

## **Briefing: Close the Loophole Campaign**

**April 2021**

The Sexual Offences (Northern Ireland) Order 2008 makes it illegal for adults in a position of trust to engage in sexual activity with a child in their care. The offences are principally designed to protect young people aged 16 and 17 who, even though they are over the age of consent for sexual activity, are considered vulnerable to sexual abuse and exploitation. Currently the offences only apply in the context of statutory functions such as education and state care. The offences do not include sports coaches, faith group leaders and other groups of people working with children and young people undertaking extra-curricular activities. This legislative gap leaves young people, aged 16 and 17, at risk of grooming and sexual abuse at the hands of adults who have substantial influence and power over them. The NSPCC believes that closing this legislative loophole is an urgent and necessary step to protect children from sexual abuse. We have long campaigned for the Government to take action and expand the definition of position of trust to all adults in positions of power and authority over children, regardless of the setting, or if they are employees or volunteers.

### **Closing the loophole**

The Department of Justice has recognised the seriousness of this matter and following its review and public consultation on the law on child sexual exploitation in 2019, announced its intention to amend the law in October 2020. On 23 March 2021, the Minister of Justice announced plans to widen the scope of the current position of trust legislation, to beyond existing statutory settings, through an amendment to the Justice (Miscellaneous) Provisions Bill at Committee Stage later this year. The NSPCC warmly welcomes the Minister's intention to amend the law without delay and close this legislative loophole. There is widespread support for a comprehensive

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amendment to be made to the law from a range of bodies in Northern Ireland, not least from sporting and religious organisations. We ask the Committee for its support in securing the timely passage of this amendment to ensure that these vital safeguarding protections for children are implemented as soon as possible.

We acknowledge the commitment and determination of officials in the Department of Justice to working in partnership with NSPCC and other stakeholders to help shape and inform work on the scope of the offence. To inform this work, we will be co-facilitating a stakeholder workshop with the Department in the near future.

### Key messages

- These protections, to varying degrees, have been extended in some neighbouring jurisdictions including Jersey and the Republic of Ireland. In England and Wales, the Police, Crime, Sentencing and Court Bill, as introduced to Parliament on 9 March 2021, proposes to extend the positions of trust offences to include the areas of sport and religion. **The NSPCC's focus is ensuring that the Northern Ireland legislative amendment is as robust and inclusive as possible, within the time available. It should afford these vital protections to children and young people across as broad a range of environments and extracurricular activities as possible, to include, but not be limited to sport and religious settings.**
- NSPCC wants to see the timely implementation of a law that is clear and unambiguous, that comprehensively protects all children from sexual abuse by all adults with power and authority over them. It needs to be easily understood by children, adults working with them and the criminal justice system. **Going forward, we wish to see the legal change being accompanied by a clear public education campaign which makes everyone aware that all children will be protected from abuse by all adults in a position of trust to them.**

For more information, please contact:

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June 2021

### Summary

At its meeting on 15 April 2021, the Committee for Justice considered the briefing paper provided by NSPCC on the 'Close the Loophole' campaign to extend the Abuse of Trust legislation. The Committee noted the Minister's intention to widen the scope of the position of trust legislation to beyond the existing statutory settings by way of an amendment to the Justice (Miscellaneous Provisions) Bill (the Justice Bill). The Committee invited NSPCC to provide further information on the position and recent developments in England and Wales and other relevant jurisdictions in this area to assist its considerations of the proposals to be brought forward by the Minister. This paper details that information, including proposals for change.

The NSPCC recognises that the delayed introduction of the Justice Bill inevitably reduces the ability to progress matters within this current Assembly mandate. We are disappointed that as a result, some of our most vulnerable children, who urgently need these legal protections, continue to be exposed to sexual abuse and exploitation. Looking forward, we ask members of the Committee for Justice to encourage the priority commencement and passage of the Justice Bill to ensure that these vital safeguarding protections for children are implemented as soon as possible.

### Position of trust legislation and scope

#### Context

1. Safeguarding older teenagers poses particular challenges as they are able to consent to sexual activity at 16 under the Sexual Offences (Northern Ireland) Order 2008. Yet, they are still children until they reach their 18th birthday and therefore require protection from harm under the Children (Northern Ireland) Order 1995. The 2008 Order affords 16 and 17 year olds additional protection from sexual harm by adults in a position of trust in the context of a statutory responsibility such as education, state care and criminal justice. However, this offence does not include adults working in non-statutory roles, including sports coaches, faith group leaders and other groups of people working with children and young people undertaking extra-curricular activities; despite fact that adults in these settings have substantial influence and power over young people and 'consensual relationships' in this context are inappropriate on the grounds that they are open to sexual exploitation and abuse.

2. It is NSPCC's view that this legislative gap leaves 16 and 17 year olds at risk of grooming and child sexual abuse by adults who have substantial influence and power over them. The Department of Justice has recognised the seriousness of this matter and following its review and public consultation on the law on child sexual exploitation in 2019, announced its intention to amend the law in October 2020. On 23 March 2021, the Minister of Justice announced plans to widen the scope of the current position of trust legislation, to beyond existing statutory settings, through an amendment to the Justice (Miscellaneous) Provisions Bill later this year.

### **Current statutory provision**

3. Across the UK it is illegal for those in a position of trust to engage in sexual activity with a child in their care, even if the child is above the age of consent (16 or 17) ([Sexual Offences Act 2003](#); [Sexual Offences \(Northern Ireland\) Order 2008](#); [Sexual Offences \(Scotland\) Act 2009](#)). These protections, to varying degrees, have been extended in some neighbouring jurisdictions including Jersey and the Republic of Ireland. Elsewhere, reviews have been carried out in both Scotland, and England and Wales on the need to extend the scope of the offence beyond non-statutory settings, with legislative change now proposed for England and Wales in the Police, Crime, Sentencing and Courts Bill.<sup>1</sup>
4. Legislative provision for positions of trust currently exists across several international jurisdictions, including: France, Germany, Canada, America and Australia. Both Canada and Australia provide broad legal definition on positions of trust. Legislation in Canada refers to a "relationship of dependency" or a relationship that is "...exploitative of the young person." It considers the nature and circumstances of the relationship, including the degree of control or influence. In Australia, legislation covers religious officials/instructors, spiritual leaders/instructors, and sports coaches.
5. The NSPCC's focus is ensuring that the Northern Ireland legislative amendment is as robust and inclusive as possible. It should afford protections to children and young people across as broad a range of environments and extracurricular activities as possible, to include, but not be limited to sport and religious settings. Find below brief commentary on the legislation and corresponding clauses in the Annex.

### **Northern Ireland**

6. [Articles 23-26 of Part 3 the Sexual Offences \(Northern Ireland\) Order 2008](#) ('the 2008 Order') provide for offences of sexual activity with a child through abuse of positions of trust relating to children under 18. The offences currently only apply where the position

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<sup>1</sup> Introduced in Westminster on 9 March 2021 and due to enter Committee Stage on 18 May 2021

of trust is in the context of a statutory responsibility such as education, state care and criminal justice.

7. Under the provision, it is an offence for persons aged 18 or over to intentionally behave in certain sexual ways in relation to a child under 18 where they are in a position of trust in respect of a child, as defined in Article 28.
8. Article 28 defines the statutory settings to which the offence applies as including education, state care and detention facilities. Article 29 of the 2008 Order sets out the related activities/responsibilities of a person in a position of trust. It provides that a person is in a 'position of trust' if they are, '*regularly involved in caring for, training, supervising or being in sole charge of such persons,*' within the statutory settings set out in Article 28.

### **Other jurisdictions**

#### **Jersey**

9. The relevant legislative provisions relating to positions of trust in Jersey are contained in Part 6, sections 18 to 20 of the [Sexual Offences \(Jersey\) Law 2018](#). Section 18 provides that an adult in a position of trust commits an offence, "*if they intentionally engage in a sexual act with or directed towards a child aged 16 or 17, or, causes or incites the child to engage in a sexual act.*"
10. Article 19 refers to five conditions that will create a position of trust. One condition is if a child being cared for in a children's home, a school, a nursing home or hospital and any other institution. Another relevant condition is when an adult looks after a child on an individual basis and is engaged in the provision of education or training, "*a professional or voluntary basis and not as a family member, in coaching, motivating, guiding or training the child for a sport, hobby, career, or competitive event*", criminal justice, and care and supervision.
11. The Jersey definition is comprehensive in its coverage and appears to apply to all sectors equally based on the relationship to the child. However, the effectiveness of the law remains unclear. According to a representative from the Jersey Safeguarding Partnership Board, who was previously the Safeguarding Lead for Sport in Jersey, "*the law hasn't been very effective so far because the Law change has not been made public knowledge.*" This feedback reinforces NSPCC's policy recommendation that any change in legislation should be accompanied by a clear public education campaign which makes everyone aware that all children will be protected from abuse by all adults in a position of trust to them.

## Republic of Ireland

12. The relevant legislative provision has been made for the offence by a person of authority in the [Criminal Law \(Sexual Offences\) Act 2006](#) as amended by the [Criminal Law \(Sexual Offences\) Act 2017](#). Accordingly, 15(f) of the 2017 Act defines a person in authority as, *'any other person who is or has been responsible for the education, supervision, training, care or welfare of the child.'* This covers teachers, sports coaches, carers and others who were persons in authority in respect of the child at some time in the past, though not necessarily when the offence was committed.
13. Section 18 inserts new section 3A into the 2006 Act. This creates the new offence of a sexual act with a child aged between 17 and 18 years by a person in authority. It includes the defence of reasonable mistake as to age, but consent provides no defence. A reasonable grounds test is included and such a test carries a civil burden of proof.
14. It should be noted that sexual acts within Republic of Ireland legislation are more narrowly defined because the age of consent within the region is 17 years.

## England and Wales

15. Provision for abuse of positions of trust is provided for in [sections 16 to 24 of Part 1 of the Sexual Offences Act 2003](#). It mirrors existing legislation in Northern Ireland and Scotland.
16. An extensive review of the position of trust offence was carried out by the Ministry of Justice in 2019, as result of recommendation from the [Independent Inquiry into Child Sexual Abuse](#) and the All-Party Parliamentary Group on Safeguarding in Faith Settings Inquiry [report](#), which was published in March 2020. The MOJs review indicated extensive support to extend the scope of the offence.
17. Draft provision has been made in the [Police, Crime, Sentencing and Courts Bill](#) to amend current legislation on position of trust offences in the Sexual Offences Act 2003. The Bill was introduced on 9 March 2021 and is currently at Committee Stage. Draft Clause 45 extends the offences to sports<sup>2</sup> and religious settings<sup>3</sup> and it defines the activities relating to the new offence. It creates a new section 22A within the 2003 Act rather than simply adding roles to the existing positions of trust contained in section 21. This is because the current positions are defined either by reference to statutory settings or

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<sup>2</sup> Sport is defined using games in which physical skill is the predominant factor and those which are engaged in for the purpose of competition or display.

<sup>3</sup> Religion is defined as including a religion which involves belief in more than one god and a religion which does not involve belief in god.

services, so far as the adult's relationship to the young person is concerned. According to the Ministry of Justice, the non-statutory settings represent a departure from the current legislation and therefore require a different approach.

18. The new 'further positions of trust' are defined by reference to the activity which A is carrying out in relation to B, namely, coaching, teaching, training, supervising or instructing in a sport or a religion, as defined. Both elements would need to be met. Furthermore, it is a requirement that A carries out the activity "*on a regular basis*", to avoid an approach that is too broad and to capture someone who only helps with a coaching session on one occasion or infrequently.
19. Also, a knowledge requirement must also be met, so that A is aware that they carry out a certain activity on a regular basis in relation to B. This is to prevent the positions of trust being drawn too broadly and strengthen the requirement for a prior connection/contact between A and B. This is intended to ensure that if, for example, A preaches regularly to a congregation of 2000 people and has had never met B, so does not even know that B is a member of that congregation, A will not be considered to be in a position of trust over B.<sup>4</sup>
20. Significantly, the "*further positions of trust*" include provisions in the Bill to allow additional positions of trust to be added via secondary legislation should that prove necessary. This avoids any need for delay in waiting for a primary legislative vehicle to become available in order to add to the current statutory definition.
21. There remains ambiguity around the scope of the draft clause 45 and NSPCC is of the opinion that limiting the positions to 'sport' potentially excludes a whole raft of other extracurricular activities, including uniformed bodies like scouts,<sup>5</sup> guides and cadets; music and drama leaders; youth activity leaders; and private tutors.

## Scotland

22. Abuse of Positions of Trust is legislated for in Scotland in Part 5 sections 42 to 47 of the [Sexual Offences \(Scotland\) Act 2009](#). Under section 42 an adult commits the offence of

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<sup>4</sup> Extract from the Police, Crime, Sentencing and Courts Bill 2021: [positions of trust factsheet](#)

<sup>5</sup> Of significance, in 2018 in the Rep of Ireland, Scouting Ireland [identified](#) 317 alleged victims and 212 alleged perpetrators of sexual abuse following a review of historical files and the opening of a confidential helpline. As Scouting Ireland is an all-island body, allegations included victims and perpetrators in Northern Ireland. The [2020-published report](#) into the historical abuse (largely dating back to the 80s/90s) doesn't mention the person in authority/position of trust law. It is unknown what engagement DoH or DoJ had in relation to this review. Also see the [Independent Commission into Child Abuse in England and Wales](#) which heard [testimony](#) from victims subjected to sexual abuse in the Scouts and other uniformed bodies.

sexual abuse of trust if they are aged 18 years or older and intentionally engage in a sexual activity with, or directed at, a person who is under 18 and in respect of whom they are in a position of trust.

23. Sections 43 and 44 define when a person is in a position of trust for the purposes of the offence of sexual abuse of trust in section 42, as including those who look after children in a range of institutional settings including schools, hospitals and residential establishments such as care homes or young offenders' institutions. It also provides that a position of trust exists if a person lives with a child and has or had any parental responsibilities or rights in respect of that child, or treats the child as a child of their family. Responsibilities are defined as *,"regularly cares for, teaches, trains, supervises or is in sole charge of the person"*. Defences for this provision are contained at section 45.
24. The Scottish Government consulted on the scope of its offences in 2019: [Protecting Children review of section 12 of the Children and Young Persons \(Scotland\) Act 1937 and section 42 of the Sexual Offences \(Scotland\) Act 2009](#); publishing its [analysis report of responses](#) to the consultation on 30 September 2019 which indicated strong support for extending the legislation. Respondents highlighted a range of areas where an extension could be made, such as music, theatre and arts tutors and youth workers, including volunteers. Specific mention was made of the high-profile media cases involving abuse in sports and religious settings, which they believed provided evidence of the need to extend provision to these sectors. Respondents also recognised the challenges in providing a definition which allowed for situations where there is a consensual sexual relationship between peers of a similar age, but where there may also be informal support, mentoring or coaching element to the relationship. A need for caution was urged to prevent criminalising young people inappropriately, especially in sports, and the potential for false allegations to be made. Next steps are still to be determined by the Scottish Government.

## **The Options**

25. In taking relevant legislative provision forward, the Department has two potential options to consider:
- (i) To extend the law widely to include all persons in a position of trust by creating an expansive definition of persons of trust, akin to the scope in Jersey.
  - (ii) To extend the law in a more limited way, but provide the ability to add to its scope. This option would reflect the approach taken in England and Wales whereby the activities of the position of trust are restricted to the area of sport and faith, but where provision has been included to expand upon these areas and to add to the activities contained, at a future stage.

## **NSPCC's Position**

26. NSPCC's firm position is that protections to keep children safe should not depend on the setting or activity the child is taking part in, but the risk of harm to children. The new legislation should provide vital protections to children and young people across as broad a range of environments and extracurricular activities as possible, to include, but not be limited to sport and religious settings.
27. In determining the legislative options, the Department in partnership with the NSPCC co-facilitated a stakeholder workshop in May 2021 with relevant stakeholders from youth, sport and religious settings etc. Contributions from that meeting will further inform policy options for the Minister and Department on the proposed way forward.

## **Next steps**

28. The legislative provision was expected to be drafted over the summer 2021 with draft provision prepared for inclusion in the Justice Bill in the autumn. These timescales are now unlikely as the Bill continues to await Executive approval and remains unapproved at 21 June 2021.

## Annex

### Extracts from relevant legislation which provide a more extended approach

Jersey: [Sexual Offences \(Jersey\) Law 2018](#)

#### Part 6

#### 19 Positions of trust

- (1) For the purposes of Article 18, an adult is in a position of trust in relation to a child if any one or more of the 5 conditions in the following paragraphs is fulfilled.
- (2) The first condition is that –
  - (a) the adult looks after any children (whether or not including the child in question) in premises; and
  - (b) those premises are –
    - (i) a children’s home, if the child is accommodated in that home or in any other children’s home in Jersey,
    - (ii) a school, if the child is receiving education at that school or at any other school in Jersey,
    - (iii) a nursing home or a hospital, if the child is accommodated in that nursing home or a hospital, or in any other nursing home or a hospital in Jersey, to receive services provided there, or
    - (iv) any other institution in which a child may be detained under a court order or an enactment, if the child is so detained in that institution or in any other such institution in Jersey.
- (3) The second condition is that the adult looks after the child on an individual basis, and does so –
  - (a) as a person engaged in the provision of services provided by the Minister for Education to enable or assist participation by other persons in education or training;
  - (b) **as a person engaged, on a professional or voluntary basis and not as a family member, in coaching, motivating, guiding or training the child for a sport, hobby, career, or competitive event;**
  - (c) in pursuance of requirements to which the child is subject, being requirements that are imposed –

- (i) by or under an enactment on the child's release from detention for a criminal offence, or
- (ii) by a court order made in criminal proceedings; or
- (d) in the exercise of functions conferred –
  - (i) by or under an order to which the child is subject, being a care order, a supervision order or an education supervision order, and
  - (ii) on an authorized person or on the authority designated by that order.

## 20 Interpretation and amendment of Article 19

- (1) For the purpose of Article 19, an adult –
- (a) looks after children if the adult is regularly involved in caring for, teaching, training, supervising or being in sole charge of children; and
  - (b) looks after a child on an individual basis if –
    - (i) the adult regularly looks after that child, and
    - (ii) in the course of doing so, the adult regularly has unsupervised contact with that child (whether face to face or by any other means).

### Republic of Ireland: [Criminal Law \(Sexual Offences\) Act 2017](#)

15. (a) by the substitution of the following definition for the definition of “person in authority”:
- “ ‘person in authority’, in relation to a child against whom an offence is alleged to have been committed, means—
- (a) a parent, grandparent, uncle or aunt whether of the whole blood, of the half blood or by affinity of the child,
  - (b) a current or former guardian or foster parent of the child,
  - (c) a current or former step-parent of the child,
  - (d) a current or former partner of a parent of the child who lives or has lived in an enduring family relationship with the parent,
  - (e) any person who is for the time being, or has been, in loco parentis to the child, or
  - (f) any other person who is or has been responsible for the education, supervision, training, care or welfare of the child;”**

### England and Wales [Police, Crime, Sentencing and Court Bill](#)

#### 45 Positions of trust

(1) The Sexual Offences Act 2003 is amended as follows.

(2) After section 22 insert—

**“22A Further positions of trust**

(1) For the purposes of sections 16 to 19, a person (A) is in a position of trust in relation to another person (B) if—

- (a) A coaches, teaches, trains, supervises or instructs B, on a regular basis, in a sport or a religion, and
- (b) A knows that they coach, teach, train, supervise or instruct B, on a regular basis, in that sport or religion.

(2) In subsection (1)—

“sport” includes—

- (a) any game in which physical skill is the predominant factor, and
- (b) any form of physical recreation which is also engaged in for purposes of competition or display;

“religion” includes—

- (a) a religion which involves belief in more than one god, and
- (b) a religion which does not involve belief in a god.

(3) This section does not apply where a person (A) is in a position of trust in relation to another person (B) by virtue of circumstances within section 21.

(4) The Secretary of State may by regulations amend subsections (1) and (2) to add or remove an activity in which a person may be coached, taught, trained, supervised or instructed.”

(3) In section 138(2) (orders and regulations) after “section 21,” insert “22A,”.