Northern Ireland Assembly

Research and Information Service
Bill Paper

December 2021

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Justice (Sexual Offences and Trafficking Victims) Bill

NIAR 213-21

The briefing should not be relied upon as legal or professional advice (or as a substitute for these) and a suitably qualified professional should be consulted if specific advice or information is required.

This paper has been prepared to inform consideration of the Justice (Sexual Offences and Trafficking Victims) Bill which completed its second stage on 13th September 2021.

The Bill contains 22 clauses and 3 schedules. It has two primary objectives which are:

- to enhance public safety by implementing certain elements of the Gillen Review Report into the law and procedures in serious sexual offence in Northern Ireland and from a review of the law on child sexual exploitation and sexual offences against children; and

- to improve services for victims of trafficking and victims of slavery, servitude and forced or compulsory labour.

Key Points

- Initially the Justice Minister, Naomi Long MLA, had planned to introduce a substantial Justice Bill to the Assembly in April 2021. However, she was unable to secure Executive agreement to do so. Therefore, the Bill that has been introduced is more narrowly scoped comprising only Parts 1 (Sexual Offences), 2 (Trafficking and Exploitation) and 5 (Prevention Orders) of the original Bill. This change was necessary to secure Executive support to its introduction to progress some of the public protection provisions of the previous Bill in this mandate.
- Northern Ireland is currently the only jurisdiction in the UK that does not have a voyeurism offence of up-skirting. The Bill's provisions follow the intent model introduced in Scotland and England and Wales. There has been criticism that the offence is only demonstrable where the perpetrator has the intent of either obtaining sexual gratification, or causing humiliation, distress or alarm to the victim. It has been said that such motivation will catch some forms of up-skirting but not all, for example those carried out for financial gain or amusement/group bonding.
- Like England and Wales, only the most serious offenders will be placed on the sex offenders register. In Scotland, everyone convicted of the offence is placed on the register.
- The sharing of up-skirting and down-blousing images will not be an offence.
- The Bill provides lesser penalties for up-skirting on summary conviction when compared to the provisions in Scotland and England and Wales, where the maximum sentence on summary conviction is 12 months' imprisonment. The Department of Justice has previously explained that its preference is a maximum of 6 months' imprisonment. Otherwise, under Article 29 of the Magistrates' Court Order (NI) 1981, a defendant has the right to elect to have their trial heard by a Judge sitting with a jury which the Department says is time consuming and adds to delay within the criminal justice system.
- Northern Ireland will be the first UK jurisdiction to introduce an offence of down-blousing. The Minister has confirmed that this will not include occasions when someone is breastfeeding. It is noteworthy that following a review of the matter by the Law Commission in England and Wales, it recommended that taking an image of someone breastfeeding should be made an offence.
- The nature of down-blousing is highly gendered. Some Australian states also apply the offence provisions to those that are transsexual and who identify as women.
- The main provisions arising from the Gillen review that are being progressed are the exclusion of the public from all serious sexual offence hearings; anonymity for defendants pre-charge; anonymity of complainants to continue after death; and an increase in the penalty for breach of anonymity.
- Although the exclusion of the public from court direction can be varied or amended on application, or by the court if it deems it in the interest of justice, there has been criticism of a blanket ban exclusion rather than on a case by case basis.

- Legal concerns were raised that the recommended indefinite reporting restrictions might contravene Article 10 European Convention on Human Rights (Freedom of Expression). The potential for an ECHR breach would have jeopardised the passage of the provision through the Assembly. A 25 year period which can be varied was considered more appropriate.
- The Bill gives effect to the outcome of a review of the law on child sexual exploitation and sexual offences against children to:
    - replace legislative references to 'child prostitution' and 'child pornography' with 'child sexual abuse'. The Department had originally intended to use the terminology 'chid sexual exploitation' but concerns were raised that this would cause a misalignment between the legislation and policy as evidenced in England and Wales; and
    - include live streamed images in the definition of exploitation for sexual purposes.
- The Bill also creates a new offence of adults masquerading as children online which is covered by four different offences so that the perpetrator does not need to have a particular child in mind, in which to communicate with, in order to be prosecuted.
- Amendments to modern slavery provisions in the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act 2015 will extend support to victims of slavery, servitude and forced or compulsory labour which already occurs in practice. The statutory requirement to produce an annual Modern Slavery Strategy is also being removed.
- A position of trust refers to certain roles and settings where an adult has regular and direct contact with children. It currently applies to positions of trust within statutory settings such as education and health care. It is proposed to extend those positions to sport and religious settings. Similar provisions are currently being introduced in England and Wales.
- The proposed amendment to criminalise threats to disclose 'revenge porn images' will bring Northern Ireland in line with the positions in Scotland and England and Wales.
- The Department of Justice intends to enact the existing common law position that a person cannot lawfully consent to their serious harm for the purpose of sexual gratification, the so called 'rough sex defence`. This aims to make clear that a person cannot consent to the infliction of a serious level of harm (or worse) for the purposes of obtaining sexual gratification. This was recently enacted in England Wales by the Domestic Abuse Act 2021.

1 Introduction

The paper is divided into the following sections:

- Section 1 is a brief introduction;
- Section 2 provides background and context to the Bill;
- Section 3 provides Bill and clause commentary; and
- Section 4 provides an overview of the proposed amendments for the Bill.

Originally the Justice Minister, Naomi Long MLA, had planned to introduce a substantial Justice Bill to the Assembly in April 2021. However, she was unable to secure Executive approval to do so as some Ministers were concerned that 'that the Bill could become a vehicle for controversial content that would not be properly scrutinised or consulted on'.[1]

Instead, the Bill that has been introduced is more narrowly scoped comprising only Parts 1 (Sexual Offences), 2 (Trafficking and Exploitation) and 5 (Prevention Orders) of the original planned Bill.[2] This change 'was necessary to secure Executive agreement to its introduction and thus progress at least some of the important public protection provisions of the previous Bill in this mandate'.[3] The Minister was 'deeply disappointed that she was forced to take this unwelcome step. However, with progression of the previous Bill being repeatedly blocked, and in the interests of some of the most vulnerable victims in the justice system, she has reluctantly decided to proceed on this basis'.[4]

Specifically, the Bill includes provisions:

- arising from the Gillen Review of serious sexual offence cases to exclude the public from all serious sexual offence hearings and to introduce anonymity for defendants' pre-charge exclusion of public from all serious sexual offence hearings;
    - anonymity for defendants pre-charge;
    - anonymity of complainants to continue after death; and
    - an increase in the penalty for breach of anonymity;
- to give effect to the outcome of a review of the law on child sexual exploitation and sexual offences against children to:
    - replace legislative references to 'child prostitution' and 'child pornography';
    - include live streamed images in the definition of exploitation for sexual purposes; and
    - create a new offence of adults masquerading as children online.
- to introduce new offences of up-skirting and down-blousing

[1] AQO 2251/17-22: http://aims.niassembly.gov.uk/questions/printquestionsummary.aspx?docid=344790

[2] Correspondence from the Department of Justice to the Committee for Justice dated 25 June 2021: http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/justice/primary-legislation/justice-etc-bill/r-20210625---doj---justice-sexual-offences-and-trafficking-victims-bill---contents-of-revised-bill.pdf

[3] Ibid

[4] Ibid

- for adjustments to include the offence of abduction of children in care to Sexual Offences Prevention Order arrangements:
- for adjustments to dis-apply time limits for complaints under Violent Offences Prevention Order arrangements; and
- for amendments to modern slavery provisions in the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act 2015 to extend support to victims of slavery, servitude and forced or compulsory labour; and to remove the statutory requirement to produce an annual Modern Slavery Strategy.

The Minister has also advised of four planned amendments to the Bill that fit within the 'public protection objectives of the Bill'. The proposed amendments will address the following:

- A legislative fix to re-instate four offences incorrectly removed into Schedule 2 of the Magistrates' Courts Order 1981 to allow for the summary prosecution of these indictable offences under Article 45 of that Order;
- Abolition of the rough sex defence;
- An extension to existing revenge porn provisions to include a threat of publication; and
- Provisions to widen the scope and strength of the current law on abuse of trust.[5]

The Department also advised the Committee for Justice of another amendment in addition to the Gillen Review provisions in the Bill relating to:

> *the exclusion of the public from hearings of serious sexual offences. It will extend those provisions to include the Court of Appeal as a setting where the public can be excluded from appeal hearings against conviction or sentence in cases of serious sexual offences. In essence, that means that exclusion is in the court when the case is first heard but, if there is an appeal, that appeal will be covered by a similar provision.*

As the Bill was originally meant to be introduced in March 2020, the Committee for Justice agreed 'on an exceptional basis, to issue a call for written evidence on the Bill following its introduction into the Assembly and prior to the Second Stage taking place. The Committee Chair, Mervyn Storey MLA explained:

> *I assure the House and the Minister that this was in no way to preempt the views of the House but was simply a pragmatic decision, given the very limited time available to us, to give the Bill a chance of completing the legislative process before the mandate ends*.[6]

[5] NI OR Committee for Justice, 9th September 2021: http://data.niassembly.gov.uk/HansardXml/committee-28367.pdf
[6] NI OR 13 September 2021: http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2021/09/13&docID=348691#3590063

2 Background and Context to the Bill

2.1 Criminal Contact – Child Sexual Exploitation

The Sexual Offences (Northern Ireland) Order 2008 provides for a number of sexual offences against children which are categorised according to the age of the victim.[7] Articles 12-15 provide for the offence of rape and other offences against children under 13. These articles include offences of assault by penetration, sexual assault and causing a child to engage in sexual activity without consent. Child grooming and sexual communication with a child offences are contained in Articles 21, 22 and 22A. Child prostitution and pornography offences are found at Articles 37- 40.

The Children (Northern Ireland) Order 1995 defines a child as a person under the age of 18.[8] The age of consent to any form of sexual activity in Northern Ireland is 16.[9] Therefore, it is an offence to have any sexual activity with a person under the age of 16. Articles 23 - 26 of the 2008 Order provide for offences of sexual activity with a child through abuse of positions of trust which apply to all children under the age of 18. The offences currently only apply where a person is in a position of trust in the context of a statutory responsibility such as education, state care and criminal justice.

Grooming refers to the preparatory process which precedes child sexual abuse. Child sexual abuse 'occurs when others use and exploit children sexually for their own gratification or gain or the gratification of others'.[10] Sexual abuse involves 'forcing or enticing a child to take part in sexual activities which may involve physical contact, including penetrative or non-penetrative acts, and non-contact activities, such as involving children in looking at, or in the production of, pornographic material, watching sexual activities or encouraging children to behave in sexually inappropriate ways'.[11]

Child sexual exploitation (CSE) is 'a form of sexual abuse in which a person(s) exploits, coerces and/or manipulates a child or a young person into engaging in some form of sexual activity in return for something the child needs or desires and/or for the gain of the person(s) perpetrating or facilitating the abuse'.[12] There is no specific offence of CSE. Rather cases of CSE may include a number of different sexual offences as well as other, non-sexual offences including child abduction, trafficking, domestic violence and abuse, and blackmail. For example:

> *CSE can range from the planned or systematic exploitation of young people, to worrying relationships between young people under 16 and adults who are a few years older. It includes party houses where drugs and/or alcohol may be provided free in the first instance, but the young people enticed to the venue are later expected to pay for it with sex. It can be a relationship that starts off looking like a consensual*

[7] Sexual Offences (Northern Ireland) Order 2008: https://www.legislation.gov.uk/nisi/2008/1769/contents
[8] Children (Northern Ireland) Order 1995, Article 2: https://www.legislation.gov.uk/nisi/1995/755/article/2/made
[9] Ibid at 7, Article 16: https://www.legislation.gov.uk/nisi/2008/1769/article/16
[10] Department of Health (2017) Cooperating to Safeguard Children and Young People in Northern Ireland
[11] Ibid
[12] Safeguarding Board Northern Ireland (2014) Professional Information: Child Sexual Exploitation Definition and Guidance

> *one, but develops into an expectation that the young person has sexual activity with the partner's friends and associates. It may involve the young person being transported from place to place. Money may also change hands*.[13]

In 2019, the Department of Justice consulted on the *Review of the Law on Child Sexual Exploitation* which set out the conclusions of a review it conducted to assess the adequacy and effectiveness of the current law. The consultation paper observed that:

> *Recent digital and technological advancements have changed the way in which many perpetrators target children and carry out abuse. There have been significant increases in online and technology-based offending such as online grooming, 'sexting', revenge pornography and live streaming. There have also been increases in image-based abuse, as indecent images and films depicting abuse can be made and shared quickly and easily while perpetrators exploit the anonymity and encryption of the 'dark web'.*[14]

The review met a commitment by former Justice Ministers to consider a wide range of legislative issues originating from a number of previous initiatives, including the 'Report of the Independent Inquiry on Child Sexual Exploitation in Northern Ireland' (the Marshall Report – 2014) and the Justice Committee report on 'Justice in the 21st Century' 2015.

In September 2013, a Ministerial Summit was held on the theme of CSE in Northern Ireland. Two weeks later, the then Minister for Health, Social Services and Public Safety, Edwin Poots MLA, announced an independent, expert-led inquiry into CSE, to be commissioned by the Minister for Health, Social Services and Public Safety and the Minister of Justice. In November 2013, Kathleen Marshall, the former Commissioner for Children and Young People in Scotland was appointed to lead the Independent Inquiry. The Inquiry made 17 key recommendations and a further 60 supporting recommendations.[15] In particular, it recommended that the Department of Justice should lead on a project to examine legislative issues highlighted in this report and bring forward proposals for change.

The Justice Committee's Report on *Justice in the 21st Century* was published in 2015.[16] It discussed three proposals for legislative change relating to online child sexual exploitation. These proposals were presented to the Committee as possible amendments to the Justice (No. 2) Bill, but it was agreed that these would be considered later as part of the review of child sexual exploitation, to allow for proper engagement on complex and difficult policy issues.

The terms 'child prostitution', 'child prostitute' and 'child pornography' are referred to in the titles of sections 38 (causing or inciting child prostitution or pornography), 39 (controlling a

[13]Kathleen Marshall (2014) Child Sexual Exploitation in Northern Ireland Report of the Independent Inquiry Executive Summary, pg 3: https://www.rqia.org.uk/RQIA/files/37/379f52ad-b99e-4559-847e-e2688e0648c6.pdf

[14] Department of Justice (2019) *Review of the Law on Child Sexual Exploitation*: https://www.justice-ni.gov.uk/sites/default/files/consultations/justice/consultation-review-law-child-sexual-exploitation.pdf

[15]Ibid at 12

[16] NIA 313/11-16, Justice in the 21st Century: http://www.niassembly.gov.uk/globalassets/documents/justice-2011-2016/copy-of-the-justice-in-the-21st-century-report-with-appendices.pdf

child prostitute or a child involved in pornography) and 40 (arranging or facilitating child prostitution or pornography) of the 2008 Order. The use of these terms is now considered 'outdated and minimises the abuse suffered by children through these forms of exploitation. Such terms are said to 'imply that child victims are somehow responsible or willing participants in their own abuse, which has the effect of stigmatising and 'blaming' victims for what has happened to them'.[17]

In the consultation on the *Review of the Law on Child Sexual Exploitation*, the Department of Justice proposed that these terms should be removed and replaced with the term 'sexual exploitation of children' 'to raise awareness of the status of children as victims of exploitation rather than as willing participants or complicit in the abuse perpetrated by others'.[18] This reflected a recommendation of the Marshall Report in addition to legislative changes in England and Wales.[19] Removal of references to child prostitution and pornography in the Sexual Offences Act 2003 was made by section 68 of the Serious Crime Act 2015 so offences now refer to the 'sexual exploitation' of children.[20]

In 2012, the Office of the Children's Commissioner for England recommended that 'a review of all legislation and guidance which makes reference to children as 'prostitutes' or involved in prostitution should be initiated by the Government with the view to amending the wording to acknowledge children as sexually exploited, and where appropriate victimised through commercial sexual exploitation'. Concerns about the continued use of this terminology were reiterated to a cross party inquiry into child sexual exploitation in April 2014, including its impact on attitudes towards victims and reinforcing misconceptions.[21]

A small number of responses to the Department of Justice's consultation disagreed with the use of the term 'sexual exploitation of children'. Academics highlighted that:

> *[…] this approach in England and Wales has led to a misalignment between policy and legislative definition, and has led to confusion over what actually constitutes CSE. Professor Anne-Marie McAlinden pointed out that the proposed definition was too simplistic and narrow in scope, whilst a number of responses highlighted the unnecessary emphasis on the transactional nature of the relationship. Further responses pointed out that the proposed legislative definition differs from the non-legislative definition of CSE which is presently adopted in NI, which may cause some confusion'*.[22]

[17] Ibid at 14, pg 20

[18] Department of Justice (2020) Review of the Law on Child Sexual Exploitation - Summary of Responses: https://www.justice-ni.gov.uk/sites/default/files/publications/justice/summary-of-responses-child-exploitation-consultation.pdf

[19] Ibid at 14

[20] Serious Crime Act 2015, Section 68: https://www.legislation.gov.uk/ukpga/2015/9/section/68/enacted

[21] Home Office (2015) Fact Sheet Child sexual exploitation Serious Crime Act: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/416040/Fact_sheet_-_Child_sexual_exploitation_-_Act.pdf

[22] Ibid at 18

2.2 Sexual Communication with a Child

The Marshall Report recommended that the grooming offence under Article 22 of the Sexual Offences (Northern Ireland) Order 2008 should be extended to include situations where an individual 'entices' a child under the age of 16. This recommendation was intended to address the 'scatter gun approach', used by perpetrators to target a large number of potential victims with messages intending to solicit a sexual response, or indicate some degree of openness to becoming involved in such communication. It also reflected concerns that the existing offence was not adequate to address this type of behaviour and did not allow the police to act or intervene at an earlier stage to prevent abuse.

Since the publication of the Marshall Report in 2014, Section 90 of the Justice Act (Northern Ireland) 2015 introduced a new section 22A into the Sexual Offences (Northern Ireland) Order 2008 to provide for the offence of sexual communication with a child.[23] It is an offence for a person over 18, for the purposes of obtaining sexual gratification, to intentionally communicate with a child under 16 where the communication is sexual in nature or is intended to encourage such as response from the child. For an offence to have been committed the perpetrator must have been aware that the person with whom they were communicating was under 16.

It defines a sexual communication as one which relates to sexual activity or where a reasonable person would consider it to be sexual. Ordinary social or educational interactions between children and adults, or communications between young people themselves, are not caught by the offence.

Those found guilty of the offence are liable to up to 6 months' imprisonment, or a fine on summary conviction, or imprisonment of up to 2 years on indictment. The offence is also subject to notification requirements under the terms of Part 2 of the Sexual Offences Act 2003 (sex offenders register).

The 2015 Act also amended the offence of meeting a child following sexual grooming under Article 22 of the 2008 Order. The test to determine if there has been an offence now requires there to have been contact between the perpetrator and victim 'on at least one occasion', a reduction from the previous threshold of 'on at least two occasions'.

These changes were intended to allow for earlier intervention by police where they believe a child to be at risk of grooming but where elements of the grooming offence (prior to amendment) had not been met. Between 1 April 2015 and 31 March 2018, the PPS made 70 prosecution decisions in relation to these two offences, of which 29 were for prosecution, three were for diversion and 38 were for no prosecution.[24]

Section 127 of the Communications Act 2003 makes it an offence to send a message by means of a public electronic communications network (including the internet) if its content is grossly offensive, indecent, obscene or menacing.[25] Depending on the content of the

[23] Justice Act (Northern Ireland) 2015, Section 90: https://www.legislation.gov.uk/nia/2015/9/section/90
[24] Ibid at 14, pg 23
[25] Communications Act 2003, Section 127: https://www.legislation.gov.uk/ukpga/2003/21/section/127

message, this offence could apply where sexual messages or messages seeking a sexual response are sent to a child by some form of electronic communication, such as text, e-mail or phone (although it would not cover non-electronic written messages or verbal communication, or electronic messages sent by a private network such as a school intranet). However, this offence is not a sexual offence and does not automatically attract sex offender registration.

England and Wales

In 2014, the National Society for the Prevention of Cruelty to Children (NSPCC) ran a campaign which recommended that a new offence was requied to target paedophiles who communicate sexually with a child. The Government 'considered the proposal and, at the WePROTECT summit in December 2014, the Prime Minister announced the intention to create a new offence in response to the campaign'.[26]

Section 67 of the Serious Crime Act 2015 inserted a new section 15A into the Sexual Offences Act 2003 to create a new offence of sexual communication with a child. The offence criminalises a person aged 18 years or over who communicates with a child under 16 (who the adult does not reasonably believe to be 16 or over), if the communication is sexual or if it is intended to elicit from the child a communication which is sexual.

The offence applies where the defendant can be shown to have acted for the purpose of obtaining sexual gratification. The offence automatically attracts the notification requirements for registered sex offenders under the Sexual Offences Act 2003.

[26] Ibid at 14

2.3 Voyeurism Offences – Up-skirting and Down-blousing

Two proposed voyeurism offences to address 'up-skirting' and 'down-blousing' also formed part of the consultation of the *Review of the Law on Child Sexual Exploitation*. Up-skirting involves taking a photo or video under a person's clothes without their consent in order to capture images of their genitals or buttocks or underwear. It is often carried out in crowded public places, for example on public transport or at music festivals, which can make it challenging to notice the perpetrator. Down-blousing refers to the taking of images, usually from above, down a person's top in order to capture their bra, cleavage and/or breasts.

Both behaviours have been described as 'gross invasions of privacy and a form of street harassment that leaves women feeling vulnerable in public spaces, impacting on their quality of life, access to public space and feelings of security'.[27] In Northern Ireland, there are currently no specific offences which address these types of behaviour. Rather, they may be prosecuted under the more general offences of outraging public decency or voyeurism. There can be difficulties in satisfying the requirements for these offences as the behaviour must have occurred in a public place and therefore may not cover, for example, instances where a teacher or pupil was up-skirted in a school environment. In particular:

> *These offences are not sexual offences and they do not capture the sexual element of the behaviour. Consequently, victims do not have automatic entitlement to anonymity and perpetrators are not considered to have committed a 'qualifying offence' for the purposes of obtaining a Sexual Offences Prevention Order or other civil prevention order which could place restrictions on them to protect people from sexual harm.*[28]

Regarding the proposed definition of the offences, while agreeing that the law needed to be changed, some respondents to the Department's consultation '*expressed concern about the need to prove sexual gratification for the act to be an offence. One respondent highlighted reports of the low level of prosecutions in Scotland (where legislation has been in place since 2010) which indicated that this was due, in part, to the requirement to prove sexual gratification*.'[29]

Scotland

Up-skirting first became a sexual offence in Scotland in 2010. The Sexual Offences (Scotland) Act 2009 was amended by the Criminal Justice and Licensing (Scotland) Act 2010 to make it an offence when a person operates equipment or records an image beneath a person's clothing, without their consent, to observe their genitals or buttocks (whether exposed or covered with underwear).[30] The motivation of the offence must be to obtain

[27] Clare McGlynn (2015), "We Need A New Law to Combat 'Upskirting' and 'Downblousing'" Inherently Human, https://inherentlyhuman.wordpress.com/2015/04/15/we-need-a-new-law-to-combat-upskirting-anddownblousing/

[28] Ibid at 14 https://niopa.qub.ac.uk/bitstream/NIOPA/10531/1/consultation-review-law-child-sexual-exploitation.pdf

[29] Ibid at 18: https://www.justice-ni.gov.uk/sites/default/files/publications/justice/summary-of-responses-child-exploitation-consultation.pdf

[30] The Sexual Offences (Scotland) Act 2009, Section 9: https://www.legislation.gov.uk/asp/2009/9/section/9

sexual gratification or to humiliate, distress or alarm the victim. The offence is triable either way. The maximum penalty following summary conviction is 12 months and/or a fine. The maximum penalty following conviction on indictment is five years and/or a fine.[31] Anyone convicted of a section 9 offence is placed on the sex offenders register.

England and Wales

In September 2017, in response to the Gina Martin campaign, and to concerns expressed by some police and crime commissioners, the then Secretary of State for Justice, David Lidington MP, committed to a review of the law. The review found that the existing law did not make up-skirting a sexual offence and so the most serious offenders were not made subject to notification requirements of the sex offenders register.

The UK Parliament followed the Scottish approach, and the definition of voyeurism contained in the Sexual Offences Act 2003 was updated by the Voyeurism (Offences) Act 2019 to include two new offences of up-skirting.[32] As with its Scottish counterpart, the offences cover the operation of equipment or recording of an image under another person's clothing with the intention of viewing their genitals or buttocks (with or without underwear), and without that person's consent. Similarly, the offences only apply where the perpetrator had a motive of either obtaining sexual gratification, or causing humiliation, distress or alarm to the victim.

The offences are triable either way. The maximum sentence following summary conviction is 12 months' imprisonment and/or a fine. The maximum sentence on indictment is two years and/or a fine. Only offenders convicted of particularly serious forms of the offences are placed on the sex offenders register.

The Domestic Abuse Act 2021 extended the offence of disclosing private sexual photographs and films with intent to cause distress (known as the 'revenge porn' offence) under Section 33 of the Criminal Justice and Courts Act 2015 to include threats to disclose such material. However, the provision does not address up-skirting specifically as it refers to[33]:

> A photograph or film is "private" if it shows something that is not of a kind ordinarily seen in public.
>
> (3)A photograph or film is "sexual" if—
>
> (a)it shows all or part of an individual's exposed genitals or pubic area,
>
> (b)it shows something that a reasonable person would consider to be sexual because of its nature, or

[31]Sexual Offences (Scotland) Act 2009, Section 48 and Schedule 2 https://www.legislation.gov.uk/asp/2009/9/section/48
[32] Voyeurism (Offences) Act 2019: https://www.legislation.gov.uk/ukpga/2019/2/enacted
[33] Criminal Justice and Courts Act 2015, Section 35: https://www.legislation.gov.uk/ukpga/2015/2/section/35/enacted

(c)its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

Markedly, the 'up-skirting' legislation in Scotland and England and Wales does not prohibit taking unauthorised intimate images for the purposes of financial gain or amusement/group bonding. During the Voyeurism (Offences) Bill's parliamentary passage, the Equality and Human Rights Commission for England and Wales recommended the removal of the two intent requirements, or at least the addition of the motivation for financial gain and entertainment.[34] In written evidence to the Public Bill Committee, expert in image-based abuse Professor Clare McGlynn stated that the new offence would cover some but not all forms of up-skirting. She highlighted that 'sexual offences are about power and control, punishment, sexual entitlement, anger, entertainment, as well as sexual gratification'.[35]

The Crown Prosecution Service also stated:

> *It is not inconceivable that suspects will advance the defence that this purpose is not made out beyond reasonable doubt and/or that they had another purpose, such as "high jinks". Consideration could be given as to whether purpose is a necessary or relevant element of the offence (once it has been proved that the conduct is intentional, and given that it involves an affront to the integrity and dignity of the victim).*[36]

Amendments discussed at both committee and report stage included:

• amendments to make all up-skirting an offence, rather than specifying that the motivations of an offender were obtaining sexual gratification or humiliating, alarming or distressing the victim;

The Parliamentary Under-Secretary of State for Justice, Lucy Frazer MP, responded:

> *The Bill specifies two purposes for which an offence can be committed: to obtain sexual gratification or to humiliate, alarm or distress the victim. The reason these purposes are identified is not only that they are clear and appropriate, but that they use language that is familiar to criminal justice agencies. These motivations are used in current legislation. They are used, word for word, in Scotland. They are also familiar to the English system. That means that the Bill as drafted has precedent in law, and we know it will catch inappropriate wrongdoing. I will deal with a few criticisms that have been made of the Bill's breadth. It has been said that it will not catch all those who should be caught—for example journalists, as the hon. Lady mentioned—but if a person takes a photograph with the intention of uploading it to a website where others will look at it for sexual gratification, the uploader will be caught. It will not matter that the person who took the image is not obtaining sexual*

[34]Equality and Human Rights Commisson (October 2018) House of Lords Second Reading https://www.equalityhumanrights.com/sites/default/files/parliamentary-briefing-voyeurism-bill-house-of-lords-second-reading-23-october-2018.pdf

[35] Voyeurism (Offences) (No.2) Bill, Written evidence submitted by Professor Clare McGlynn, Law School, Durham University (VOB01): https://publications.parliament.uk/pa/cm201719/cmpublic/Voyeurism/memo/VOB01.htm

[36]Voyeurism (Offences) (No.2) Bill 2019, Committee stage: https://bills.parliament.uk/bills/2267/stages/10548

gratification themselves—for example, if they just want to get paid for the photograph. If they share it with another person with the intention that that person obtains sexual gratification, they will still be caught by the new offences.[37]

• making the disclosure/distribution of an image recorded through up-skirting an offence similar to the position in Scotland.

The Parliamentary Under-Secretary of State for Justice also clarified:

> *The amendment raises an important question about the distribution of images, but this issue is not confined to upskirting. Sharing images and inappropriate material online is a significant issue; indeed, it is a wider problem than this specific offence. As the hon. Lady mentioned, there is already good work under way across Government to consider these issues closely. As she said, DCMS has asked the Law Commission to look into the onward sharing of images as part of its review in relation to online abuse, and in May we published our response to the Green Paper on internet safety strategy. Therefore, although the hon. Lady makes an important point, it seems both prudent and beneficial to be careful not to cut across the ongoing work. It would be better to wait until we know the outcome of these reviews so that we can consider them properly, in slower time, to decide what steps are necessary, if any, to take this matter forward. Tackling image sharing more widely is complex and requires detailed consideration and analysis.*[38]

No amendments were pushed to a division.

After the Voyeurism (Offences) Act 2019 came into force, there was some academic commentary discussing the Act's shortcomings, including the failure to address down-blousing images:

> *Where someone is using equipment to see down the top of a woman to observe or record her breasts, this is as much an affront to her dignity as operating equipment up her skirt. As with genitalia, many women will exercise a conscious choice as to who sees their naked breasts. Whilst not a sexual organ, the female breast remains an intimate part of her body, and she alone should control who sees her breasts. It is notable that the original offence of voyeurism included the observation of the female breast, and it is not clear why the VOA 2019 did not do likewise.*[39]

Down-blousing has not been specifically criminalised in any part of the UK to date, a 'lacuna which has attracted criticism'.[40] As such, Northern Ireland will be the first UK jurisdiction to

[37] Voyeurism (Offences) (No. 2) Bill (Third sitting) 12 July 2018: https://hansard.parliament.uk/Commons/2018-07-12/debates/f12302b4-c146-48d9-8e3f-cc41b03f13ad/Voyeurism(Offences)(No2)Bill(ThirdSitting)

[38] Ibid

[39] Alisdair Gillespie, "Tackling Voyeurism: Is The Voyeurism (Offences) Act 2019 A Wasted Opportunity?" (2019) 82 Modern Law Review 1107, 1125 as cited by Law Commission (2021) Intimate Image Abuse Consultation Paper Pg 189: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Intimate-image-abuse-consultation-paper.pdf

[40] Law Commission (2021) Intimate Image Abuse Consultation Paper Pg 151: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Intimate-image-abuse-consultation-paper.pdf

introduce a specific criminal offence of down-blousing. However, some other international jurisdictions have criminalised down-blousing alongside up-skirting. In 2015, the Australian Capital Territory amended its voyeurism legislation to make both up-skirting and down-blousing an offence. In doing so, they made specific inclusion of those persons who are transgender and those who identify as female. Section 61B(5) of the Crimes Act 1900[41] specifies that:

> A person (the offender) commits an offence if—
>
> (a) the offender observes with the aid of a device or captures visual data of— (i) another person's genital or anal region; or (ii) for a female or a transgender or intersex person who identifies as a female—the breasts; and
>
> (b) a reasonable person would, in all the circumstances, consider the observing or capturing of visual data to be an invasion of privacy.

Cognisant of concerns about the adequacy of the criminal law in an emerging digital area, the UK Government commissioned the Law Commission for England and Wales as part of their Review of Abusive and Offensive Online Communications to review the law relating to the non-consensual taking, making, and sharing of intimate images. It ran a consultation from February 2021 until May 2021. It is now analysing the responses to the consultation which will inform the development of its final recommendations for reform. It is aiming to publish the final report by Spring 2022.

In its consultation paper, it provisionally proposed that taking or recording an image of someone's breasts, or the underwear covering their breasts, down their top without consent should be a criminal offence. It stated:

> *The evidence shows that "downblousing" can cause significant harm, and it is a form of abuse that specifically targets women. It also appears to be a common phenomenon, although it is near impossible to form an accurate picture of how common it is. Many women do not report the abuse, likely because it is not currently criminalised in England and Wales. It is also likely that many victims of "downblousing" do not learn that they have been targeted. Therefore, we are of the view that recording down someone's top without consent should be a criminal offence, in the same way that recording up someone's clothing is*.[42]

[41]The Crimes Act 1900, Section 61B: https://www.legislation.act.gov.au/a/1900-40/19870211-27536/pdf/1900-40.pdf
[42]Ibid at 40, pg 190

2.4 The Gillen Review - Report into the law and procedures in serious sexual offences in Northern Ireland

In 2018, the Criminal Justice Board commissioned a review of the law and procedure in prosecutions of serious sexual offences. The Review was led by a former Lord Justice of Appeal, the Right Honourable Sir John Gillen. In his report, published in May 2019, he made sixteen key recommendations, supplemented by more than two hundred and fifty supporting recommendations.[43] Addressing the anonymity of complainants and defendants of sexual offences, provisions for restrictions on reporting, and restrictions on public attendance at court hearings were all keystones of the Review.

The Sexual Offences (NI) Order 1978 first afforded anonymity to complainants of serious sex offences. Currently anonymity is provided for by the Sexual Offences (Amendment) Act 1992.[44] While the Order originally legislated for defendant anonymity on the grounds of equality with the complainant, the Criminal Justice (NI) Order 1994 repealed defendant anonymity to equalise rape defendants with those accused of any other crime.[45] The defendant is not anonymised unless there is a risk to their life or to do so would cause the complainant to be identified.

Currently Article 13 of Criminal Evidence (Northern Ireland) Order 1999 enables special measures for victims in sexual offences cases, in particular for a judge to clear a courtroom when a witness is giving evidence.[46] Only legal representatives connected with the case and one nominated press member are allowed to remain. This measure applies to sexual offence and intimidation cases only. However, the Gillen report suggested that the provision to clear the court is rarely invoked, suggesting it is too widely drafted in order to be effective.[47]

An English case of *R v Richards (1999)* implies that the court may go beyond the statutory framework if it believes that clearing the court is 'strictly necessary' to ensure justice is done.[48] It has been suggested that:

> *While this English precedent is not strictly binding in the courts of NI, of course, it hints toward the existence of a somewhat wide (and commensurately vague) power at common law for the courts to hold a human rights compliant hearing in camera should the interests of justice demand it in particular case. While the general principle which appears to have been formulated in Richards stands to reason, obvious concerns arise about the level of judicial discretion it involves.*[49]

[43] Gillen Review (2019) *Report into the law and procedures in serious sexual offences in Northern Ireland* : https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf

[44] Sexual Offences (Amendment) Act 1992, Sections 1&2: https://www.legislation.gov.uk/ukpga/1992/34/contents

[45] The Criminal Justice (Northern Ireland) Order 1994, Article 18: https://www.legislation.gov.uk/nisi/1994/2795/article/18

[46] Criminal Evidence (Northern Ireland) Order 1999, Article 13: https://www.legislation.gov.uk/nisi/1999/2789/article/13

[47] Ibid at 43, pg 129

[48] R v Richards (1999) 163 JP 246, [1999] Crim LR 764

[49] Queen's University Belfast School of Law (2018) Review of arrangements to deliver justice in serious sexual offence cases, pg 11 https://pureadmin.qub.ac.uk/ws/portalfiles/portal/204303284/Final_Draft_QUB_Sumission.pdf

Moving forward, the Gillen Review recommended that:

> *There should be no change in the current law concerning publication of the identity of the accused post charge. The identity of the accused should be anonymised pre-charge and the accused should have the right to apply for a judge-alone trial in the rare circumstances where the judge considers it to be in the interests of justice.*[50]

Despite the 'severe consequences, both physical and mental, often suffered by accused persons (and their close family members) who have been acquitted of serious sexual offences, together with the public opprobrium often visited on them (and their families)', Sir John provided two key reasons for maintaining the status quo of the publication of the defendant's identity post charge:

> *First, a crucial advantage of the publication of the name of the accused post charge — and I emphasise post charge — is that there is clear evidence in Northern Ireland and elsewhere that it serves to bring forward other complainants, for example, in institutional abuse or serial offender cases.*
>
> *Such additional witnesses can be vital in a genre of crime where it is often a case of one person's word against another with little further evidence, where a large number of complainants do not report serious sexual offences to the police, the dropout rate of those who do report is too high and where acquittal rates are already very substantial.*
>
> *Secondly, it is extremely difficult to justify the identity of an accused being anonymised in serious sexual offences and not in other heinous offences such as murder, crimes of unspeakable cruelty to children and other offences of nonsexual extreme violence etc*.[51]

He also recommended '**that the public at large be excluded in all serious sexual offence hearings in the Crown Court save for officers of the court, persons directly concerned in the proceedings, bona fide representatives of the press, a parent, relative or friend of the complainant or, a parent or relative of the accused together with such other persons (if any) as the judge, or the court, as the case may be, may in their or its discretion permit to remain. The public will be admitted for the verdict and sentencing in the event of conviction'**. He explained that:

> *[…] recent experience has shown that in certain high profile trials, where the national or local profile of the parties is high, the process of permitting uncontrolled public access can lead in some instances to gross abuse and blatant sexual and unsavoury voyeurism to some degree. Such attendance serves not only to deter, intimidate and humiliate witnesses, whose right to anonymity is destroyed even when special measures are invoked, but also brings the whole legal process into disrepute fuelling already existing fears about reporting to the police. It is not calculated to afford*

[50] Ibid at 43
[51] Ibid, pg 21

appropriate respect to the accused and complainants as well as the administration of justice. There is a clear distinction to be made between what interests the public and what is in the public interest.[52]

He went on to clarify that he was:

[…] not in favour of vesting a wide discretion on a case by case basis in the court to decide which cases should be heard in public and which should not, based on some vaguely worded "interest of justice" or "strict necessity" test. The current discretion to clear the court is extremely rarely used in light of the principle of open justice. Moreover vesting a wider description in the court is, in my view, a recipe for judicial inconsistency, potential unfairness to different complainants in different parts of the country, and uncertainty in terms of application.

The Northern Ireland Human Rights Commission raised concerns to the Gillen Review about the blanket approach being taken to the exclusion of the public for particular forms of criminal trials, rather than a case by case consideration of the merit of a closed hearing. It proposed that the recommendations should be examined to see if an individualised approach within a structured framework, asking the judge to make a formal decision at the commencement of the trial, could be adopted.

However, Sir John responded:

I am satisfied that the circumstances of deterrence, which currently preclude so many complainants from advancing their case, are as such that they represent exceptional circumstances justifying special measures in terms of the recommendations I have made. Complainants have rights which they are entitled to have protected. If we are to restore confidence in the criminal justice system for these complainants, then I consider this to be a vital building block along the way.[53]

The right to a fair and public hearing, as enshrined as an element of Article 6 European Convention on Human Rights (ECHR), is recognised a safeguard of the rule of law and open justice. It is explained as:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[54]

[52] Ibid,pg 128
[53] Ibid,pg 133
[54] European Convention on Human Rights, Article 6: https://www.echr.coe.int/Documents/Convention_ENG.pdf

In *Re S (FC) (A Child) (2004)*, Lord Steyn explained the relationship between these two concepts as follows:

> *A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of the contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.*[55]

The principle of open justice is also supported by the right to freedom of expression under Article 10 of the ECHR. The public broadcasting of judgments and knowledge of evidence presented to a court occurs by both media reporting and word of mouth on the part of public attendees. While Article 10 of the ECHR protects freedom of speech, it is not an unfettered right. Article 10(2) provides that the right may be subject to such formalities, conditions, restrictions or penalties as prescribed by law and are necessary in a democratic society in respect of a number of interests, including the authority and impartiality of the Judiciary.

The right to a public hearing is also not absolute. The provisions of the ECHR permit the exclusion of the press or the public from all or part of a trial, 'where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'.[56]

The Queen's University Belfast School of Law noted these concepts and contemporary judgments while responding to the Review. It urged:

> *[…] members of this review to be especially mindful of the rule of law at a more general level when contemplating an increase in existing powers to restrict reporting and public attendance in serious sexual offence cases. Given that publicity – whether direct or indirect – is essential in order to educate NI citizens seeking to understand how the law is applied in serious sexual offence cases, any further constraints on that publicity may have the effect of creating or emboldening doubt and mistrust about the operation of the law. Moreover, further restrictions on publicity in the criminal law context run a hazardous risk of preventing revelation on the part of individuals who are exposed to information about individual cases. In this regard we are sympathetic to concerns that where parties to a criminal case are not named publicly then justice may be inhibited by the subjugation of new or further evidence about the individuals involved…*
>
> *[…] We noted above that the principle of open justice is not absolute and may be restricted even in respect of an entire class of case where it is considered necessary to do so. However, we wish to emphasise some of the dangers involved in adding to*

[55] Please see ibid at 49, Re S (FC) (A Child) [2004] UKHL 47, [2005] 1 AC 593, [30]
[56] European Convention on Human Rights, Article 10: https://www.echr.coe.int/Documents/Convention_ENG.pdf :

> *the existing exceptions. Lord Shaw once encapsulated the point by warning that 'there is no greater danger of usurpation than which proceeds little by little'.*[57]

Another recommendation by the Gillen Review was that the **'anonymity of complainants shall be made permanent so that it applies even after death'.** Sir John's rationale was that:

> *Complainants coming forward to the police would not know whether or not that anonymity was going to be preserved. Even when they did come forward, and the case is before the court, the question of public access would have to be applied at the earliest stage of the proceedings. At this stage in most cases it is impossible to know the full circumstances that may unfold at trial, how much publicity the case is going to generate in the locale and what damage is likely to occur to the complainant. Applying it at the later stages of the proceedings is probably too late to be effective*.[58]

He also recommended the **increase of 'current penalties for breaching the anonymity of complainants'**.

Given the 'substantial consultation undertaken by the Review in the area, no further public consultation by the Department was deemed necessary. However, a targeted policy consultation was subsequently carried out with key criminal justice partners on specific recommendations of the Review report, to help inform the development of legislative proposals*'*.[59]

A Ministerial commitment was given that these recommendations would be implemented by legislative change. However, as the proposals were developed, legal concerns were raised that indefinite reporting restrictions might contravene Article 10 ECHR (Freedom of Expression).[60] The Department said 'legislating in accordance with the Gillen recommendation was not an option as the potential for ECHR breach would have jeopardised the passage of the provision through the Assembly'. Likewise, not proceeding with the recommendation was also not an option 'given the Ministerial commitment to implement this recommendation'.[61]

Therefore, to minimise the potential for ECHR breach, the proposal was altered to provide that the restriction on the publication of anything that would identify a victim of a sexual offence would end 25 years after their death. Within the 25 year period, an interested party can apply to the courts to have the reporting restrictions extended for a further period. A similar limit has been applied to the provisions providing for the anonymity of a suspect in a sexual offence case who has not been subsequently charged.

[57] Ibid at 49
[58] Ibid at 43,pg 129
[59] Justice (Sexual Offences and Trafficking Victims) Bill, Explanatory and Financial Memorandum: http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2017-2022/justice-sexual-offences-and-trafficking-victims-bill/justice-sexual-offences-and-trafficking-victims-bill---efm---as-introduced.pdf
[60] Ibid
[61] Ibid

2.5 Protection Orders

Sexual offences prevention orders

Sexual offences prevention orders (SOPOs) were introduced by section 104 of the Sexual Offences Act 2003. They are civil preventative orders designed to protect the public from serious sexual harm:

> *Protecting the public or any particular members of the public from serious sexual harm from the defendant" means protecting the public in the United Kingdom or any particular members of that public from serious physical or psychological harm, caused by the defendant committing one or more offences listed in Schedule 3.*[62]

There are two ways a Court can order a SOPO. Firstly, a Court can make a SHPO when a defendant is before the Court in relation to an offence in Schedule 3 or 5 of the Sexual Offences Act 2003. Secondly, the Court can also make an Order where a Chief Officer of Police applies to a court for one.

A court dealing with an offender for one of the offences listed in Schedule 3 or Schedule 5 may make a SOPO if it is satisfied that it is necessary to make such an order for the purposes of protecting the public, or any particular members of the public, from sexual harm from the defendant. Schedule 3 Sexual Offences Act 2003 deals with most of the substantive sexual offences, for example rape. Schedule 5 contains a range of generally violent offences, such as murder and GBH as well as theft, child cruelty and harassment.

A court which finds that the offender is not guilty of an offence in either Schedule 3 or Schedule 5 by reason of insanity, or that he is under a disability and has done the act charged against him in respect of an offence may also make a SOPO. Similarly, it has to be satisfied that it is necessary to make such an order for the purposes of protecting the public (or any particular members of the public) from sexual harm from the defendant.

SOPOs are available in both the magistrates' courts and the Crown Court.

The only prohibitions which can be imposed by a SOPO are those which are necessary for the purpose of protecting the public from sexual harm from the defendant. The order may only include negative restrictions, for example, prohibit someone from undertaking certain forms of employment. It may also prohibit the offender from engaging in particular activities on the internet. SOPOs may be used to limit and manage internet use by an offender, where it is considered proportionate and necessary to do so.

An order has effect for a fixed period of at least five years, or until further order. The Court may specify that some of the prohibitions have effect until further order and some for a fixed period or different periods for different prohibitions. The court can make an interim order when immediate protection from risk is necessary. The order can also be changed, renewed or dismissed by the Court.

[62]Sexual Offences Act 2003,Section 106: https://www.legislation.gov.uk/ukpga/2003/42/section/106

Breach of an Order is triable either way. The maximum penalty for conviction on indictment is imprisonment for a term not exceeding five years.

Unlike a SOPO which must be imposed by a court, the sex offender notification rules follow automatically upon conviction for most sexual offences.[63] The term for which the notification requirements apply depends upon the length or nature of the sentence and range from 2 years in the case of a caution to indefinitely if the sentence is imprisonment for 30 months or more. SOPOs and the notification provisions are completely different. The former restricts a person from doing specific things, while the latter requires an offender to notify the police of his personal details and home address.

In *R v Smith and Others,* the English Court of Appeal considered the relationship between SOPOs and the notification provisions and held that, *'a SOPO must operate in tandem with the statutory notification requirements' and 'not conflict with any of those requirements'*.[64] They denounced any use of a SOPO to extend notification periods beyond the time prescribed by law as, *'not a proper use of … power'.* The Court of Appeal considered whether any SOPO should be for the same period as any notification and decided this was not necessary.*[65]*

England and Wales

In England and Wales, SOPOs were replaced by Sexual Harm Prevention Orders (SHPO) in March 2015. Section 103A of the Sexual Offences Act (SOA) 2003 deals with SHPOs. The introduction of SHPOs lowered the test from 'serious sexual harm' to 'sexual harm'. Sexual Harm is defined in section 103B of the Sexual Offences Act as:

> *sexual harm from a person means physical or psychological harm caused by the person committing one or more offences listed in Schedule 3 or (in the context of harm outside the United Kingdom) by the person doing, outside the United Kingdom, anything which would constitute an offence listed in Schedule 3 if done in any part of the United Kingdom"*

Otherwise, they operate similarly to SOPOs.

[63] Ibid, Sections 80-102:

[64] R v Smith and Others [2011] EWCA Crim 1772

[65] Crown Prosecution Service Guidance (May 2021):https://www.cps.gov.uk/legal-guidance/rape-and-sexual-abuse-chapter-14-sexual-harm-prevention-orders-shpos

Violent Offences Protection Order

Section 55 of the Justice Act (Northern Ireland) 2015 introduced Violent Offences Prevention Order (VOPO) to assist with the management of risk from violent offending.[66]

A court can give an offender a Violent Offences Prevention Order (VOPO) to protect the public if there is a risk the offender could cause serious violent harm. The court can make a VOPO against someone:

- who has committed a specified offence; or
- when police apply because a risk has been identified.

The order places restrictions on the offender's behaviour. It may contain such prohibitions or requirements as the court making the order considers necessary, in order to protect the public from the risk of serious violent harm caused by the offender. It provides that an order can be made for a minimum period of two years, up to a maximum term of five years, unless the order is renewed or discharged by the court. It defines the term 'serious violent harm' as 'serious physical or psychological harm caused by a person committing one or more specified offences'. A 'specified offence' is defined as an offence listed in Part 1 of Schedule 2 to the Criminal Justice (Northern Ireland) Order 2008 (violent offences).

The order can last between two and five years. The Court can make an interim order when immediate protection from risk is necessary. The order can also be changed, renewed or dismissed by the Court.

[66] Justice Act (Northern Ireland) 2015, Sections 55: https://www.legislation.gov.uk/nia/2015/9/section/55

2.6 Human Trafficking

The United Nations Convention against Transnational Organised Crime (the 'Palermo Protocol') describes human trafficking as:

> *the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs* .[67]

The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015[68] was introduced to provide a more robust legal framework in relation to:

- the prosecution of traffickers and those subjecting people in Northern Ireland to conditions of slavery;
- the provision of improved support for victims; and
- tackling the demand for the services of trafficked victims.

In 2020, 128 potential victims of human trafficking were identified in Northern Ireland. Of that figure, 99 were adults; 20 were children; and 9 were of an unknown age. 49 potential victims were female (mainly relating to suspected sexual exploitation) and 79 were male (generally linked to labour exploitation). The majority of victims were from outside the United Kingdom.[69]

Section 1 of the 2015 Act provides for the offence of slavery, servitude and forced or compulsory labour. Section 2 provides for the offence of human trafficking**.** Section 12 requires the Department of Justice to publish a strategy on the trafficking offences at least once a year. The purpose of the annual strategy, as set out in the legislation, is to raise awareness of modern slavery offences and contribute to a reduction in the number of these offences.

The National Referral Mechanism (NRM) is the UK's referral mechanism for identifying and supporting victims and potential victims. First Responders are responsible for completing and submitting NRM referral forms in cases where an individual is suspected to be a potential victim of human trafficking or modern slavery. The First Responder organisations in Northern Ireland which can make NRM referrals are:

[67] United Nations Convention against Transnational Organised Crime: https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf

[68] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015: https://www.legislation.gov.uk/nia/2015/2/contents

[69] Department of Justice Modern Slavery and Human Trafficking Strategy 2021-22, pg 12: https://www.justice-ni.gov.uk/sites/default/files/publications/justice/modern-slavery-strategy-27-05-v2_0.pdf

- Police Service for Northern Ireland
- Health and Social Care Trusts
- Gangmasters Labour Abuse Authority
- UK Border Force
- UK Immigration Enforcement
- HM Revenue & Customs
- Airport Police
- Harbour Police

Potential victims of human trafficking aged 18 years and over who have been referred to the NRM are entitled to assistance and support under section 18 of the 2015 Act. Support is provided for a 45 day period until it is determined whether or not the person is a victim of human trafficking. Support will end before the 45 day period is over if it has been determined that there are no reasonable grounds to conclude that the person is a victim of human trafficking.

At present, section 18 only legislates for assistance and support to be made available to potential victims of human trafficking (an offence under section 2 of the Act) pending determination of their status as a victim. However, in January 2016 the then Justice Minister, David Ford MLA, in line with UK-wide support for victims of slavery policy, made a policy decision to extend this assistance to potential victims of slavery, servitude and forced or compulsory labour (offences under section 1 of the Act), but it is not a statutory requirement.

Contracted providers deliver this support on behalf of the Department of Justice. It includes but is not limited to: appropriate secure accommodation, assistance in obtaining healthcare, translation and interpretation services; and assistance with repatriation. Throughout this process other departments, agencies and law enforcement bodies work together as appropriate to ensure that the needs of potential victims are met.[70]

[70] Ibid pg 14

3 Bill and Clause Commentary

This section provides short commentary on the key clauses of the Bill.[71]

Clause 1: Voyeurism: additional offences

This clause amends the Sexual Offences (Northern Ireland) Order 2008 to insert new Articles 71A and 71B. It also introduces a new Schedule 1 which lists the required consequential amendments in this area.

New Article 71A addresses "up-skirting" to includes two offences of 'operating equipment' and 'recording images'.

> 71A.— (1) A person (A) commits an offence if—
>
> (a) A operates equipment beneath the clothing of another person (B),
>
> (b) A does so with the intention of enabling A or another person (C), for a purpose mentioned in paragraph (3), to observe—
>
> (i) B's genitals or buttocks (whether exposed or covered with underwear), or
>
> (ii) the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible, and
>
> (c) A does so—
>
> (i) without B's consent, and
>
> (ii) without reasonably believing that B consents.
>
> (2) A person (A) commits an offence if—
>
> (a) A records an image beneath the clothing of another person (B),
>
> (b) the image is of—
>
> (i) B's genitals or buttocks (whether exposed or covered with underwear), or
>
> (ii) the underwear covering B's genitals or buttocks, in circumstances where the genitals, buttocks or underwear would not otherwise be visible,
>
> (c) A does so with the intention that A or another person (C) will look at the image for a purpose mentioned in paragraph (3), and
>
> (d) A does so—
>
> (i) without B's consent, and
>
> (ii) without reasonably believing that B consents.
>
> (3) The purposes referred to in paragraphs (1) and (2) are—

[71] Justice (Sexual Offences and Trafficking Victims) Bill : http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2017-2022/justice-sexual-offences-and-trafficking-victims-bill/justice-so--tv---as-introduced---full-print-version-.pdf

(a) obtaining sexual gratification (whether for A or C);

(b) humiliating, alarming or distressing B

Article 71B addresses “down-blousing” to include two new offences of ‘operating equipment’ and ‘recording images’:

71B.— (1) A person (A) commits an offence if—

(a) A operates equipment beneath or above the clothing of another

person (B),

(b) A does so with the intention of enabling A or another person (C),

for a purpose mentioned in paragraph (3), to observe—

(i) B’s breasts (whether exposed or covered with underwear), or

(ii) the underwear covering B’s breasts, in circumstances where the breasts or underwear would not otherwise be visible, and

(c) A does so—

(i) without B’s consent, and

(ii) without reasonably believing that B consents.

(2) A person (A) commits an offence if—

(a) A records an image beneath or above the clothing of another person (B),

(b) the image is of—

(i) B’s breasts (whether exposed or covered with underwear), or

(ii) the underwear covering B’s breasts, in circumstances where the breasts or underwear would not otherwise be visible,

(c) A does so with the intention that A or another person (C) will look at the image for a purpose mentioned in paragraph (3), and

(d) A does so—

(i) without B’s consent, and

(ii) without reasonably believing that B consents.

(3) The purposes referred to in paragraphs (1) and (2) are—

(a) obtaining sexual gratification (whether for A or C);

(b) humiliating, alarming or distressing B

A person found guilty of either offence will be liable for a sentence of imprisonment of up to six months or a fine not exceeding the statutory maximum of £5,000 or both on summary conviction in the Magistrates' Court. A conviction on indictment in the Crown Court will attract a penalty of up to two years' imprisonment. The corresponding penalty in England and Wales on summary conviction is up to 12 month's imprisonment and a fine.

When asked about offences in the Protection from Stalking Bill not attracting a maximum of 12 months' imprisonment on summary conviction like England and Wales, the Department of Justice explained:

> *If a sentence of more than six months is available on summary conviction in Northern Ireland, it triggers a mechanism by which the person can apply for a hearing with a jury rather than a summary judgement. It is about trying to make sure that that circumstance is not routine. The intention of having a summary judgement is that it is quick, concise and determined, and the judge is able to make that determination. If you start to expand that to allowing the Magistrates' Court to hear trials with a jury, that clearly introduces an element of additional time and potential delay.*[72]

Under Article 29 of the Magistrates' Court Order (NI) 1981 a defendant has the right to elect to have their trial heard by a Judge sitting with a jury provided that:

- They are over the age of 14; and
- If found guilty of the offence they face a custodial sentence of more than 6 months.[73]

The up-skirting offence only focuses on the taking of images. Therefore, while taking an up-skirting image is specifically criminalised, the sharing of that image is not an offence. The distribution of up -skirting images is permissible unless the case falls under another offence such as a communications offence.

When asked if the down-blousing offence would incorporate breastfeeding, the Department of Justice indicated that it would 'be considered on a case-by-case basis, depending on the circumstances of the case and how people feel':

> *If the breast were not ordinarily visible, it would be an offence for someone to observe or record it, but I hope that good sense will prevail in the relevant authorities' considerations when applying the legislation.*
>
> *[…] It is about gaining access to images that would not otherwise be readily available. If a woman is feeding a child and the breast is exposed, it is not really seen as that. I do not know. I am not sure that it would fit into the category of being sexualised or degrading or fit with the principles behind the Bill. The aim is to capture in the Bill instances in which people are trying to gain access to images that would otherwise be unavailable. Clearly, breastfeeding is a natural and normal process, and, as such, it is not as private, if you like. Campaigners argue that it is the right of all women to*

[72] NI OR Committee for Justice 14th October 2021: http://data.niassembly.gov.uk/HansardXml/committee-28870.pdf
[73] Magistrates' Court Order (NI) 1981 Article 29: https://www.legislation.gov.uk/nisi/1981/1675/article/29

breastfeed anywhere that is appropriate when the child is hungry. It would therefore seem to be a different category of situation.

[…] We recognise that you are aiming to criminalise behaviour where there is a sexualised dimension or a degrading situation. You also get certain pop stars gallivanting in fields in Northern Ireland, waving their bits quite happily for photographs, and that clearly is not against the law. Again, on beaches and other areas where people are more exposed, taking photographs in a normal situation would not be against the law. We are trying to capture the situation in which people try to access images that would otherwise be unavailable and are doing so for an essentially malevolent purpose. That is what we are trying to capture.[74]

At the second reading of the Bill on 12th September 2021, the Justice Minister clarified:

Currently, taking photographs of someone who is breastfeeding is not an offence where they are breastfeeding in public, and there is no expectation of privacy. The Bill's provisions apply specifically to taking images of breasts or underwear that is covering breasts that would not otherwise be visible. Images of a woman who is breastfeeding would not, at this point, come within scope where the woman is breastfeeding openly. However, if the woman is taking steps to be discreet from public view when an image is taken to reveal more than she intended to reveal, it would potentially be covered by the legislation. It is not a simple issue. There are many circumstances in which someone who is breastfeeding will be more than happy to have photographs taken by family members and friends. Again, it will fall back on the issue of whether there is a cause of distress, alarm or disquiet in the motivation of the offence.[75]

During the passage of the Police, Crime, Sentencing and Courts Bill,[76] the House of Commons' Public Bill Committee tabled a new clause to specifically address breast feeding voyeurism:

'(1) Section 67A of the Sexual Offences Act 2003 (Voyeurism: additional offences) is amended as set out in subsection (2).

(2) After subsection (2), insert—

"(2A) A person (A) commits an offence if—

(a) A records an image of another person (B) while B is breastfeeding;

(b) A does so with the intention that A or another person

(C) will look at the image for purpose mentioned in

subsection (3), and

[74] Ibid at 5
[75] Ibid at 6
[76] Police, Crime, Sentencing and Courts Bill (as amended): https://bills.parliament.uk/publications/43970/documents/1042

(c) A does so—

(i) without B's consent, and

(ii) without reasonably believing that B consents."'—

The Under-Secretary of State for the Home Department, Victoria Atkins MP, responded:

> *The reasons why mums and babies benefit from breastfeeding are well established. In what can often feel like a very busy, hectic and sometimes even—dare I say it?—harried time with a newborn, breastfeeding provides a moment of tenderness, of love, and of innocence.*
>
> *To have a stranger defile that moment by trying to take photographs or video it—that is not something that would occur to most decent, right-thinking people. I very much understand why this new clause has been tabled, and I want to support the mothers and the women who are facing this.*
>
> *[…] However, we absolutely agree that it is right to ask whether the law has kept up to date with the emergence of the internet. That is why we have asked the Law Commission to review the law around the taking, making and sharing of intimate images without consent, to see where there are gaps, and to get the Commission's advice on how people can be protected from such behaviour.*
>
> *That review looks at the question of voyeurism offences and non-consensual photography in public places, including the issue of images taken of breastfeeding […]*
>
> *We await the results of the Law Commission's report. We want to wait for the results of that report, because it is foreseeable that the Commission's work will include a body of recommendations knitting together the various types of offending behaviour that it has identified, and suggesting how the law should be redrafted or improved to tackle such offences. As such, I am in the position of asking the Committee—and, I suspect, later on, the House—to bear with us while we await the results of that report.*
>
> *[…] For those reasons, we do not feel able to support the new clause at this stage, but I want to give the Committee a sense of the urgency we feel about the matter. While we are waiting for the Law Commission to report, we are looking at this as part of the VAWG strategy, as I said on the Floor of the House when the hon. Member for Manchester, Withington asked me about this, and we are determined to tackle it. We will be including this type of voyeurism in our considerations of the strategy.*[77]

[77] Police, Crime, Sentencing and Courts Bill (Nineteeth sitting) Thursday 24 June 2021: https://hansard.parliament.uk/Commons/2021-06-24/debates/0382b011-7d8b-4a75-a657-e0f7b3df245e/PoliceCrimeSentencingAndCourtsBill(NineteethSitting)

The Law Commission's analysis of breast feeding in its consultation paper was that:

> *[…] taking a picture without consent of someone breastfeeding in a public place, for instance on a park bench, where their breasts are exposed, partially exposed or covered only with underwear. Under our provisional proposals, this would be a semi-nude image and would therefore be an intimate image.*

Considering the issue, it went on to explain:

> *One argument in favour of criminalisation is that expectations around observation are similar when someone is breastfeeding in public to when someone is changing in a changing room. Fleeting glances are acceptable, but prolonged observation is not. Therefore, while we might argue here too that prolonged observation of someone breastfeeding should not be criminalised, taking a picture without consent is substantially more wrongful and harmful, such that it warrants criminalisation.*
>
> *Another argument is that breastfeeding can be an inherently private act. It is at least as inherently private as changing one's clothes. As with changing in public changing rooms, instances of breastfeeding in public can arise out of necessity as well as choice. Even when someone is breastfeeding in a public place they are entitled to a high degree of privacy due to the nature of the act.*
>
> *A final argument is that there are strong public policy reasons to criminalise recording someone breastfeeding without their consent. Women are already protected from being discriminated against because they are breastfeeding. Under section 17 of the Equality Act 2010, it is unlawful for a trader or service provider to treat a woman "unfavourably" because she is breastfeeding, regardless of the age of the child. Scotland has gone further, making it a criminal offence to stop a woman from breastfeeding a child of up to 24 months in a public place or on licensed premises.*
>
> *Therefore, our provisional view is that criminalisation is warranted where an individual records someone breastfeeding in a public place. As with recording someone in a changing room, in our view criminalisation should not depend on whether the person who took the recording intended to cause the depicted person distress or to obtain sexual gratification.*[78]

The Law Commission also observed that:

> *Although a person breastfeeding in public is semi-nude in public out of necessity, we would not characterise it as "nonvoluntary"; there is still agency in the act of breastfeeding. We do consider that people breastfeeding should be protected from images being taken without consent, but this is because the act can be considered private and not because the act depicted is itself a violation of privacy*.[79]

[78] Law Commisson (2021) Intimate Image Abuse A Consultation Paper, pg 259: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/02/Intimate-image-abuse-consultation-paper.pdf

[79] Ibid pg 273

In the House of Lords, another amendment was tabled to the Police, Crime, Sentencing and Courts Bill by Baroness Hayman to extend the definition of voyeurism in the Sexual Offences Act 2003 to make it an offence to take a photograph or video of a person breastfeeding without that person's consent.[80] Introducing the amendment, she explained:

> *When this issue was discussed in Committee in another place, the Minister did not query the need for action, and obviously shared the disquiet among Members at the present situation. She suggested that the matter could be considered in the strategy on violence against women and girls, but that strategy has now been published without any reference to the issue. Her main argument, however, was that we should wait for the Law Commission, which is reviewing the law around the taking, making and sharing of internet images without consent. That is a very broad subject, and we know how slowly grind the wheels of such a report's journey to legislation. Even when the Law Commission recommends action, there is no guarantee that it will be agreed. Fewer than 50% of Law Commission reviews commissioned in the past decade have, as yet, led to legislative change. Rather than waiting on a review that may or may not be accepted by the Government after more consultation, and then for a relevant legislative vehicle, we have the chance in this Bill to act on the specific, clearly defined issue and to protect mothers and babies now.*[81]

Lord Wolfson of Tredegar invited the amendment to be withdrawn on account of the Law Commission's review, which it was.

Clause 2: Sexual grooming: pretending to be a child

This clause amends the Sexual Offences (Northern Ireland) Order 2008 to include new Articles 22B to 22G. They create four new offences to deal with an adult pretending to be a child or masquerading as a child and making a communication with a view to sexually grooming a child under the age of 16. They seek to cover all possible angles of communication:

- communicating with an individual;
- communicating with a group;
- communicating with a view to grooming a particular child; and
- communicating with a view to grooming any child in the group under 16.

The provisions 'aim to address behaviour at an earlier stage, where offenders pretend to be children as a precursor to grooming or carrying out other sexual offences and where this

[80] Justice (Sexual Offences and Trafficking Victims) Bill: http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2017-2022/justice-sexual-offences-and-trafficking-victims-bill/justice-so--tv---as-introduced---full-print-version-.pdf

[81] Ibid

behaviour would constitute an indicator that they present a risk to children'.[82] These provisions are not limited to online communication.

Article 22B (**communicating with a person with a view to grooming a particular child**) a person (A) commits an offence if they: are aged 18 or over; communicate with another person (B); and intentionally present to B, to a group including B, or to the public at large, as being under 18.

> 22B.—(1) A person aged 18 or over (A) commits an offence if—
>
> (a) A communicates with another person (B),
>
> (b) at the time of the communication, A intentionally presents himself or herself to B, to a group of persons that includes B or to the public at large as being under 18,
>
> (c) A's intention in communicating with B is to establish or participate in an exchange of communications with a particular person whom A has in mind (C) with a view to subsequently committing a relevant offence against C, and
>
> (d) C is under 16 and A does not reasonably believe that C is 16 or over.
>
> (2) B and C may be the same person.
>
> (3) If—
>
> (a) A communicates with a group of persons, and
>
> (b) the group contains a person to whom A intentionally presents himself or herself as being under 18.
>
> A is to be regarded as communicating with that person.

As such, the perpetrator is communicating with a certain individual (who may or may not be a child) to reach a particular child (who may or may not be the same person as the individual communicated with). This may or may not be within the context of a group setting.

Article 22C (**communicating with a group with a view to grooming a particular child**) a person (A) commits an offence if they are aged 18 or over and A communicates with a group of persons with a view to establishing, or participating in, an exchange of communication with a particular person whom A has in mind (B), with a view to subsequently committing a relevant offence against B.

At the time of the communication, A must intentionally present to the group or to the public at large as being under 18 and B must be a child (under 16) and A must reasonably believe B is

[82] Explanatory and Financial Memorandum http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2017-2022/justice-sexual-offences-and-trafficking-victims-bill/justice-sexual-offences-and-trafficking-victims-bill---efm---as-introduced.pdf

a child. As such, the perpetrator is communicating with a group to find a child they have in mind.

Article 22D (**communicating with a person with a view to grooming any child**), a person (A) commits an offence if they are 18 or over and A communicates with another person (B) who may or may not be a child (under 16).

At the time of the communication, A must intentionally present to B (who does not have to be under 16), or to a group of persons that includes B, or to the public at large, that they are under 18.

A's motivation in communicating with B must be to establish, or participate in, an exchange of communication with any child with a view to subsequently committing a relevant offence against them. In this case, A does not have a particular child in mind. This provision contrasts from Articles 22B and 22C in that the perpetrator does not have a particular child in mind, rather, they are communicating with someone for the purposes of conducting a fishing exercise with the aim of finding any child with whom they can communicate

Under new Article 22E (**communicating with a group with a view to grooming any child**), a person (A) commits an offence if they are 18 or over and A communicates with a group of persons.

At the time of the communication, A must intentionally present to the group, or to the public at large, as being under 18. A's intention in communicating with the group must be to establish or participate in an exchange of communication with any child with a view to subsequently committing a relevant offence against them. In this case, A does not have to have a particular child in mind at the time of the communication.

As with Article 22D, this provision differs from Articles 22B and 22C in that the perpetrator does not have a particular child in mind. This provision diverges from Article 22D in that the perpetrator is communicating with a group rather than an individual, but again with the hope of finding any child with whom they can communicate with. They are communicating with a group and not an individual person.

Article 22F provides a 'reasonable person' test in respect of whether A has presented themselves as being under 18. It provides that for the purposes of Articles 22B to 22E, a person (A) presents to a person (or persons) as being under 18 if a reasonable person would consider that, in all the circumstances, A presents to that person as being under 18.

Article 22G sets out the penalties for an offence committed under Articles 22B to 22E. Those convicted summarily are liable to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both. Conviction on indictment attracts a maximum term of imprisonment not exceeding two years. These offences will be subject to the notification requirements in Part 2 of the Sexual Offences Act 2003 (the sex offenders register).

Clause 3: Miscellaneous amendments as to sexual offences

This clause introduces Schedule 2 of the Bill which:

- makes certain amendments to references in the Sexual Offences (Northern Ireland) Order 2008 to certain forms of child abuse; and
- extends offences that relate to the recording of indecent images so that they apply also to streaming or other transmission of such images.

Cause 4: Extended anonymity of victims

This clause brings forward provisions to implement four recommendations from the Gillen Review 'Report into the law and procedures in serious sexual offences in Northern Ireland'.

It 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 sexual offence case, for a period of 25 years after the death of the alleged victim or complainant.

Lifelong anonymity is provided under the 1992 Act by prohibiting the publication, during the victim's or complainant's lifetime, of anything that would assist to identify them. This clause extends the reporting restrictions for a period of 25 years after their death. The sexual offences to which the provisions apply are those listed in section 2 of the 1992 Act.

Explaining the 25 year limit, the Department of Justice stated:

> *During drafting of the legislative provisions, the legal advice was that an indefinite period, as Sir John had recommended, would not be proportionate in law. This was on the basis of European Convention on Human Rights (ECHR) article 10, freedom of expression. It would have meant that someone could not do that within a permanent period. We then had to try to establish a proportionate period that would somehow recognise a period of time that could elapse. […] the recognised generation gap is about 20 to 30 years, so we went for the mid point of 25 years. That, in our view, is proportionate.*[83]

Clause 5: Disapplication of anonymity of victim after death

This clause inserts new sections 3A (Disapplication of section 1 after victim's death) and 3B (Rules of Court) into the 1992 Act.

Section 3A(2) enables 'interested parties' to make an application to the court for an order dis-applying or modifying the reporting restrictions of the anonymity of a victim after death under

[83] Ibid at 5: http://data.niassembly.gov.uk/HansardXml/committee-28367.pdf

amended section 1 of the 1992 Act. An 'interested party' means a family member or a personal representative of the deceased victim, or a person interested in publishing matters relating to the deceased victim. Sections 3A(8) and 3A(9) further define 'family member'.

Under Section 3A(4) any order of the court to modify the reporting restrictions can reduce or increase the 25 year period.

Section 3A(5) places a duty on the court to make an order where an application has been made and where it is in the interests of justice or the public interest to do so.

Under section 3A(6), any order made can be subsequently varied or revoked by the court on an application by an interested party, where the court is satisfied that the same tests are met.

New section 3B makes express provision for the making of Court Rules relating to the process of making applications to the court to dis-apply or modify reporting restrictions and the consideration of these applications by the court.

Clause 6: Increase in penalty for breach of anonymity

This clause increases the current penalty for a breach of anonymity from a fine of £5,000 on summary conviction. Instead, a person found guilty of a breach will be liable, on summary conviction, to a term of imprisonment of up to six months, or a fine not exceeding level 5 on the standard scale, or both.

Clause 7: Special rules for providers of information society services

This clause inserts a Schedule into the 1992 Act which sets out protections for certain online service providers from legal responsibility for illegal publication where the online service providers are a 'mere conduit' for the relevant information, 'caching' the information or 'hosting' the information.

The Department of Justice clarified the necessity for this provision with the Justice Committee:

> *Having liaised with the UK Government following Brexit, we had to include that particular provision. It relates to a particular directive and to e-commerce regulations that encourage such free movement around the European area. Given Brexit, defences had to be included in our domestic law to provide for those service providers, usually regarding the sale of goods and such things, whereby they would be liable under our domestic law, where they have a base here and are a service provider for other UK channels.*
>
> *[…] To commit an offence, you need to have an intention, and the clause is trying to pick up situations in which providers have acted inadvertently, where something has happened that they are not aware of and could not reasonably be aware of. Consequently, you cannot find them guilty of an offence, as they were not in a position to make a decision to commit an offence. That is the issue. You are right to*

say that that area is normally reserved. This is very much a tidying-up exercise to make sure that we stay within the appropriate law.

[…] It was included on the advice of the UK Government to our lawyers, who also liaised with their lawyers on the matter. The particular provision has been put in because this is a new piece. It is being put into the Sexual Offences (Amendment) Act 1992, because that predated the directive. It therefore had to be put in in that guise. It is in two areas of the Bill.

[…] More broadly, the Government nationally are looking at putting in additional protections that relate to service providers. That is a reserved matter, and they take the lead, so our aim is not to try to solve all the problems of the use of the internet but rather to make sure that we stay within the law in a narrow and particular area.[84]

Clause 8: Restriction on reports as to suspects of sexual offences

This clause provides for the anonymity of the suspect in a sexual offences allegation up to the point of charge. Subsection 2 specifies that:

> No matter relating to the suspect is to be included in any publication if it is likely to lead members of the public to identify the suspect as a person who is alleged to have, or is suspected of having, committed the offence.

Subsection (5) details the matters to which the reporting restrictions particularly apply. In particular:

(a) the suspect's name;

(b) the suspect's address;

(c)the identity of any school or other educational establishment attended by the suspect;

(d) the identity of any place of work;

(e) any still or moving picture of the suspect.

Subsection (4) provides that where no charge is made, the reporting restrictions will apply for the suspect's life and for 25 years after the suspect's death.

Clause 9: Meaning of sexual offence in clause 8

Subsection (1) lists the offences which fall within the meaning of 'sexual offence' for the purposes of clause 8. The list refers to:

- an offence under section 61 or 62 of the Offences against the Person Act 1861 (buggery, attempt to commit buggery, assault with intent to commit buggery or indecent assault on a male);

[84] Ibid at 5: http://data.niassembly.gov.uk/HansardXml/committee-28367.pdf

- an offence under Article 19 of the Criminal Justice (Northern Ireland) Order 2003 (buggery);

It should be noted, that this research has identified that sections 61 and 62 of Offences Against the Person Act 1861[85] and Article 19 of the Criminal Justice (Northern Ireland) Order 2003 are no longer in force.[86] Buggery has since been reclassified as rape.[87]

Subsections (2) and (3) provide that the Department of Justice can amend the meaning of 'sexual offence' by regulations which must be laid before, and approved by a resolution of the Assembly.

Clause 10: Power to disapply reporting restriction

This clause enables a 'relevant person' to apply to a magistrates' court to dis-apply or modify the reporting restrictions provided by clause 8. During the suspect's lifetime, 'relevant person' means the suspect or the Chief Constable. After the suspect's death, 'relevant person' means a family member or a personal representative of the suspect, or a person interested in publishing matters relating to the suspect.

Subsection (3) clarifies that any order of the court to modify can reduce or increase the 25 year period of anonymity but cannot supersede the loss of anonymity upon charge.

Subsections (8) and (9) define what is meant by 'a family member'. Where an application has been made, subsection (5) places a duty on the court to make an order where it is in the interests of justice or the public interest to do so. An initial order can dis-apply or modify the reporting restrictions. A further order can vary or revoke the reporting restrictions.

Clause 11: Magistrates' courts rules

This clause provides for the making of magistrates' courts rules relating to the making of applications to the Court to dis-apply or modify reporting restrictions and the consideration of these applications to be heard in private.

Clause 12: Offence relating to reporting

This makes it an offence if any matter is included in a publication in violation of section 8(2). Subsection (1) details those who are accountable where information identifying a suspect is included in a newspaper or periodical, in a relevant programme or in any other publication. Subsections (2), (3) and (4) outline the defences available to a person charged with the offence.

A person found guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding level 5 on the standard scale, or to both.

[85] No longer in effect: https://www.legislation.gov.uk/ukpga/Vict/24-25/100/section/61?view=extent
[86] Repealed by the Sexual Offences (Northern Ireland) Order 2008
[87] Sexual Offences (Northern Ireland) Order 2008

Proceedings for an offence under this clause may only be brought with the consent of the Director of Public Prosecutions.

Clause 13: Interpretation of clauses 8 to 12

This clause provides interpretation of the terms 'picture', 'publication', relevant programme, 'statutory provision' and 'suspect' for the purposes of clauses 8 to 12.

Clause 14: Consequential amendment

This clause makes a consequential amendment to section 44(4)(a) of the Youth Justice and Criminal Evidence Act 1999 (restrictions on reporting alleged offences involving persons under 18). It excludes a suspect to whom new clause 8(2) applies to ensure 'that the two legislative regimes do not overlap'.[88]

Clause 15: Serious sexual offences: exclusion of public from court

The Criminal Evidence (Northern Ireland) Order 1999 is amended by inserting new Articles 27A to 27D to provide for the exclusion of the public from hearings of serious sexual offences tried on indictment.

New Article 27A (Exclusion of public from trial) imposes a duty on the court to give an exclusion direction where a person is to be tried on indictment for a serious sexual offence. This duty also applies where the trial includes offences additional to the serious sexual offence. It will not apply where the complainant has died.

Under an exclusion direction, all persons are excluded from the court with the exception of those listed in Article 27A(2). These are:

- members and officers of the court;
- persons directly involved in the proceedings;
- a relative or friend of the complainant as nominated by the complainant;
- a relative or friend of the accused as nominated by the accused;
- bona fide representatives of news gathering or reporting organisations; and
- any other person excepted from the exclusion direction at the discretion of the court.

Under Article 27A(5) an exclusion direction has effect from the commencement of the trial until the proceedings have been determined or abandoned and does not apply when a verdict is being delivered.

The court will retain discretion to allow any other person to remain in the court, where it considers that it is in the interest of justice.

[88] Ibid at 82

New Article 27B (Nomination etc. of persons to be excepted from exclusion) supplements Article 27A(2)(c) and (d) which enable nominations to be made by the complainant and the accused for a relative or friend to remain in the court. The court can specify the nominated person to be allowed to remain in the court.

The court also has the power to refuse to specify the nominated person as excepted from the exclusion direction. The court can exercise this power either on application by a party to the proceedings or the complainant, or of its own motion, where it is in the interest of justice to do so.

Article 27C (Variation of exclusion directions given under Article 27A) provides that the court may vary an exclusion direction either: by revoking the specification of a person nominated in accordance with Article 27B; by specifying a person not already specified in the exclusion direction as allowed to remain in the court; or by revoking a specification of any person previously specified by the court as being allowed to remain in the court.

Variations may be made by the court only where it is in the interest of justice to do so and either on application by a party to the proceedings or the complainant where there has been a material change of circumstances, or of its own motion. New Article 27D (Exclusion directions under Article 27A: general) requires the court to state in open court its reasons for specifying or refusing to specify persons to be excepted from an exclusion direction and varying or refusing to vary exclusion directions. 'Open Court' means the court from which the public are excluded under Article 27A.

During the second stage of the Bill, Mr. Jim Allister MLA raised concern about the impact of the exclusion of the public in addition to the Gillen Review's other recommendations:

> *Part of the confidence-building aspect of our justice system down through decades and centuries is the fact that we have open justice, that we do not hide behind closed doors and that we generally do not convict people away from the public gaze. That is for the profound and good reasons that we do not want to generate gossip, misrepresentation and misconception of how our justice system operates. Therefore, fundamentally, we operate an open book and a justice system that is open to the public. Of course, there have to be certain exceptions as one progresses through that, but to come to the point in the Bill where we introduce a blanket ban on the public being present at any trial that deals with any serious sexual offence takes the matter far further than it needs to go.*
>
> *I would have thought that the way to approach it and to obtain a legitimate objective would be to, rather than imposing a blanket ban, insert in what would be new article 27A under clause 15 words like, "Where the court is satisfied that it is in the public interest that a person is to be tried on indictment for a serious sexual offence, the court must give an exclusion direction". That would leave it within the control of the court; instead, the Bill would put it beyond the control of the court by introducing a blanket ban. That will not produce fairness and openness; it will suppress fairness and openness in some cases — maybe in many cases — unnecessarily. I say to the*

Committee, "When you come to look at clause 15, please consider conditioning the ban with the threshold of it having to be in the public interest to exclude". Otherwise, it is not just unnecessarily draconian but potentially destructive to essential confidence in our open justice system.[89]

To which the Justice Minister responded:

I take on board entirely the concerns that were expressed by Mr Allister, specifically with regard to the issue of open justice. It is important that we demur from that only where it is absolutely necessary and where there is an evidence base that justifies such a decision. In this case, it is not just the vulnerability of the witness or victim but also the protection of their anonymity which gives us that evidence base. I also reassure Mr Allister, if I may, that this is not, as he suggested, taking away responsibility from the courts. The courts retain responsibility for the extent of those who are excluded and can make provision, for example, for members of the press, and others where they see fit, to have access to the court legitimately. However, we have been advised that the best way to allow the courts to do that in a constructive way is to have this particular provision in place, which can then be adjusted by the court.

Clause 16: Support for victims of trafficking etc

This clause extends the statutory assistance and support provided under section 18 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 Act to adult potential victims of slavery, servitude or forced or compulsory labour where there is no element of trafficking.

The Department explained the rationale for this clause as follows:

The provision of assistance and support of such potential victims has been in place in Northern Ireland since March 2016. However, it is not a statutory requirement. Placing the arrangements on a statutory footing provides reassurance for victims that the Department is committed to providing support and assistance to those who have been subject to slavery, servitude and forced or compulsory labour.[90]

Clause 17: Reports on slavery and trafficking offence

This clause replaces the existing requirement to publish a modern slavery and human trafficking strategy under section 1 and 2 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 at least once every year to at least once every three years. The Department explained the policy intent behind this change:

Having now had four years of an annual strategy, it is considered that a longer term strategy with annual plans would provide the Department and partners with the ability

[89] Ibid at 6 :http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2021/09/13&docID=348691#3590063
[90] Ibid at 5

to set the longer term direction for addressing modern slavery while also delivering shorter-term operational plans. It is considered that combining these two planning components will provide an appropriate and proportionate level of assurance that we can respond quickly to a changing environment while also enabling us to work collectively with others to agree a longer term vision for the protection and support of victims and the prosecution of traffickers.[91]

Clause 18: Qualifying offences for Sexual Offences Prevention Orders (SOPO)

Section 5 of the Sexual Offences Act 2003 is amended to include the offence of 'abduction of children in care', under article 68 of the Children (Northern Ireland) Order 1995, in the list of the specified offences for which a SOPO can be applied for. This means that a SOPO could be applied for in respect of persons who present a risk of serious sexual harm, where they have been convicted of the offence of abduction of a child in care.

Clause 19: Time limit for making Violent Offences Prevention Orders (VOPO)

The VOPO provision amends the Justice Act (Northern Ireland) 2015 to remove the statutory six-month time limit within which a civil complaint must be made to court. This removal aims to ensure that the behaviour of an offender, evidenced more than six months previous to an application being made for a VOPO, can still be considered by the court.

Schedules

Schedule 1 contains consequential amendments to bring the new offences of up-skirting and down-blousing within the scope of existing legislation.

Certain offenders convicted of the new section 67A offences will be subject to the notification requirements in Part 2 of the Sexual Offences Act 2003 (the sex offenders register). The notification requirements will only be imposed if the offence was committed for the purpose of obtaining sexual gratification and the 'relevant condition' is met.

The 'relevant condition' mirrors the current provision for the existing section 67 voyeurism offences:

- if the offender is aged under 18, the relevant condition is that they have been sentenced to imprisonment for at least 12 months; or
- in any other case, the relevant condition is either that the victim was under 18, or the offender has been sentenced to a term of imprisonment, detained in a hospital, or given a community sentence of at least 12 months.

[91] Department of Justice(2020) Consultation on Proposed Amendments to the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) : https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.justice-ni.gov.uk%2Fsites%2Fdefault%2Ffiles%2Fconsultations%2Fjustice%2Fconsultation-human-trafficking.docx&wdOrigin=BROWSELINK

Schedule 2

Part 1 makes amendments to the Sexual Offences (Northern Ireland) Order 2008 to remove the terms 'prostitution' and 'pornography' relating to child victims of offences. The changes to the terminology are intended to reflect a modern understanding of children victims of sexual abuse:

> *The Department considers that this terminology is outdated and that its use tends to minimise the abuse suffered by children through such forms of exploitation. The terms may be taken as implying that children are somehow responsible or willing participants in their own abuse, which has the effect of stigmatising and 'blaming' victims for what has happened to them.*[92]

They do not change the behaviour to which the offences apply, which remains the recording of an indecent image of a person or the offer or provision of sexual services to another person in return for payment or a promise of payment. These new provisions refer to sexual abuse rather than the original proposal of 'child sexual exploitation' which some academic respondents to the consultation did not support:

It also widens the scope of the three offences beyond recording of images to capture live streaming and other transmission of the images. Responding to the Department of Justice's consultation, the PSNI suggested that real-life scenarios which do not involve technology should also be included.[93]

Part 2 amends Article 76(10) (a) of the Sexual Offences (Northern Ireland) Order 2008 which relates to offences committed outside the United Kingdom, to bring Article 22A (sexual communication with a child) within scope of extra territorial jurisdiction arrangements available for certain offences within the 2008 Order.

Part 3 comprises an amendment to Article 64A of the Sexual Offences (Northern Ireland) Order 2008 (offence of paying for sexual services of a person) to clarify the elements which constitute the offence under that provision.

Schedule 3

This Schedule sets out the exceptions for certain online service providers from legal responsibility for illegal publication under Section 12 where the online service providers are a mere conduit for the relevant information, caching the information or hosting the information.

[92] Ibid at 82

[93] Ibid at 18: https://www.justice-ni.gov.uk/sites/default/files/publications/justice/summary-of-responses-child-exploitation-consultation.pdf

4 Proposed amendments

The Department has also advised of four planned amendments to the Bill that the Minister is currently developing that fit within the 'public protection objectives of the Bill'. The proposed amendments cover the following:

- A legislative fix to re-instate four offences incorrectly removed into Schedule 2 of the Magistrates' Courts Order 1981 to allow for the summary prosecution of these indictable offences under Article 45 of that Order;
- Abolition of the rough sex defence;
- An extension to existing revenge porn provisions to include a threat of publication;and
- Provisions to widen the scope and strength of the current law on abuse of trust.[94]

The Department has also advised of an additional amendment to the Gillen provisions in the Bill relating to the exclusion of the public from hearings of serious sexual offences.[95] It will extend those provisions to include the Court of Appeal as a setting where the public can be excluded from appeal hearings against conviction or sentence in cases of serious sexual offences. In essence, that means that exclusion is in the court when the case is first heard but, if there is an appeal, that appeal will be covered by a similar provision.

4.1 Rough Sex

Consent to serious harm for sexual gratification has been raised in trials as a defence to serious harm, murder or manslaughter a number of times in recent years. The Department intends to set in legislation the existing common law position that a person cannot lawfully consent to their serious harm for the purpose of sexual gratification. The amendment would give effect to a ministerial desire to address perceived issues of clarity and consistency regarding the application of the existing common law position.

'Rough sex, including sadomasochistic sexual activity, can involve the infliction of pain or violence, simulated or otherwise, with the aim of providing sexual gratification for the parties involved'.[96] This type of activity can encompass a wide range of behaviours and, although it may occur in private and be consensual, the common law states that the infliction of serious harm which results in actual bodily harm or other more serious injury or worse, will make a perpetrator liable to prosecution. This is irrespective of whether consent had been given by the victim or not to behaviour of this type.

The courts in Northern Ireland are bound to consider the common law precedents set by the English case of *R v Brown (1994)*. In its judgment the House of Lords held that a person could not consent to anything more than a trifling or transient injury, and so any claim of

[94] Ibid at 2
[95] Ibid at 5
[96] Home Office (2021) Policy Paper - Consent to serious harm for sexual gratification not a defence: https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/consent-to-serious-harm-for-sexual-gratification-not-a-defence

'rough sex gone wrong' would not be accepted as a defence to serious injury or worse. Even the dissenting judges in the case were clear that some threshold as to when consent can provide a defence must apply but believed it should be set at grievous bodily harm (GBH).

A number of subsequent judgments had cast doubt on the applicability of the Brown decision or sought to limit its reach, and there was growing concern that the defence was being increasingly used in the courts. Concerns about the use of this defence are located within broader concerns about the high rates of domestic abuse and fatal violence against women.[97]

In June 2019, Criminal Justice Inspection Northern Ireland published a report entitled "*No Excuse: Public Protection Inspection II: A thematic inspection of the handling of domestic violence and abuse cases by the criminal justice system in Northern Ireland".*[98] It recommended that the Department of Justice should review how potential inadequacies in current legislation regarding the act of choking or strangulation by defendants could be addressed. Following an amendment to the UK Parliament's Domestic Abuse Bill now enacted, the review was broadened to include consent to serious harm for sexual gratification not being a defence.[99]

The Justice Minister commissioned a review of the position in Northern Ireland which culminated in the consultation seeking views on the need for similar legislation to the Domestic Abuse Bill amendment.[100] Given the strength of support for introducing legislation to outlaw the defence of consent, the Department considered new legislation similar to that found in the Domestic Abuse Bill should be introduced in Northern Ireland, limited to those cases where serious harm occurred.

The Department of Justice also consulted on the issue of non-fatal strangulation. It highlighted that strangulation can occur in two different contexts: the most common is in a domestic abuse or violent context; it can also occur in consensual intimate relationships, where rough sex is practised. It also noted that social media is increasingly depicting rough sex and in particular strangulation as a normal part of intimate relationships:

> *Taking a cue from such depictions, and without an understanding of the risks involved, incidences of rough sex going wrong has the potential to continue to rise. In addition, raising the defence of rough sex may mask other coercive behaviours involving non-fatal strangulation as a means of asserting dominance or control.*
>
> *Strangulation, whether harm is intended or not, can result in significant injury. However, despite that potential risk, non-fatal strangulation frequently leaves no*

[97] Getting Away With Murder? A Review of the 'Rough Sex Defence'
Hannah Bows, Jonathan Herringhttps://journals.sagepub.com/doi/full/10.1177/0022018320936777

[98] Criminal Justice Inspection Northern Ireland (2019) "No Excuse: Public Protection Inspection II: A thematic inspection of the handling of domestic violence and abuse cases by the criminal justice system in Northern Ireland: https://cjini.org/getattachment/48e855ca-cd40-4283-83c2-720cf49b5c94/report.aspx

[99] Department of Justice website announcement, 9 November 2020: https://www.justice-ni.gov.uk/news/justice-minister-launches-public-consultation-consent-serious-harm-sexual-gratification-not-defence

[100] Department of Justice (2020) Consent to Serious Harm for Sexual Gratification: Not a defence: https://www.justice-ni.gov.uk/sites/default/files/consultations/justice/consent-consultation-nov-2020.pdf

visible marks. This is one of the explanations for its prevalence in the domestic abuse context, where it can be used as a coercive and controlling tool.

The UK campaign group 'We Can't Consent to This', which focuses on the difficulties associated with consent to rough sex, highlights this list of potential injuries and reports that victims of non-fatal strangulation in relationships are up to 8 times more likely to be murdered by their partner.[101]

Although there are obvious links between consent to "rough sex" and non-fatal strangulation, the question of whether the rough sex defence should be outlawed was prioritised:

That is primarily because what we are doing with the rough sex defence is turning a common law practice into statute. That consolidates it and means that we can, in fact, tighten it slightly. In essence, it is building on the existing common law set. We are developing new policies in the area of non-fatal strangulation. The consultation on non-fatal strangulation is not over until 17 September. As you might expect, I am loath to write the policy before I have finished the consultation; otherwise the groups who are keen that the Department consults on policy matters before we reach the conclusions would be on top of me. We are taking this seriously. It takes time to develop policy. I have to look at the consultation, analyse it and put advice to the Minister. She will then advise me on what she wants to do. From that, we will move towards drafting instructions. We will go back and forward with the Departmental Solicitor's Office (DSO), and we will go to the First Legislative Counsel and his team. Some time after that, we will get to the actual policy.[102]

However, the exclusion of the offence of common assault does not mean that every assault occurring in a sexual context will be excused. If consent is not supported by evidence, a person may still be convicted of assault.

England and Wales

The emergence and use of consensual rough sex by the defence in homicide cases led to calls by the public, campaign groups and MPs to review and reform the law to prevent the rough sex 'defence' being used in future cases. The campaign group, "We Can't Consent to This", lobbied the UK Government on what had been reported to be an increasingly successful use of a claim made by defendants that their victim had died or sustained serious injuries as a result of 'rough sex gone wrong'. It stated that 60 UK women have been killed by men who made such a defence claim. In the preceding five years, the campaigners also claimed that this defence was successful in seven of the 17 killings of a woman which

[101] Department of Justice (2021) Non-Fatal Strangulation:A public consultation: https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.justice-ni.gov.uk%2Fsites%2Fdefault%2Ffiles%2Fconsultations%2Fjustice%2Fnfs-consultation-extended.docx&wdOrigin=BROWSELINK nfs-consultation-extended.docx (live.com)

[102] Ibid at 5 http://data.niassembly.gov.uk/HansardXml/committee-28367.pdf

reached trial, with the man being found either not guilty or, much more frequently, being convicted of manslaughter.[103]

As a result of the We Can't Consent to This campaign and that of MPs, specifically Harriet Harman MP and Mark Garnier MP, the UK Government amended the Domestic Abuse Bill in July 2020 to enact the existing legal precedent that consent will not be accepted as a defence to serious harm caused for the purpose of sexual gratification. It specifies the defence cannot be used in offences where actual bodily harm or grievous bodily injury is inflicted, making an exception in relation to sexually transmitted infections of which the injured party was aware:

> *Section 72 of the Act re-states the current law, particularly in relation to the use of the so-called 'rough sex defence,' making it clear that a person cannot consent to the infliction of serious harm or, by extension, to their own death, for the purposes of obtaining sexual gratification.*
>
> *The Act codifies the principle set out in the case of R v Brown [1993] 2 W.L,R 556 that where an assault occasioning actually bodily harm (ABH), or worse, takes place, then public policy requires that society be protected by the use of criminal sanctions, notwithstanding that a person may have consented to the acts inflicted upon him or her. This means that where a defendant claims that the victim's death, or the injuries they sustained, were the result of' 'rough sex gone wrong', the defendant will remain liable to prosecution for a relevant offence—sections 18 (grievous bodily harm with intent), section 20 (inflicting grievous bodily harm) and section 47 (actual bodily harm) of the Offences Against the Person Act 1861.*
>
> *The Act does not directly address or make reference to those circumstances in which the victim dies as a result of injuries sustained during so called rough sex. However, the position in relation to serious harm, by extension, covers the position where even greater harm is caused, i.e. a person cannot consent to their death either. A charge of murder will be applicable where there is evidence to support such a charge being brought.*
>
> *The Act also recognises another aspect of existing case law and, of necessity, makes an exception for certain circumstances involving the acceptance of the transmission of a sexually transmitted infection (STI), as established by the cases R v Dica ([2004] 3 All ER 593) and R v Konzani ([2005] EWCA Crim 706). This exception is necessary in order to recognise that a person may have consensual sex with a party infected with HIV (or other STI) notwithstanding the general proposition that a person cannot consent to an injury above actual bodily harm. Not providing for this exception would amount to a significant and undesirable interference with the right to personal autonomy.* [104]

[103] Ibid at 96
[104] Ibid

It should be noted that the offence applies to all cases, not just to those which occur within a domestic abuse context, where a person consents, or is said to have consented, to the infliction of serious harm (or, by extension, their death) for the purposes of obtaining sexual gratification.

Scotland

In Scotland, it is also the common law position that a person cannot consent to the infliction of serious harm or, by extension, to their own death, for the purposes of obtaining sexual gratification. The 2001 case and 2004 appeal of *McDonald v HMA* is the current precedent. The defendant was charged with murdering his wife in what he claimed was consensual 'unusual sex'. The defendant was found guilty of culpable homicide. The conviction was upheld on appeal. [105] Nonetheless, 'the Government recognises that there is still a perception in some quarters that the 'rough sex' defence exists in Scotland 'and it continues to keep the law under review'.[106]

4.2 Revenge Porn

The second new policy amendment relates to 'revenge pornography'. Revenge porn is the practice of posting intimate images online without the consent of the person depicted usually as a way of humiliating the victim after a perceived wrong (such as the end of a relationship or refusing advances).[107] The provision is intended to make threats to disclose private sexual photographs and films with the intent to cause distress an offence, alongside existing offence provisions that relate to the actual disclosure of such material.[108]

The rise in revenge pornography led to its criminalisation in Northern Ireland in February 2016, via section 51 of the Justice Act (Northern Ireland) 2016.[109] The offence is committed where a person discloses a photograph or film:

- without the consent of an individual who appears in the photograph or film; and
- with the intention of causing that individual distress.

To fall within the offence, a photograph or film has to be private and sexual. This could include an image that depicted an individual's exposed genitals, or a picture of someone who is engaged in sexual behaviour or posing in a sexually provocative way, if what is shown is not of a kind ordinarily seen in public.

A person guilty of an offence under this section is liable on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both), and on summary

[105] McDonald v HMA Appeal No: XC277/03 :https://www.scotcourts.gov.uk/search-judgments/judgment?id=28ab87a6-8980-69d2-b500-ff0000d74aa7

[106] Scottish Parliament Written Question S5W-3574: https://www.parliament.scot/chamber-and-committees/debates-and-questions/questions/2021/03/04/s5w35741?qry=rough%20sex

[107] Ibid at 40, pg xvi

[108] Ibid at 5

[109] Justice Act (Northern Ireland) 2016, Section 51: https://www.legislation.gov.uk/nia/2016/21/section/51

conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum (or both).

A local district judge, Judge Rangan, has expressed his concern about 'revenge porn' cases being dealt with in the lower courts and believes that someone with "more judicial gravitas" should decide what happens to defendants:

> *I view these offences as cruel, vicious, controlling, cowardly and devoid of compassion for victims.*

The judge had previously urged the Public Prosecution Service to reconsider the decision not to send the case and others like it to the Crown Court. However, his call was rejected.[110]

Currently Northern Ireland is the only jurisdiction in the UK where it is not an offence to threaten to disclose intimate images. Depending on the circumstances, threatening to disclose intimate sexual images may be covered by a range of existing offences such as harassment, malicious communications or blackmail.

It has been observed that:

> *Threats are made for a variety of reasons. It could be to "force the victim to engage in an unwanted sexual act, or prevent them from leaving the relationship or obtaining an intervention order, or to blackmail them for monetary payment, sexual favours or other related acts.*[111]

Scotland

In Scotland, Section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 made it an offence to either disclose, or threaten to disclose an intimate photograph of film.[112]

> A person ("A") commits an offence if—
>
> (a)A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person ("B") in an intimate situation,
>
> (b)by doing so, A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress, and
>
> (c)the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B's consent.

It applies to private sexual pictures. For the purposes of section 2, a person is in an "intimate situation" if—

> (a)the person is engaging or participating in, or present during, an act which—

[110] BBC New Website 16th February 2021: https://www.bbc.co.uk/news/uk-northern-ireland-56085409
[111] Ibid at 40, pg 50
[112] Abusive Behaviour and Sexual Harm (Scotland) Act 2016 , Section 2: https://www.legislation.gov.uk/asp/2016/22/section/2/enacted

(i)a reasonable person would consider to be a sexual act, and

(ii)is not of a kind ordinarily done in public, or

(b)the person's genitals, buttocks or breasts are exposed or covered only with underwear.

A person who commits an offence under subsection (1) is liable—

(a)on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),

(b)on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).

England and Wales

In England and Wales, disclosing an intimate photo or film was made an offence via sections 33-35 of the Criminal Justice Act 2015. Before being enacted, the Domestic Abuse Bill 2021 was extensively amended in the House of Lords. The Act clarifies that threats to disclose private sexual photographs and films, as defined at section 33 of the Criminal Justice and Courts Act 2015, will constitute a criminal offence within England and Wales. A person guilty of an offence under this section is liable to the existing penalties:

(a)on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both), and

(b)on summary conviction, to imprisonment for a term not exceeding 12 months or a fine (or both).

It is subject to a maximum penalty of two years' imprisonment, or a fine, or both.

The Law Commission's review had observed before the that 'threatening to share an intimate image is not currently an offence, [which] seems to be a gap in the law'.[113]

Baroness Morgan was pleased the UK Government had not waited to act on the issue of threats, and said she looked forward to working to improve the law on image-based abuse "more broadly" once the Law Commission has concluded its work. Lord Wolfson said that the fact the Law Commission's consultation paper "acknowledged that threats to disclose intimate images should be further considered adds strength to the calls to extend the revenge porn offence" as provided for in the amendment. He said the amendment had been drafted to stay as close as possible to the existing wording of section 33 rather than making

[113] Ibid at 40, pg 213

any broader changes to the law. He considered that this was the right approach given the Law Commission's ongoing work.[114]

4.3 Abuse of Position of Trust

The final amendment will change the existing legislation covering the abuse of a position of trust of a child, contained in articles 23 to 31 of the Sexual Offences (Northern Ireland) Order 2008. [115] Under these provisions, it is an offence for someone in a position of trust to engage in sexual activity with a child in their care, even if that child is over the age of consent (16 or over). The amendment aims to provide greater protection for young people who are in the care of adults in certain non-statutory environments. The extension will cover the abuse of positions of trust held in sports and faith settings, with a delegated power to enable the extension of those settings in the future, should that be considered necessary.

A person is in a position of trust if they are 'regularly involved in caring for, training, supervising or being in sole charge' of a person under 18 years of age. The position of trust offence reflects the fact that, while the 'age of consent' is 16, adults who are in a position where they have particular power, influence or control over a child should not engage in sexual activity with them, irrespective of whether they have attained the age of consent as doing so amounts to a breach of a position of authority and trust.

The 2008 Order defines a 'position of trust' for the purposes of the offence 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. For example:

- teachers
- care workers
- youth justice workers
- social workers
- doctors.

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. Parental and other familial relationships are covered by Articles 32-33 of the same Order.

There have been views expressed that the existing definition of a 'position of trust' may be seen as too narrow as it does not include all the roles in which an adult may have particular power, influence or control over a child. For example, it does not include sports coaches, music tutors or people providing religious instruction, except where they are performing such

[114] Domestic Abuse Bill Volume 811: debated on Wednesday 21 April 2021: https://hansard.parliament.uk/Lords/2021-04-21/debates/99B0FAAA-A5C5-41A1-94CC-F1FB0299C9C3/DomesticAbuseBill

[115] The Sexual Offences (Northern Ireland) Order 2008, sections 23 to 31: https://www.legislation.gov.uk/nisi/2008/1769/contents

a role while looking after children in an institution such as a school (which is covered by the offence). This has been identified by some campaigners as a legislative gap.[116]

A previous review of extending the position of trust offences to include sports coaches was carried out in 2010, when consultation was undertaken with sports bodies and the Department for Culture, Arts and Leisure. Following that work, the Department of Justice decided that no changes would be made to the existing position of trust offences for the following reasons:

- the original policy intention underpinning these offences was not designed to include positions of trust outside of the strictly formal definition in the current legislation, which focuses on positions of trust governed by the state, for example in education, state care and the criminal justice system;
- adding sports coaches as a single group would be outside the scope originally envisaged;
- the opposition of sports organisations to being singled out in this way;
- the unclear evidence surrounding whether there is a real problem to be addressed; and
- the difficulties in defining a sports coach in legislation.

Positions of abuse were consulted on in the *Review of the Law on Child Sexual Exploitation* by the Department of Justice. However, given that there has not been significant new evidence since the previous review of the issue in 2010, the Department did not believe that there was a clear need to change the law to further expand the scope of abuse of trust offences. Instead it proposed to keep the issue under review, in line with the Department for Digital, Culture, Media and Sport, the Ministry of Justice and the Home Office, but not to make any changes at that stage:

> *The Department has considered this issue again and concluded that there has not been any significant change or new evidence presented since the 2010 review clearly indicating a significant issue relating to abuse and exploitation of 16 and 17 year old children by sports coaches in Northern Ireland that would require a legislative response. There is also no clear evidence of problems relating to abuse of these older children involved in other activities, such as church groups, Scouts/Guides or other social clubs. There does not seem to be an established need to change the law to further expand the scope of abuse of trust offences.*

The vast majority of respondents disagreed with the Department's suggested way forward. In particular, of the eleven responses received on behalf of sporting organisations based in

[116] NSPCC NI (2021) Briefing: Close the Loophole Campaign http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/justice/primary-legislation/justice-etc-bill/nspcc-merged-briefing-r.pdf

Northern Ireland and Ireland ten strongly disagreed with the proposal, and felt that the offences should be extended to include a range of organisations including sports groups:

> *Many of the responses highlighted the large amounts of time spent by adults in authority with young people, as well as the power differentials at play within many nonstatutory groups. In this context, a respondent highlighted that research demonstrates the silencing effects of power dynamics, influencing reporting rates and consequently, understanding of the scale of the issue.*

Consequently, the proposed amendment will extend the abuse of positions of trust to sports and faith settings, with a delegated power to enable the extension of those settings in the future, should that be considered necessary. The Department believes that:

> *The amendment will provide greater protection for young people who are in the care of adults in certain non-statutory environments. As I have previously advised the Committee, the Department originally planned to develop the proposal for introduction in the next mandate. However, responding to recent developments in other jurisdictions and to an increasing number of lobbying requests for the law in Northern Ireland to be changed, the Department and the Minister now consider that that important change should be made sooner rather than later. In bringing this proposal forward, the Department 4 has been working closely with the NSPCC to gauge wider views on the scope and the content of the amendment.*
>
> *[…] What we will do in the Bill is extend the abuse of trust legislation to cover sporting and religious-type activities. We are also proposing to include a clause that gives power to extend beyond those two areas. Had we had more time to go through that policy development in greater detail, I would have been interested in extending it beyond those two areas. Realistically, however, we did not have the underpinning evidence to do so. There is clear evidence of support from the sporting and religious communities for this particular legislation, alongside support from the NSPCC and other victims' groups. We are focusing on sporting and religious circumstances but have the capacity to extend into other areas as we gain sufficient evidence and understanding to suggest that doing so would be helpful. The two biggest areas of concern were sports and religious organisations. In future, there may be other areas that we might pick up on, but, since the Minister was keen to bring forward the legislation now, because of various groups' lobbying and, indeed, because MLAs and others had expressed their own concerns, we have done so sooner than I said that we would when I was previously before the Committee. The consequence of that is that we have not had time to go through the very detailed process that we would normally have followed in policy development. At this stage, we do not have sufficient evidence to go beyond where we have gone.*[117]

[117] Ibid at 5 http://data.niassembly.gov.uk/HansardXml/committee-28367.pdf

England and Wales

In England and Wales, several examples of abuse in a sport and a religious context have come to light, most prominently the widespread child sexual abuse in football that was revealed in 2016. Allegations of sexual abuse across a variety of religious and faith settings prompted an investigation by the Independent Inquiry into Child Sexual Abuse.

As a result, there was a call for change, including the 'Close the Loophole campaign' run by the National Society for the Prevention of Cruelty to Children (NSPCC), and the All-Party Parliamentary Group on Safeguarding in Faith Settings report published in 2020, which called for a change in the existing legislation to protect young people.

In Spring 2019, the Ministry of Justice conducted a review of the law in this area, speaking to 45 stakeholders, including charities, sports bodies, religious organisations, victims' groups, the police, and the CPS. This review found strong evidence for extending the law to cover situations involving activities taking place in a sport or in a religious context.[118]

Section 45 of the Police, Crime, Sentencing and Courts Bill, which is currently before Parliament, aims to amend the Sexual Offences Act 2003 to include sports coaches and faith leaders as follows:

> "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, ona 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 religion which involves belief in more than one god, and a religion which does not involve belief in a god'.[119]

[118] Home Office(2021) Policy Paper: Police, Crime, Sentencing and Courts Bill 2021: positions of trust factsheet: https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-positions-of-trust-factsheet

[119] The Police, Crime, Sentencing and Courts Bill, Section 45 : https://bills.parliament.uk/publications/43970/documents/1042

The Secretary of State may by regulations amend add or remove an activity in which a person may be coached, taught, trained, supervised or instructed.

Non-statutory settings represent a departure from the current legislation. The Government has highlighted the difference in approach between new section 22A and the existing positions of trust in section 21:

> *We are creating a new s22A of the Sexual Offences Act 2003, rather than simply adding roles to the existing positions of trust contained in s21. This is because the current positions are defined either by reference to statutory settings or services so far as the adult's (A's) relationship to the young person (B) is concerned. Non-statutory settings represent a departure from the current legislation and require a different approach. 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.*

The Government has also expanded on the "regular basis" and knowledge requirements:

> *Furthermore, it is a requirement that A carries out the activity "on a regular basis", to avoid an approach that is too broad and capture someone who only helps with a coaching session, say, on one occasion or infrequently.*
>
> *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*.[120]

Scotland

Sections 42-45 of the Sexual Offences (Scotland) Act 2009 ('the 2009 Act') provide that an adult who engages in sexual activity with a child under the age of 18 in respect of whom they are in a 'position of trust' also commits an offence. As in Northern Ireland, the 2009 Act defines a 'position of trust' for the purposes of the offence 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.

In August 2018, the Scottish Government consulted on whether the definition of a 'position of trust' in section 42-45 of the Sexual Offences (Scotland) Act 2009 should be extended.

[120] Ibid at 118

The vast majority of respondents felt that a new definition of a position of trust should be very broad:

> *We believe that all children and young people have the right to be safe and protected across all aspects of their life, a belief which is firmly in keeping with Getting It Right for Every Child (GIRFEC), the Scottish Government's national approach to child well-being. This means that a child or young person's right to protection should not be restricted to roles held by adults within statutory or institutional settings. The same level of protection must be provided to ensure that children and young people can safely fulfil their right to participate in leisure and recreational activities. (UNCRC Article 31). We therefore strongly believe that in order to better protect young people from abuse this loophole must be closed - it is not enough to simply make the loophole smaller.*

Many of those who supported the proposal made reference to recent high profile media cases of abuse of trust and suggested that this provided evidence of a need for change, especially the need to cover sports coaches and religious leaders in the offence.[121] However, there has been no introduction of any new legislation to date.

[121] Scottish Government (2019) Protecting children: consultation analysis : https://www.gov.scot/publications/analysis-report-responses-scottish-government-consultation-protecting-children-review-section-12-children-young-persons-scotland-act-1937-section-42-sexual-offences-scotland-act-2009/pages/9/