



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Alastair Ross, MLA
Chairman, Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
BT4 3XX

20 November 2015

Dear *Alastair,*

The Commission welcomes an opportunity to provide further comments on the proposed amendments from Jim Gamble, on behalf of the Ineqe Group. We recognise the positive intent behind the proposals. However the practical implications of the proposals raise some potential legitimate concerns.

First proposal

On the first proposed amendment the Commission has repeatedly advised that the minimum age of criminal responsibility should be raised to at least twelve in line with international human rights standards. A number of UN Treaty bodies have raised this issue, alongside the Youth Justice Review in 2011. The Commission does not therefore support any measure that would increase the number of criminal offences that may apply to a child under the age of twelve.

It appears that the amendment proposes altering the Protection of Children (NI) Order 1978 to provide that a child who takes, makes, shows, distributes or possesses an image of themselves will commit no criminal offence and that a child who takes, makes, shows, distributes or possesses an image of another child will only commit a criminal offence if he/she has malicious intent.

The Commission advises that the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography requires the criminalisation of the production, distribution, dissemination, import, export, offer, sale or possession of child pornography. The Optional Protocol defines child pornography as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes”. The Optional Protocol requires the ‘act’ or ‘activity’ to be criminalised it does not place a requirement that a perpetrator of whatever age must have a malicious intent as included in the proposed amendment.

The provisions of the UN CRC are complemented by other international and regional human rights standards, in particular the Council of Europe Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention). The Lanzarote Convention has been signed by the UK but has not been ratified. It refers to the State making exceptions for consensual sexual activities amongst minors. In addition, the Lanzarote Convention acknowledges that the State may make exceptions to the legal framework governing child pornography where this involves: “children who have reached the age of consent, where these images are produced and possessed by them with their consent and solely for their own private use”.

International human rights law has realised that in certain circumstances children should not be criminalised for sharing images of themselves for private use with consent. This is a complex area, the Commission notes that Jim Gamble’s suggested amendments to the 1978 Order are intended to encourage the reporting of crimes relating to child pornography. However, there may be other ways to address this, for instance through guidance from the Director of Public Prosecutions. In the absence of draft amendments it is difficult to anticipate the implications of the proposals on the legal framework to address sexual offences.

Second proposal

The Commission notes the proposal that a new criminal law be created to ‘deal with the aggravated impact when an individual or individuals use the anonymity provided by the internet and/or the ability to create multiple online accounts to harass another person’. It appears that this proposal relates specifically to sentencing and not to proof of the constituent elements of an offence. The PSNI Service Procedure document on dealing with stalking and harassment acknowledges that: “Increasingly, people interact with others through social networking sites and other online methods. These sites can be used to harass people, eg by posting derogatory or abusive comments, embarrassing photographs, etc”. The

Commission notes that the Judicial Studies Board sentencing guidelines on offences within the Protection for Harassment (NI) Order 1997 recognise 'Creating email/website accounts purporting to be the victim' as an aggravating factor. The Commission advises the Committee to consider whether the proposal requires amendments to the 1997 Order or could be addressed through the Sentencing Guidelines.

Third proposal

A new law to criminalise an adult who 'masquerades as someone below that age and engages online with an individual they know or believe to be, under the age of 18' is proposed. This would reverse the burden of proof and criminally penalise the act of masquerading as an 18 year old to an under 18 year old regardless of whether it results from criminal intent or from negligence. Such departures from the presumption of innocence, as protected by the ECHR, Article 6(2) are permissible in certain circumstances. The European Court of Human Rights has held that departures from the presumption of innocence must be confined within reasonable limits which take account of the importance of what is at stake while maintaining the rights of the defence (*Salabiaku v France* (1988) para 28). With this proposal, careful consideration would be required as to the threat posed by persons masquerading as children online. This would require an assessment of patterns of behaviour amongst perpetrators of offences against children. Consideration should also be given to the full range of circumstances in which the scenario may occur. While we have highlighted the human rights standard relevant to the issues raised in the proposal, in the absence of specific detail it is difficult for the Commission to offer specific advice on how this new offence would work in practice.

An additional issue

Finally, I would also like to highlight that the UN CRC Committee has raised a concern that the Sexual Offences (Northern Ireland) Order 2008, for certain offences of sexual exploitation of children between 13 and 16 years of age, enables a defendant to claim "that he/she believed the victim to be above 16 years... it is then for the prosecution to prove that the defendant "did not reasonably believe" that this was the case.

The UN has recommended that the burden of proof be reversed so that a defendant must prove that he or she had a reasonable belief that a victim was above the age of 16. Members may recall that the Commission raised this matter during the passage of the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill. The issue remains outstanding. The Commission is pleased that the Tackling Child Sexual Exploitation in NI Action Plan contains a commitment from the Department to consider a review of the 2008 Order by December 2015.

The Committee may want to consider this issue alongside the amendments proposed by the Ineqe Group.

I hope this is helpful in your deliberations.

Yours sincerely

A handwritten signature in black ink that reads "Les". The letters are cursive and connected.

Les Allamby
Chief Commissioner