

SEXUAL OFFENCES (NORTHERN IRELAND) ORDER 2008

S.I. 2008 No. 1769 (N.I. 2)

EXPLANATORY MEMORANDUM

7.

POLICY BACKGROUND

The Provisions

Part 4 – Sexual offences against a person with a mental disorder

Offences against persons with a mental disorder impeding choice

Article 43: Sexual activity with a person with a mental disorder impeding choice

Article 44: Causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity

Article 45: Engaging in sexual activity in the presence of a person with a mental disorder impeding choice

Article 46: Causing a person, with a mental disorder impeding choice, to watch a sexual act

- 7.111. All the offences in these Articles are concerned with the situation where a person (A) involves another person (B) in sexual activity where B has a mental disorder and because of that mental disorder, or for reasons related to it, B is unable to refuse involvement in the sexual activity. "Mental disorder" is stated at Article 2(9) to have "the meaning given by Article 3 of the Mental Health (Northern Ireland) Order 1986". In section 1(2) of that Act, subject to section 1(3), mental disorder is defined as "mental illness, mental handicap and any disorder or disability of mind." A person with a "learning disability" would fall within this definition. The definition of sexual activity is at Article 4. *Paragraph (2)* of each section contains a definition of what is meant by B being unable to refuse.
- 7.112. The offences are divided according to the different types of sexual activity (the types of sexual activity covered are the same as for the child sex offences (Articles 16 to 19).
- 7.113. [Article 43](#) covers touching, which as Article 2(11) explains, includes any type of physical contact including penetration.
- 7.114. [Article 44](#) covers the situation where A causes or incites B to engage in sexual activity, for example, where A causes B to have sexual intercourse with A's friend, or incites him to do so, even if the incitement does not result in B engaging in sexual activity.
- 7.115. [Article 45](#) covers the situation where, for the purpose of obtaining sexual gratification, A engages in sexual activity in the presence of B, or in a place from which B can observe him. The offence is only committed, however, where A knows or believes that B is

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aware of the sexual activity or intends him to be aware of it. B might be aware of the sexual activity because he is watching it at A's behest or because A is describing what he is doing to B.

- 7.116. [Article 46](#) covers the situation where A, for his sexual gratification, causes B to watch a third person engaging in sexual activity or to look at an image of a person engaging in sexual activity. "Image" is defined in Article 2(8).

Inducements etc. to persons with a mental disorder

[Article 47](#): Inducement, threat or deception to procure sexual activity with a person with a mental disorder

[Article 48](#): Causing a person with a mental disorder to engage in or to agree to engage in sexual activity by inducement, threat or deception

[Article 49](#): Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder

[Article 50](#): Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception

- 7.117. Like the previous set of offences, these Articles are concerned with the situation where a person (A) involves another person (B) in sexual activity where B has a mental disorder. However, for these offences, there is no need to prove that B is unable to refuse. Instead, the offences address the situation where A uses inducements, threats or deceptions to obtain B's agreement to the sexual activity. The definition of mental disorder is at Article 2(9); the definition of sexual activity is at Article 4. An inducement might be A promising B presents of anything from sweets to a holiday; a threat might be A stating that he will hurt a member of B's family; and a deception might be A stating that B will get into trouble if he does not engage in sexual activity, or persuading him that it is expected that friends should engage in sexual activity. The division of the Articles according to the type of sexual activity involved is similar to that in the previous set of offences.

Care workers for persons with a mental disorder

[Article 51](#): Care workers: sexual activity with a person with a mental disorder

[Article 52](#): Care workers: causing or inciting sexual activity

[Article 53](#): Care workers: sexual activity in the presence of a person with a mental disorder

[Article 54](#): Care workers: causing a person with a mental disorder to watch a sexual act

- 7.118. Like the previous two sets of offences, these Articles are concerned with the situation where a person (A) involves another person (B) in sexual activity where B has a mental disorder. The difference here is that A and B must be in a relationship of care. There is no need to prove that B is unable to refuse. The definition of mental disorder is at Article 2(9); the definition of sexual activity is at Article 4. The relationships of care that are covered by these offences are set out at Article 55. The offences are divided according to the different types of sexual activity involved. The division is the same as for Article 43 to 46 and what is said in the notes for those Articles about the different types of sexual activity covered applies here too. The prosecution must prove, in addition to the other requirements, that the defendant knew or could reasonably have been expected to know that B had a mental disorder. *Paragraph (2)* of each Article puts an evidential burden on A in this respect. This means that, unless A shows from the evidence that there is an arguable case as to whether or not he knew or could reasonably have been expected

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to know of B's mental disorder, it is presumed that he did know or could reasonably have been expected to know of this.

Section 55: Care workers: interpretation

- 7.119. This Article defines a relationship of care for the purposes of Articles 51 to 54. An example of a relationship covered by *paragraph (2)* is where A is a member of staff in a care home and B is a resident there. An example of a relationship covered by *paragraph (3)* is where A is a receptionist at the clinic that B attends every week. *Paragraph (4)* covers any situation where A provides care, assistance or services to B in connection with B's mental disorder. An example of a relationship covered by *paragraph (4)* is where A takes B on outings every week or treats B for his learning disability with complementary therapies in B's own home. In all cases, A must have, or be "likely to have", regular face to face contact with B. The "likely to have" limb is to cover persons who provide care to B in these situations from day one of their involvement with B.

Article 56: Articles 51 to 54: exception for spouses and civil partners

- 7.120. This Article provides A with a defence to the offences under sections 51 to 54 if he proves he was lawfully married or a civil partner to B at the time of the sexual activity and B was over 16.

Article 57: Articles 51 to 54: sexual relationships which pre-date care relationships

- 7.121. This Article provides A with a defence to the offences under Articles 51 to 54 if he proves that his sexual relationship with B pre-dated his relationship of care with B. But the sexual relationship must have been lawful for this defence to apply. So if A and B had a lawful sexual relationship before B developed his mental disorder and A started caring for him, A would not commit an offence by continuing that sexual relationship.