

*These notes refer to the Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022 (c.19) which received Royal Assent on 27 April 2022*

# Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022

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## EXPLANATORY NOTES

### OVERVIEW

#### Part 1: Sexual offences

##### *Chapter 1: Criminal Conduct*

#### **Voyeurism**

4. The Act creates new offences that capture the highly intrusive behaviours known as “up-skirting” and “down-blousing”. The up-skirting offence will occur where a person operates observational equipment, or takes a picture, beneath a person’s clothing in order to observe, or record an image, of the person’s genitals, buttocks or underwear without the person’s consent.
5. The down-blousing offence will occur where a person operates observational equipment, or takes a picture, beneath or above a person’s clothing in order to observe, or record an image, of the person’s breasts or underwear without the person’s consent. Up-skirting is an offence within the rest of the United Kingdom, but the offence within this Act for down-blousing is unique to this jurisdiction.

#### **Sending an unwanted sexual image (Cyber-flashing)**

6. A new offence is created that captures the increasingly prevalent behaviour of sending an unwanted sexual image, more commonly referred to as cyber-flashing. The offence will occur where a person intentionally sends an image of sexual activity or genitals to another person without that person’s consent.

#### **Sexual grooming**

7. Provisions are also brought forward to strengthen the law on sexual offending to better protect children from child sexual exploitation by implementing specific proposals made during consultation on the ‘Review of the Law on Child Sexual Exploitation’
8. Under these provisions, four new offences are created, all of which seek to deal with an adult masquerading as a child and making a communication with a view

to sexually grooming a child under 16. The four offences, collectively, seek to cover all possible angles of approach – 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 under 16.

9. This builds upon existing child grooming and sexual communication with a child offences contained within the 2008 Order (Articles 21, 22 and 22A). The proposals in this area aim to address behaviour at an earlier stage, where offenders pretend to be children as a precursor to grooming or carrying out other offences and where this behaviour would constitute an indicator that they present a risk to children.
10. The offending behaviour is not limited to online activity. The act of pretending to be a child does not fall within any of the existing offences contained within the 2008 Order and therefore this provision seeks to bridge that gap. The proposed offence will be unique to this jurisdiction.

### **Abuse of Position of Trust**

11. New provision amends the current abuse of position of trust legislation, contained in Part 3 of the Sexual Offences (Northern Ireland) Order 2008. Specifically, it extends the scope of the relevant offences (provided for at Articles 23 to 26) to include the non-statutory sector settings of sport and religion.
12. This means that those who hold a position of trust where they knowingly coach, teach, train, supervise, or instruct a child on a regular basis within the area of sport or religion (as defined in the provisions) and who abuse that position, would be liable for any of the relevant offences contained in Articles 23 to 26.
13. These are: sexual activity with a child; causing or inciting a child to engage in sexual activity; sexual activity in the presence of a child; causing a child to watch a sexual act.
14. A delegated power is also included so that categories additional to sport and religion can be added by secondary legislation where the need for further legal intervention is evidenced and required. Provision also requires the Department to annually review the areas of sport and religion to determine whether the delegated power contained should be exercised.

### **Private Sexual Images**

14. Provisions amend existing provision in section 51 of the Justice Act (Northern Ireland) 2016 which provides for the offence of disclosing private sexual photographs and films with intent to cause distress.
16. Section 51 is amended to make it an offence to threaten to disclose private sexual photographs and films with intent to cause distress.

17. All elements of the existing offence are attached to the new offence. An additional element which relates solely to the threats to disclose offence is that, where a person was charged with the offence, it would not be necessary for the prosecution to prove that the photograph or film referred to in the threat existed, or if it did exist, that it was in fact a private sexual photograph or film.

### **Miscellaneous amendments as to sexual offences**

18. Provisions also amend the 2008 Order to remove and replace existing references to ‘child prostitution’ and ‘child pornography’.
19. 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.
20. It is hoped that amending the legislative references will go some way to helping raise awareness of the status of children as victims of exploitation rather than as willing participants or being complicit in the abuse perpetrated by others. This change reflects particular recommendation made in the Marshall Report, as well as changes made in England and Wales.
21. The 2008 Order is also amended to widen the scope of the definition of ‘images’ relevant to specific offences within the Order to include ‘live streaming’. As it currently stands, the legislation around indecent images of a child only relates to ‘recorded’ images. Specifying the use of live streaming in statute is designed to ensure that the law in this regard is in keeping with updates in modern technology.
22. Provision is also made to bring the Article 22A offence of sexual communication with a child, contained within the 2008 Order, within scope of extra-territorial jurisdiction arrangements. Minor amendment is also being made to the offence of paying for sexual services as contained in Article 64A of the 2008 Order, but only in so far as to provide clarity on what constitutes an offence under this provision.

### ***Chapter 2: Anonymity and Privacy***

23. These provisions implement four of the Gillen recommendations. These are:
  - (1) To extend the current lifelong anonymity of the victim of a sexual offence to provide for their anonymity for 25 years after death. The provisions allow for applications to be made to the court to discharge or modify reporting restrictions, including to reduce or increase the period of 25 years;
  - (2) To provide for the anonymity of the suspect in a sexual offence case up to the point of charge. Where a suspect is not subsequently charged, then the anonymity will be protected during their lifetime and for

25 years after their death. The provision allows for applications to be made to the court to dis-apply or modify reporting restrictions, including to reduce or increase the period of 25 years;

- (3) To increase the penalty for breach of anonymity. Currently a penalty of up to a level 5 fine on summary conviction is available for breach of anonymity. The provisions increase the penalty to a maximum of six months imprisonment, or a fine, or both; and
- (4) To exclude the public from hearings of serious sexual offence cases (Crown Court and those proceeded by way of appeal to the Appeal Court). Only the complainant, the accused, persons directly involved in the proceedings, a witness while giving evidence, any person required to assist a witness, jury members and bona fide members of the press will be allowed to remain in the court during the hearing of a serious sexual offence. The court also has discretion to permit any other person to remain in the court where it considers it is in the interests of justice to do so.

## **Part 2: Trafficking and Exploitation**

24. The Act amends the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 to:
  - (1) Change from annual to three-yearly reporting in relation to the Modern Slavery Strategy;
  - (2) Extend statutory assistance and support to adult potential victims of slavery, servitude or forced or compulsory labour where there is no element of trafficking;
  - (3) Provide for the support to adult potential victims of slavery, servitude or forced or compulsory labour beyond the 45 days specified in the 2015 Act for as long as may be needed;
  - (4) Extend the support provided to a person who has received a conclusive determination of being a victim of trafficking for a period of up to 12 months, or more than 12 months for such period as the Department may determine;
  - (5) Include Class A drugs in Section 22 (9) of the 2015 Act for a statutory defence for offences under the Misuse of Drugs Act 1971; and
  - (6) Insert a new provision in the 2015 Act to enable the Department to introduce steps or measures to protect a person from slavery or trafficking. These steps or measures are to be introduced within 24 months of Royal Assent and are to be introduced by means of regulations laid before and approved by the Assembly.

### **Part 3: Chapter 1: Prevention Orders**

25. The legislative provision seeks to strengthen the effectiveness of the Sexual Offences Prevention Order (SOPO) and the Violent Offences Prevention Order (VOPO) in certain areas identified by key operational partners.
26. The provisions applicable to both are relatively minor in nature and comprise adjustments to existing legislation. This is Schedule 5 to the Sexual Offences Act 2003 (“the 2003 Act”) for SOPO and section 57 of the Justice Act (Northern Ireland) 2015 (“the 2015 Act”) for VOPO.
27. The amendment to the 2003 Act brings the offence under Article 68 of the Children (Northern Ireland) Order 1995 (abduction of children in care, etc.) into the scope of existing SOPO provision, by including the offence in the list of specified offences. This would mean that a SOPO could be applied for in respect of persons who present a risk of serious sexual harm where they have committed the offence now being specified.
28. The amendment to the 2015 Act removes, in connection with a VOPO application, the statutory six month time limit (under Article 78(1) of the Magistrates’ Courts (Northern Ireland) Order 1981) within which a civil complaint must normally be made to the court. The amendment will ensure that behaviour of an offender evidenced more than six months previous to the time when an application is being made for a VOPO could be considered by the court.

### **Chapter 2: Causing or Risking Serious Harm**

29. This Chapter clarifies the law on the defence of consent to harm for the purpose of sexual gratification and creates a new offence of non-fatal strangulation or asphyxiation, reflecting similar changes made to the law of England and Wales via the Domestic Abuse Act 2021.
30. Section 27 makes the existing common law position clear that a person cannot rely on the injured party’s consent as a defence where acts carried out for the purpose of obtaining sexual gratification, regardless of whose sexual gratification, result in serious harm.
31. The threshold of ‘serious harm’ aims to balance individuals’ private law rights with the public interest of protecting the health and safety of members of society, and reflects the general proposition established in the case of *R. v. Brown* [1993] 2 W.L.R.556, that a person may not consent to the infliction of serious harm on themselves and, by extension, is unable to consent to their own death.
32. The section also acknowledges the exception in relation to cases involving the transmission of sexually transmitted infections, in so far as the law has been established by the cases of *R v Dica* [2004] 3 All ER 539 and *R v Konzani* [2005] EWCA Crim 706.

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33. Section 28 makes provision for a new offence of strangulation or asphyxiation. It provides for trial in either the magistrates' courts or in the Crown Court and sets the maximum penalties for each mode of trial.
34. Aligning with section 27, section 28 also makes provision for consent to be available as a defence provided serious harm does not occur.