

# **Justice (Sexual Offences and Trafficking Victims) Bill**

## **Written submission to the Justice Committee**

**24 September 2021**

### **Introduction**

The Commissioner for Children and Young People (NICCY) was created in accordance with 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003) to safeguard and promote the rights and best interests of children and young people in Northern Ireland. Under Articles 7(2) and (3) of this legislation, NICCY has a mandate to keep under review the adequacy and effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities. Under Article 7(4), NICCY has a statutory duty to advise any relevant authority on matters concerning the rights or best interests of children and young persons.

The Commissioner's remit includes children and young people from birth up to 18 years, or 21 years if the young person is disabled or is care experienced. In carrying out her functions, the Commissioner's paramount consideration is the rights of the child or young person, having particular regard to their wishes and feelings. In exercising her functions, the Commissioner has regard to all relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).

NICCY welcomes the opportunity to provide written evidence to the Committee on the Justice (Sexual Offences and Trafficking Victims) Bill. Please note that this submission is not intended to be comprehensive but instead addresses the key aspects of the Bill which most directly engage children and young people's rights and best interests.

### **Children's Rights**

The United Nations Convention on the Rights of the Child (UNCRC) sets out minimum standards for children's rights across all areas of their lives such as, civil and personal protection, health, education, welfare. The four guiding principles which flow through the Convention are: children's right to non-discrimination; right to survival and development to the highest level; to their best interests being a primary consideration; and to their voice being heard in all matters affecting them.

The Convention also highlights that as rights-holders children have special rights to protection from all forms of harm, violence and abuse and to be supported in their recovery

from abuse. The State party has an obligation to ensure that appropriate measures and procedures, including investigatory, court and judicial processes, are in place to realise these rights. The rights of the Convention are interdependent and indivisible – like children’s lives they cannot be compartmentalised.

In 2016 following examination of the UK and devolved governments, the UN Committee on the Rights of the Child stated that in Northern Ireland the recommendations of the 2014 Independent Inquiry into Child Sexual Exploitation (CSE) must be implemented and we note that this includes the Inquiry’s key recommendation 14 on strengthening the law in order to better protect children and young people from sexual abuse and exploitation.<sup>1</sup> This is of particular interest to the Bill and the Committee may be aware of NICCY’s Reviews of Government CSE Progress Reports on the implementation of Inquiry recommendations and the Commissioner’s concerns about the lack of evidence that the process to take forward the recommendations has resulted in improved outcomes for children or more effective pursuit of perpetrators.<sup>2</sup>

The 2016 Concluding Observations of the Committee on the Rights of the Child also noted that, across the UK, the capacity of law enforcement bodies and the judiciary to detect and prosecute sexual abuse and exploitation cases and to grant effective remedies to victims should be strengthened and recommended that video recorded interviews with child victims and witnesses be used in court as evidence rather than children attending in person and being subject to cross-examination.<sup>3</sup> On this last point, the Committee may also be aware that in NICCY’s submission to Sir John Gillen’s Review into law and procedure in cases of serious sexual offences we recommended that Northern Ireland take forward the Barnahus model of child centred justice for child victims of sexual violence and abuse.<sup>3</sup> This approach, which is promoted by the Council of Europe, ensures that child victims can give their best evidence and meet the requirements of cross-examination

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<sup>1</sup> K. Marshall (2014) Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry. Available at: <https://www.rqia.org.uk/RQIA/files/37/379f52ad-b99e-4559-847e-e2688e0648c6.pdf>

<sup>2</sup> NICCY (2018) Reflections on Government CSE Progress Reports (Third and Fourth Composite Reports) Available at: <https://www.niccy.org/publications/2018/december/14/niccy-review-cse-progress-reports/><sup>3</sup>

Committee on the Rights of the Child (2016) Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, paras 45 and 81. Available at: <https://www.ohchr.org/en/countries/enacaregion/pages/gbindex.aspx>

<sup>3</sup> NICCY (2018) Advice to the Review of arrangements to deliver justice in serious sexual offences cases. Available at: <https://www.niccy.org/publications/2018/september/07/review-of-sexual-offences-cases/>

through pre-recorded testimony led by a forensic interviewer and undertaken with minimal delay.

### **Scope of Bill**

NICCY welcomes the intent of the Bill, as set out in the Explanatory and Financial Memorandum, to improve the operation and effectiveness of the justice system by enhancing public safety through the strengthening of sexual offences legislation and improving services for victims of trafficking and exploitation. However, the Commissioner is deeply disappointed that the intended scope of the planned Miscellaneous Justice Bill have not been brought forward, particularly in relation to bail and remand reform and the Minimum Age of Criminal Responsibility and highlights the lost opportunities to address these important issues within the current mandate.

In relation to sexual offences and protections in law, NICCY also notes disappointment that all areas included in the Department's 2019 consultation on CSE and law reform are not being brought forward, including proposals regarding the defence of reasonable belief. We will return to this in more detail during the submission but draw attention to the UN Committee's 2014 examination of the UK and devolved governments<sup>4</sup> in their compliance with the Optional Protocol on the sale of children, child prostitution and child pornography which highlighted that the Sexual Offences (Northern Ireland) Order 2008 did not provide adequate levels of protection for all children up to the age of 18 years against all sexual offences. We also note that the Independent Inquiry into CSE in Northern Ireland recommendations reiterated these concerns.<sup>5</sup>

The UN Committee on the Rights of the Child is instructive in reminding governments that all children aged up to 18 years are considered vulnerable until completing their neural,

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<sup>4</sup> Committee on the Rights of the Child (2014) Concluding observations on the UK report on the Optional Protocol on the Rights of the Child on the sale of children, child prostitution and child pornography. Committee on the Rights of the Child (2016) Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, para 82.

<sup>5</sup> K. Marshall (2014) Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry. Belfast: RQIA.

psychological, social and physical growth and development.<sup>6</sup> Across a number of General Comments (which provide authoritative guidance on the implementation duties placed on

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Convention signatories) the Committee highlights the requirement that, while respecting children’s developing autonomy, young people under 18 must be afforded robust safeguards. For example, in General Comment 20 on the rights of the child during adolescence, the Committee emphasises that as children have increasing agency their “right to exercise increasing levels of responsibilities does not obviate the State’s obligation to guarantee protection” to them as they mature.<sup>7</sup> International standards are clear that children up to the age of 18 are entitled to continuing protection from all forms of sexual violence, abuse and exploitation.

In addition to this, following the UK Government’s ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) in 2018, we note the requirement placed on Government to ensure that domestic legislation and procedures reflect the obligations of the Convention including Article 3 which states that provisions and protections apply to all persons under the age of 18 years.<sup>8</sup> **NICCY asks the Committee to consider in detail how provisions within the Bill can ensure that there are protections in law for all children under 18 years.**

In final comment on the scope of the legislation, we request that as part of a Bill which seeks to more improve public safety and better safeguard children and young people from harm the Committee give full consideration to **ensuring that Equal Protection under the**

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<sup>6</sup> Committee on the Rights of the Child (2016) General Comment 20: On the implementation of the rights of the child during adolescence. Available at:

[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=)

<sup>7</sup> Committee on the Rights of the Child (2016) General Comment 20: On the implementation of the rights of the child during adolescence, para 19.

<sup>8</sup> <https://www.coe.int/en/web/children/lanzarote-convention>

**law for children from all forms of assault, including physical punishment, is addressed within the Bill.** We draw attention to the repeated recommendation of the UN Committee on the Rights of the Child that this be addressed as a priority<sup>9</sup> and we highlight the well-established evidence base which demonstrates that physical punishment is not effective in managing challenging behavior, that it results in poor outcomes for children, and, of particular concern, that it can escalate into injurious abuse and maltreatment.<sup>11</sup> There has been much progress in Northern Ireland in strengthening measures to protect children, and others, from many forms of harm, abuse and violence and the Bill represents an important opportunity to ensure this significant gap in legal protection for children is addressed.

### **Draft Bill Chapter 1 Clause 1: voyeurism**

We welcome the intention to strengthen offences regarding voyeurism to ensure that actions, such as, up-skirting and down-blousing are within scope and note that the Committee may wish to seek clarification on the application of intention (including where harm may be caused regardless of initial intent) and consent within the clause.

We also note the Committee may wish to examine how children under 18 years who display harmful sexual behaviour may be within scope and, as with all such provisions, seek to ensure that arrangements effectively address harmful or abusive behaviour while also seeking to divert children from the criminal justice system while ensuring that they have access to therapeutic support. We highlight that this is of particular concern in the context of the low minimum age of criminal responsibility in Northern Ireland and highlight that the UN Committee on the Rights of the Child has repeatedly recommended that this is raised, in line with acceptable international standards, in all jurisdictions of the UK.<sup>10</sup>

NICCY also notes that the Committee may wish to consider current arrangements for ensuring that all children have access to healthy relationships and RSE education.

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<sup>9</sup> CRC (2016) Concluding Observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, para 41. <sup>11</sup> See NICCY (2021) Equal Protection: <https://www.niccy.org/publications/2021/may/12/equal-protection-update/> NICCY (2020) Equal Protection for Children - Improving Outcomes: <https://www.niccy.org/publications/2020/june/24/equal-protection-for-children-improving-outcomes/>

<sup>10</sup> United Nations Committee on the Rights of the Child (2016) Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland. See para 79a: <https://www.ohchr.org/en/countries/enacaregion/pages/gbindex.aspx>

## Clause 2: Sexual grooming

NICCY welcomes the intent to ensure that grooming offences capture masquerading as a child and communicating with a child or group of children with the intent to groom and that this is not confined to online abuse. We note the challenges of seeking to establish evidence and intent in such cases but highlight the importance of ensuring that the law takes account of the complex dynamics of abuse, including where this is facilitated by technology, and that it provides an effective basis for early intervention to protect children and disrupt offenders. We note that the Department has not extended the offence to include ‘enticing’, which had been raised during the Independent Inquiry into CSE and that the Committee may wish to seek further clarification on this. We also highlight that **the protections of the clause should apply fully to all children under 18 years.**

NICCY also draws attention to the ‘reasonable belief’ or ‘rebuttal defence’ whereby a defendant is afforded access to a defence that they did not believe a child was under 16 years if the child is over 13 years. We highlight that the Committee may wish to clarify why the Department has not proceeded with **reversing the burden of proof regarding the defence of reasonable belief** as had been outlined as an intention in the 2019 consultation. We again draw attention to concerns regarding the current defence that have been raised by the UN Committee on the Rights of the Child, the 2014 Independent Inquiry into CSE in Northern Ireland and, more recently, the 2020 CJINI Inspection into CSE.<sup>11</sup> In our response to the Department’s 2019 consultation, we welcomed the proposals to address this issue which allows for the uneven application of legal safeguards to children at different ages and were supportive of the Department’s consideration of both reversing the burden of proof for the defence and limiting the circumstances in which defendants could access the defence. We are disappointed that the Department has not sought to progress this within in the mandate and urge the Committee to consider this issue in detail.

## Clause 3: Miscellaneous amendments to sexual offences

In relation to clause 3(a) NICCY welcomes the intent of proposals in Schedule 2 Part 1 to amend the language of ‘child prostitution’ and ‘child pornography’ and to ensure that live streaming and other forms of transmission are captured within provisions. We note that the Committee may wish to explore whether there is merit in amending references to ‘sexual services’ and ‘indecent images’ to wording which references ‘child sexual abuse’ and ‘child abuse images’ which more clearly capture the harm, abuse and exploitation of children

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<sup>11</sup> CJINI (2020) [Child Sexual Exploitation: An inspection of the criminal justice system’s response \(cjini.org\)](https://www.cjini.org/)

through such activities. The Committee may also wish to ensure that references to 'payment' take full account of understandings of sexual exploitation which recognise that such abuse may take tangible (such as, exchange for accommodation or debt payment) and non-tangible (such as, exchange to secure protection of self or others) forms.

While the proposals include children up to 18 years within scope, we reiterate the concerns set out above regarding clause 2 in relation to the 'defence of reasonable belief'. We again highlight that the Committee may wish to clarify why the Department has not proceeded with **reversing the burden of proof regarding the defence of reasonable belief** as had been outlined as an intention in the 2019 consultation.

In relation to clause 3(b) NICCY welcomes the intention to ensure provisions relating to sexual communication with a child are brought into arrangements regarding extra territorial jurisdictions and 3(c) to ensure that online and other remote forms of abuse are within scope of provisions.

## **Chapter 2 Clauses 4-15 Anonymity and privacy**

NICCY is not providing detailed comment on clauses relating to anonymity but notes that we are supportive of proposals which will seek to ensure that proceedings in such cases are conducted in a manner which better protects victims and witnesses while ensuring the principles of fair trial and the interests of justice for all are served. This reflects the advice we provided to Sir John Gillen's Review into law and procedures in cases of serious sexual offences<sup>12</sup> and the Committee may wish to consider how this could apply to all proceedings.

NICCY looks forward to implementation of the full range of Gillen Review recommendations, particularly those in relation to children and young people including proper consideration of a Barnahus model being developed in Northern Ireland to ensure a child centred safeguarding and justice response to child victims.

In relation to Schedule 3 we note that Committee may wish to ensure appropriate action can be taken against Internet Service Providers where anonymity and privacy are not protected.

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<sup>12</sup> NICCY (2018) Advice on the Review of arrangements to deliver justice in serious sexual offence cases. <https://www.niccy.org/publications/2018/september/07/review-of-sexual-offences-cases/>

## **Part 2 Clause 16 Trafficking and exploitation**

We welcome moves to ensure protections and supports for potential adult victims of modern slavery and trafficking where trafficking is not an element of the abuse and are content with proposals to that Department publish a Tackling Modern Slavery strategy every three years rather than annually.

## **Part 3 Prevention Orders Clause 18**

NICCY is supportive of the proposal to ensure offences under Article 68 of The Children (Northern Ireland) Order 1995 are within scope of Sexual Offences Prevention Orders, including the abduction of a child in care or subject to an emergency protection order or police protection. We are however disappointed that the Bill does not address wider concerns regarding the need to **ensure that all children up to the age of 18 are afforded safeguards under abduction and recovery arrangements**, regardless of age, care or other status.

As with other areas of the Bill, specific concerns have been repeatedly raised on this point, including by the 2014 Independent Inquiry into CSE and more recently by both the 2020 CJINI CSE Inspection report<sup>13</sup> and the 2020 Leonard Report into the effectiveness of the Safeguarding Board's member agencies in responding to CSE.<sup>16</sup> We have already highlighted that the legislative framework for safeguarding in Northern Ireland should reflect the standards and obligations of, for example, the UNCRC, the UN Optional Protocol on the sale of children, child prostitution and child pornography and the Council of Europe Lanzarote Convention.

## **Clause 19**

In relation to Violent Offences Prevention Orders, we are broadly supportive of proposals to extending the timeframes of complaints which fall within scope of the Orders.

## **Planned amendments**

We welcome the commitment of the Minister to bring forward a number of further amendments to the Bill including those in regard to threat to publish images or 'revenge

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<sup>13</sup> CJINI (2020) [Child Sexual Exploitation: An inspection of the criminal justice system's response \(cjini.org\)](https://www.cjini.org/child-sexual-exploitation-report) <sup>16</sup>

Leonard Consultancy (2020) Report into the effectiveness of the Safeguarding Board's member agencies in responding to CSE.

[SBNI CSE Report PDF 0.pdf \(safeguardingni.org\)](https://www.safeguardingni.org/SBNI-CSE-Report-PDF-0.pdf)



pornography', the 'rough sex defence' and importantly provisions to extend current abuse of trust protections.

On this last proposal, our 2019 advice to the Department expressed serious concern that the 'abuse of trust' offences required amendment in order to reflect contemporary configurations of how services to children are delivered on behalf of, or are funded by, statutory and government agencies (through for example, voluntary, community, sporting and faith based organisations) and to demonstrate a clear understanding of the power dynamics of sexual abuse when perpetrated by a person in a position of trust.

In noting the view of the Department at the time that there is no evidence of abuse committed against older children in such settings, we cited a number of sources for this including: work undertaken by NSPCC in England which found that police were unable to investigate over 650 complaints made to local authorities concerning adults having sex with children aged 16 and 17 years in their care as their roles were not within the scope of position of trust definitions<sup>14</sup>; the ongoing Independent Commission into Child Abuse in England and Wales which has heard testimony from victims subjected to sexual abuse in a wide range of settings, including sporting organisations and uniformed bodies<sup>15</sup>; and the reviews and investigations into Scouting Ireland which identified over 317 alleged victims and 212 alleged perpetrators with one review author noting that allegations include victims and perpetrators living in Northern Ireland.<sup>16</sup>

NICCY would again also highlight European and international obligations in this area, and draw attention to Article 18(1b) of the Lanzarote Convention which sets out that necessary legislation must be in place to ensure that abuse of a recognised position of trust, authority or influence over a child is criminalised.<sup>17</sup> The Lanzarote Committee who monitor implementation of the Convention provide detailed direction on this and define 'the circle of trust' as including a relationship of trust which has been established with the child in the context of a professional activity and where unequal physical, economic, religious or social power is exploited and abused. The Committee highlights the Convention's Explanatory Report which sets out that such relationships, including within voluntary and youth

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<sup>14</sup> <https://www.nspcc.org.uk/what-we-do/news-opinion/abuse-of-position-of-trust/>

<sup>15</sup> <https://www.iicsa.org.uk/>

<sup>16</sup> <https://www.dcy.gov.ie/docs/EN/Press-Releases-copy-dcya-gov-ie-2019/81/5071.htm>  
<https://www.thejournal.ie/scouting-ireland-abuse-cases-4351408-Nov2018/>

<sup>17</sup> <https://www.coe.int/en/web/children/lanzarote-convention>

organisation settings, are within the remit of the Convention and “that children in certain relationships must be protected, even when they have already reached the legal age for sexual activities, even when the person involved does not use coercion, force or threat”.<sup>18</sup>

**We urge the Committee to further explore how such abuse of trust protections can be secured within the Bill.**

### **Conclusion**

The Bill addresses some of the measures that can safeguard children and young people’s most fundamental rights – rights to safety and to protection from violence and abuse and it has the potential to strengthen these significantly. NICCY is of the view that the current inconsistency in legislative protections, some of which are replicated in this Bill, do not recognise the vulnerability of all children to sexual abuse and exploitation. It is important that opportunities within the Bill to effectively protect all children up to the age of 18 are taken forward and that the many recommendations made in this area, including those of the UN Committee on the Rights of the Child and the Independent Inquiry into CSE in Northern Ireland, are now implemented.

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<sup>18</sup> Council of Europe (2007) Explanatory report to the Council of Europe Convention on the Protection of Children against sexual exploitation and Sexual Abuse, para 123 and 124.

