



Clairita Frazer

Assistant Clerk,
Committee for Justice

By email

Date: 28 September 2021

Dear Madam

Call for evidence in respect of the Justice (Sexual Offences and Trafficking Victims) Bill

I refer to your letter to the Director of Public Prosecutions, Mr Stephen Herron, dated 28th July 2021 calling for evidence on the above legislation. I am an Assistant Director in the Public Prosecution Service of Northern Ireland (PPS) which is led by the Director and he has asked me to respond to the Committee on his behalf. I am the Head of the Serious Crime Unit within the PPS and am the organisational lead on the prosecution of serious sexual offences, Modern Slavery/ Human Trafficking and implementation of the Gillen Review.

I should say that as the independent prosecuting authority for Northern Ireland and a non-ministerial Department the PPS does not generally comment on the appropriateness or otherwise of legislation or suggest amendments as that is a matter we leave to the legislators. We are, of course, keen that any legislation operates effectively in practice and where appropriate we are happy to indicate our support for proposed legislation. I hope that my comments on the Bill may be of some assistance to the Committee. I am also aware that the Committee has recently considered the Bill, having heard from the Department of Justice on 9 September 2021 and I have attempted to address some of the issues that arose during that session. We will of course, be happy to attend the Committee during your scrutiny of the Bill should the members consider that useful.

I will, as suggested, deal with the Bill on a clause by clause basis.

PART 1

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SEXUAL OFFENCES

1. Voyeurism: additional offences

This provides for offences to be created for what is sometimes called 'upskirting' and 'downblousing'. The PPS has recognised that the existing legislation provided some challenges when seeking to prosecute those who engage in the behaviour that this clause sets out to deal with. Although we have successfully prosecuted in these circumstances, we do welcome a clearly articulated offence that does not require the observation or recording to be of a private act and does not need to rely on older legislation that was drafted at a time when it not envisaged that behaviour such as that described in the Bill could occur.

I am aware that the Committee raised how we might prove that the behaviour dealt with in the draft legislation was done with the purpose of obtaining sexual gratification. As this is one of the essential proofs of the offences it is a matter that we must prove beyond a reasonable doubt. It is, however, also an element of a number of other offences in the Sexual Offences (Northern Ireland) Order 2008 (the 2008 Order), most notably the existing offence of voyeurism under Article 71 of the Order. In prosecuting these cases, and indeed any offences, we must first be satisfied that the PPS Test for Prosecution is met. That is, firstly, is there a reasonable prospect of a conviction and secondly is a prosecution in the public interest. In cases where we must prove that an act was done for the purpose of sexual gratification, we will invite a judge or jury to conclude that they can be sure that in all the circumstances of the case that the act has been done for that purpose. This has not created particular issues in cases we have prosecuted for other offences over and above the challenges inherent in these cases. It is often the case in voyeurism cases under Article 71 of the 2008 Order that we can submit that, in the circumstances of the case, the act could have been done for no other reason. We are of the view that in the new offences where we are seeking to establish that an act has been done for the purpose of sexual gratification we should be able to adopt a similar approach.

In the proposed new offences there is a second purpose – namely that the purpose of the act was to humiliate, alarm or distress - and at present we do not consider that the legislation requires us to particularise between the purposes sought. The inclusion of this second set of 'motivations' will, we believe, allow us to effectively prosecute the behaviour this offence seeks to criminalise.

Whether there is a basis for adding further purposes is a matter for the legislators.

I understand that the issue arose of whether a 'reasonable person' test should form part of the clause. Amendments are, of course, a matter for the Committee and Assembly members, but the absence of such a test has not proven to be particularly problematic in prosecuting those cases mentioned above that have as an element the need to prove that an act was done for sexual gratification. That said the Committee will be aware that a 'reasonable person' test does exist in the 2008 Order in, for example, the offence of sexual communication with a child in Article 22A;

Serious Crime Unit



, a communication is sexual if—

(a) any part of it relates to sexual activity, or

(b) a reasonable person would, in all the circumstances but regardless of any person's purpose, consider any part of the communication to be sexual;

It is matter for the legislators whether they consider such a test appropriate here.

2. Sexual grooming: pretending to be a child

As the Committee will know meeting or travelling to meet a child following sexual grooming is already an offence under Article 22 of the 2008 Order. It is also possible to prosecute for an attempt to commit this offence where the 'child' is in fact not a child at all, for example where the Police have mounted an operation using decoys' or a member of the public poses as a child and the defendant proceeds on the basis that they are communicating with a child. There are also offences of sexual communications with a child in Article 22A as mentioned above. In our experience where any such offending has occurred in circumstances where the defendant had masqueraded as being under 18 years, the Court would treat that as an aggravating factor when sentencing.

As we understand the Department's intent, however, this legislation seeks to capture those individuals who masquerade as a child, whether online or not, with the intention of committing a relevant offence against children but without the need for such a person to commit a relevant offence. Without commenting on the individual sub-clauses in the bill this overall Policy intent is one that the PPS supports. It will be for the prosecution to prove the intent to commit a relevant offence – and this may be challenging - but this draft clause will allow for Police to investigate cases where, for example, a child communicated with becomes suspicious of a suspect's status or intent at a point before the suspect sexually communicates or arranges travel to meet with a child.

3. Miscellaneous amendments as to sexual offences

This clause seeks to make various amendments and the PPS have no comment.

4-7. Anonymity of Victims

Clause 4 amends section 1 of the Sexual Offences (Amendment) Act 1992 (the 1992 Act) to extend the existing lifelong anonymity of the alleged victim of a sexual offence, or the complainant in a

Serious Crime Unit



sexual offence case, for a period of 25 years after the death of the alleged victim or complainant. This clause implements recommendation 21 of Sir John Gillen's Report into the law and procedures in serious sexual offences in Northern Ireland (The Gillen Report) albeit that recommendation 21 had called for permanent anonymity. The PPS accepted recommendation 21 in its entirety and has no comment on the decision to restrict the period of anonymity to a period of 25 years.

Clauses 5-7 make further amendments to the 1992 Act to reflect the changes introduced by clause 4, increase the penalty for breach of anonymity and provide special rules for providers of information society services. The PPS have no comment.

8-14. Anonymity of suspects

Clause 8 provides anonymity to a person against whom an allegation of having committed a sexual offence has been made to the police or a person who is being investigated by the police in connection with a sexual offence – 'the suspect'. Nothing can be published that would lead to the identification of the suspect. Recommendation 159 of the Gillen Review proposed statutory regulation to prohibit the publication of the identity of those being investigated for serious sexual offences until they are charged. While it is current practice in this jurisdiction that individuals are not mentioned until charged, statutory regulation would ensure a clear and uniform approach, but beyond this we have no comment on this clause.

Subsection (5) details matters to which the reporting restrictions particularly apply. Subsection (3) provides that the reporting restrictions apply only up to the point of charge and sets out what constitutes a charge. Subsection (4) provides that where no charge is made, the reporting restrictions apply for the life of the suspect and for 25 years after the suspect's death. Subsection (6) provides that the reporting restrictions will apply to a suspect regardless of whether the allegation is made, or there is a police investigation, before or after commencement of clause 8. This clause implements recommendation 159 of the Gillen Report. The PPS has no particular comments.

Clauses 9-14 provide a definition of 'sexual offence' for the purposes of clause 8, a power to disapply or modify a reporting restriction, provision for Magistrates' Courts Rules relating to such applications, a penalty for breaching a reporting restriction, interpretations of terms and a consequential amendment to section 44(4)(a) of the Youth Justice and Criminal Evidence Act 1999. The PPS observes that the offences listed in Clause 9(1) do not include a number of offences that have been repealed but which can still be prosecuted for offending that occurred before the date of repeal.

Serious Crime Unit



15. Serious sexual offences: exclusion of public from court

This clause amends the Criminal Evidence (Northern Ireland) Order 1999 by inserting new Articles 27A to 27D to provide for the exclusion of the public from hearings of serious sexual offences tried on indictment. This clause implements recommendation 19 of the Gillen Report. The PPS accepted recommendation 19 which balances the need for open justice with minimising the risk of retraumatisation to the complainant. While we note that the provisions apply to trial we would highlight whether it would be appropriate for this exclusion to also apply to hearings in the Magistrates' Court such as mixed committals which, at present, can require the complainant to appear in open court. We would also highlight, for the sake of consistency, whether the removal of an exclusion in the case of death proposed at new Article 27A (4) sits easily with the proposed extension of reporting restrictions to 25 years after death.

PART 2

TRAFFICKING AND EXPLOITATION

16. Support for victims of trafficking etc.

The PPS recognises that the provision of services and support for victims, and ensuring their needs are met, is essential to the overall effectiveness of the criminal justice system. The PPS therefore supports the proposed amendment to the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (HTA 2015). This amendment extends the current statutory assistance and support to adult potential victims of slavery, servitude or forced or compulsory labour where there is no element of trafficking. It is fully accepted that this will benefit a number of victims that are currently not able to access statutory assistance and support.

17. Reports on slavery and trafficking offences.

It is considered that a longer term strategy will provide the Department and partners on the OCTF MSHT Sub Group with an opportunity to set longer term direction for addressing modern slavery human trafficking while also delivering shorter-term operational plans. The PPS therefore supports the proposed amendment to the HTA 2015 to replace the requirement for an annual reporting of the Modern Slavery and Human Trafficking Strategy to a three-yearly reporting cycle.

PART 3

PREVENTION ORDERS

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18. Qualifying offences for sexual offences prevention orders.

Clause 27 amends provisions contained within the Sexual Offences Act 2003 by including 'abduction of children in care' (as provided for in Article 68 of the Children (Northern Ireland) Order 1995) within the list of specified offences of Schedule 5 to that Act.

The PPS supports this widening of the scope of offences to which the SOPO provisions apply.

19. Time limit for making violent offences prevention orders.

Clause 28 amends provision contained within section 57 of the Justice Act (Northern Ireland) 2015 (VOPOs made on application by the Chief Constable) by inserting a new subsection (6) to dis-apply statutory time limits provided for under Article 78 of the Magistrates' Court (Northern Ireland) Order 1981 (time within which civil complaint must be made to give jurisdiction). Clause 28(2) ensures that provision made under 28(1) will apply to a complaint made after its coming into operation even where the cause of complaint arose more than six months before the making of the complaint.

The PPS supports the relaxation of the time limit for the Chief Constable to make such applications to reflect the fact that relevant matters may come to light only after a period of six months.

The Committee has also asked for comment on a number of proposed amendments. We have not as yet seen the proposed text of any amendments the Department propose to bring forward so any comment we make should be considered with that caveat. We understand from the Department that they are not proposing to proceed with the amendment referred to in your letter as a legislative fix and so make no comment on that. The remaining proposed amendments are:

- The abolition of the 'rough sex' defence.

In the absence of the proposed text of any amendment the PPS is not able to comment in any detail. The Committee may wish to note however that the PPS has been consulted on this proposal generally and we would observe that without such a proposed legislative provision it has been possible to successfully prosecute cases in which AOABH type injuries (and above) have been sustained, and in which the issue of consent has been raised, on the basis of the principles established in R v Brown.

Similarly in murder and manslaughter cases the suggestion by a defendant that the death occurred as a result of consensual sexual intercourse that involved the infliction of injury does not prevent the prosecution being able to prove the offence.

Serious Crime Unit



However, we are aware that there has been some criticism of R v Brown and, whilst the principles contained therein have been widely accepted, the case is still arguably open to interpretation.

A provision that clearly allowed for the abolition of what is known as the rough sex defence could therefore potentially help to make the law in Northern Ireland clear and unambiguous.

- An extension to existing revenge porn provisions to include a threat of publication.

Without sight of the text of any proposed amendment the PPS is unable to comment in any detail but we are broadly supportive of the policy intent to extend the provisions in respect of what is sometimes referred to as revenge porn.

- Provisions to widen the scope and strength of the current law on abuse of trust.

Again, without sight of the text of any proposed amendment the PPS is unable to comment in any detail but are supportive of any proposals to allow for the effective prosecution of offences involving a breach of abuse of trust.

I hope these comments are useful to the Committee in their deliberations and if the Committee wished to invite the PPS to attend with them we would be happy to assist.

Yours sincerely

Ciaran McQuillan
Assistant Director
Head of Serious Crime Unit

Tel: [REDACTED]

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