Her Majesty's
Principal Secretaries of State**

¹ S.I. 2004 No. 1501 (N.I. 10)

SCHEDULE

Prescribed Categories of Offences

PART 1

THEFT CATEGORY

1. An offence under section 7 of the Theft Act (Northern Ireland) 1969² (theft).
2. An offence under section 8 of that Act (robbery).
3. An offence under section 9 of that Act (burglary).
4. An offence under section 10 of that Act (aggravated burglary).
5. An offence under section 12 of that Act (taking motor vehicle or other conveyance without authority).
6. An offence under section 21 of that Act (handling stolen goods).
7. An offence under section 24 of that Act (going equipped for stealing).
8. An offence under Article 5 of the Theft (Northern Ireland) Order 1978³ (making off without payment).
9. An offence under Article 172A of the Road Traffic (Northern Ireland) Order 1981⁴ (aggravated vehicle taking).
10. An offence of –
 - (a) aiding, abetting, counselling, procuring or inciting the commission of an offence specified in this Part of this Schedule; or
 - (b) attempting to commit an offence so specified.

² 1969 c.16

³ 1978 S.I. No. 1407 (NI 23)

⁴ 2004 S.I. No. 1991 (NI 15)

PART 2

SEXUAL OFFENCES (PERSONS UNDER THE AGE OF 17) CATEGORY

1. Rape if committed in relation to a person under the age of 17.
2. An offence under section 52 of the Offences against the Person Act 1861⁵ (indecent assault upon a female person) if it was committed in relation to a person under the age of 17.
3. An offence under section 53 or 54 of that Act (abduction of a woman) if it was committed in relation to a person under the age of 17.
4. An offence under section 2 of the Criminal Law Amendment Act 1885⁶ (c.69) (procurement of a girl under 21) if it was committed in relation to a person under the age of 17.
5. An offence under section 3 of that Act (procuring defilement of a woman using threats, etc.) if it was committed in relation to a person under the age of 17.
6. An offence under section 4 of that Act (unlawful carnal knowledge of a girl under 14)
7. An offence under section 5 of that Act (unlawful carnal knowledge of a girl under 17)
8. An offence under section 7 of that Act (abduction of girl under 18)
9. An offence under section 1 of the Punishment of Incest Act 1908⁷ (incest by males) if it was committed in relation to a person under the age of 17.
10. An offence under section 2 of that Act (incest by females) if it was committed in relation to a person under the age of 17.
11. An offence under section 21 of the Children and Young Persons Act (Northern Ireland) 1968⁸ (causing or encouraging seduction, etc. of a girl under 17).
12. An offence under section 22 of that Act (indecent conduct towards a child).
13. An offence under Article 3 of the Protection of Children (Northern Ireland) Order 1978⁹ (indecent photographs of children).
14. An offence under Article 9 of the Criminal Justice (Northern Ireland) Order 1980¹⁰ (inciting girl under 16 to have incestuous sexual intercourse).

⁵ 1861 (c.100)

⁶ 1885 (c.69)

⁷ 1908 (c.45)

⁸ 1968 (c.34)

⁹ S.I. 1978/1047 (N.I.17)

¹⁰ S.I. 1980/704 (N.I.6)

15. An offence under Article 15 of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988¹¹ (possession of indecent photograph of child).
16. An offence under Article 19 of the Criminal Justice (Northern Ireland) Order 2003¹² (buggery) if it was committed in relation to a person under the age of 17.
17. An offence under Article 20 of that Order (assault with intent to commit buggery) if it was committed in relation to a person under the age of 17.
18. An offence under Article 21 of that Order (indecent assault on a male) if it was committed in relation to a person under the age of 17.
19. An offence under section 15 of the Sexual Offences Act 2003¹³ (meeting a child following sexual grooming etc.).
20. An offence under any of sections 16 to 19 or 47 to 50 of this Act (abuse of trust, prostitution, child pornography)
21. An offence of -
 - (a) attempting, conspiring or inciting to commit that offence; or
 - (b) aiding and abetting, counselling or procuring the commission of that offence

¹¹ S.I. 1988/1847 (N.I.17)

¹² S.I. 2003/1247 (N.I.13)

¹³ 2003 (c.42)

EXPLANATORY NOTE

(This note is not part of the Order)

Article 8(4)(b) of the Criminal Justice (Evidence) (Northern Ireland) Order 2004 provides that a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of an offence of the same category as the one with which he is charged. Article 84(4)(b) provides that two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of that section by an order made by the Secretary of State.

The categories prescribed by this Order are theft and sexual offences (persons under the age of 17). Each category consists of offences of the same type.

A Public Consultation: The Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Categories of Offences) Order 2005

Summary of Responses

1. Between January and April this year the Northern Ireland Office undertook a public consultation on proposed subordinate legislation related to revised rules of evidence which allow the disclosure of a defendant's previous convictions where relevant in criminal proceedings.
2. The Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Categories of Offences) Order 2005 ("the 2005 Order") provides guidance as to the categorisation of certain types of conviction allowed to be disclosed when relevant. The underpinning Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order"), which provides the basis of the 2005 Order, is already in place having come into force on 9 April 2005. The 2004 Order already allows previous convictions to be admitted into court in appropriate circumstances. The 2005 Order provides additional guidance.
3. The 2005 Order prescribed two categories of offences: 'theft' and 'sexual offences against young persons under 17'. Where a defendant has a previous conviction for an offence which is in the same category as that for which he is charged, a presumption is created that the previous conviction should be admitted as evidence. It would still be possible for the defence to argue that such evidence would be prejudicial to the fairness of the trial and therefore should not be admitted. Similarly, the absence of categories for other types of offences would not prevent previous convictions of other types from being admitted if they demonstrate a propensity to commit a certain type of offence.
4. A total of 17 responses to the consultation were received. This paper reports on those responses, the concerns raised and the Government's response and way forward.

Overview

The majority of the responses related largely to the underpinning 2004 Order. Many were fully supportive of the Governments' proposals and welcomed the introduction of the new legislation as it would enable juries to hear the full range of evidence in criminal trials. In addition, a number of respondents expressed support but indicated a need for greater clarity. There were also a number of concerned responses demonstrating opposition largely to the 2004 Order.

Concerns Raised

Conviction for a specific offence should be based on proof that a person committed that offence, not on evidence of previous convictions.

The 2004 Order already standardised the rules on how evidence of bad character and previous convictions can be admitted. The 2004 Order includes a power for the court to exclude such evidence if it would be more prejudicial than probative of the issues. This would prevent somebody being convicted solely on the basis of bad character evidence. It therefore remains the case that the prosecution must satisfy the court beyond reasonable doubt that it was the defendant who committed the offence.

Introduction of previous convictions is bound to be prejudicial to a fair trial.

Evidence of previous convictions has always been admissible in certain circumstances in criminal proceedings in Northern Ireland. However, the rules were often confusing and difficult to apply. The 2004 Order standardised these rules and set out clearly when this evidence can and cannot be admitted. In doing so, the 2004 Order included a number of safeguards including a power for the courts to exclude evidence of previous convictions if it is felt that the jury will give it disproportionate weight. Evidence of previous convictions will only be admissible if their value (in terms of throwing new light on a case) is greater than the risk that the trial may be unfairly prejudiced.

Previous convictions should always be disclosed as a matter of course and not left to the discretion of the judge.

Although the Government is keen to ensure that the widest range of evidence is available in all criminal proceedings, it is clear that in some cases, previous convictions have little or no relevance to the charge being judged. Therefore it is essential to retain the element of discretion to ensure that trials do not have their fairness obstructed. A fair trial is the primary concern and judicial discretion will be essential to ensure this remains the case.

Concern that legislation only deals with offences against persons under the age of 17. Need to ensure that offences relate to 17 year olds too.

The purpose of the 2005 Order is to establish a propensity to commit offences against children. For the purposes of the 2005 Order children are classified as those under 17 years because, in sexual matters this is in fact the case. The fact that more generally, persons under 18 are regarded as children only relates to the age of majority, not to matters in relation to sexual offences.

Sexual Offences should not be limited to children.

The categories attached to the 2005 Order cover two areas of offending that cause the public particular concern and where there is a strong risk of repeat offending. The absence of categories for other types of offending - such as sexual offences in general - does not prevent previous convictions from being admitted if they demonstrate a propensity to commit an offence of a certain type, providing those convictions are relevant and probative. A staged approach to the introduction of categories will enable further categories to be considered for introduction in the future.

Why has theft been included as a category?

The Government feels that theft is a category in which previous convictions indicate a strong propensity to commit this type of offence. It is an area of considerable public concern and the Government believes that the people of Northern Ireland should be offered the same protection as those in England and Wales where theft was included as a category in an equivalent Categories of Offences Order last year.

Next steps

It is the Government's intention to lay the Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Categories of Offences) Order 2005 before Parliament for approval and commencement in autumn 2005.

List of respondents

Antrim Borough Council
Ards Borough Council
Ballymena Borough Council
Castlereagh Borough Council
Department of Culture, Arts and Leisure
Department of the Director of Public Prosecutions
Down District Council
Eastern Health and Social Services Board
Ian Paisley Jr MLA
Northern Ireland Commissioner for Children and Young People
Northern Ireland Court Service
NSPCC Northern Ireland
Police Federation for Northern Ireland
Probation Board for Northern Ireland
Ronan McGuigan
Southern Health and Social Services Board
Thomas McCullough