

*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

### COMMENTARY ON SECTIONS

#### **Part 1: Sexual offences**

#### *Chapter 1: Criminal Conduct*

#### *Section 1: Voyeurism: additional offences*

This section amends the Sexual Offences (Northern Ireland) Order 2008 to add new Articles 71A and 71B – Voyeurism: additional offences (genitals and buttocks) and Voyeurism additional offences (breasts). New Article 71A deals with “up-skirting” and includes two offences of ‘operating equipment’ and ‘recording images’.

Under Article 71A (1) a person (A) commits an offence if they: operate equipment (e.g. phone camera) beneath another person’s (B’s) clothing with the intention of enabling them or another (C) to observe B’s genitals or buttocks, whether exposed or covered with underwear, or the underwear covering the genitals or buttocks, where they wouldn’t ordinarily be visible; with the intention of A or another (C) looking at the image for the purpose of sexual gratification (for A’s or C’s); to humiliate, alarm or distress B or; are reckless as to whether B is humiliated, alarmed or distressed and B is, in fact, humiliated, alarmed or distressed; and without the consent of B and where they reasonably know that B had not consented

Under 71A (2) a person (A) commits an offence if they: record an image beneath another person’s (B’s) clothing; the image is of B’s genitals or buttocks, whether exposed or covered with underwear, or the underwear covering the genitals or buttocks, where they wouldn’t ordinarily be visible; with the intention of A or another (C) looking at the image for the purpose of sexual gratification (for A’s or C’s); to humiliate, alarm or distress B or; are reckless as to whether B is humiliated, alarmed or distressed and B is, in fact, humiliated, alarmed or distressed; and without the consent of B and where they reasonably know that B had not consented.

It will also be an offence where B has consented to the operation of equipment or the recording of an image for a particular purpose, and A operates the equipment or records the image for a different or additional purpose.

The penalties proposed for offences committed under Article 71A are: for summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; and on indictment, imprisonment for a term not exceeding two years.

New Article 71B deals with “down-blousing” and includes two offences of ‘operating equipment’ and ‘recording images’.

Under Article 71B (1) a person (A) commits an offence if they: operate equipment (e.g. phone camera) beneath or above another person’s (B’s) clothing with the intention of enabling them or another (C) to observe B’s breasts whether exposed or covered with underwear, or the underwear covering the breasts, where they wouldn’t ordinarily be visible; they do so for the purpose of sexual gratification (for A’s or C’s); to humiliate, alarm or distress B or; are reckless as to whether B is humiliated, alarmed or distressed and B is, in fact, humiliated, alarmed or distressed; and without the consent of B and where they reasonably know B had not consented.

Under 71B (2) a person (A) commits an offence if they: record an image beneath or above another person’s (B’s) clothing; the image is of B’s breasts, whether exposed or covered with underwear, or the underwear covering the breasts, where they wouldn’t ordinarily be visible; with the intention of A or another (C) looking at the image for the purpose of sexual gratification (for A’s or C’s); to humiliate, alarm or distress B or; are reckless as to whether B is humiliated, alarmed or distressed and B is, in fact, humiliated, alarmed or distressed; and without the consent of B and where they reasonably know that B had not consented.

It will also be an offence where B has consented to the operation of equipment or the recording of an image for a particular purpose, and A operates the equipment or records the image for a different or additional purpose.

The penalties proposed for offences committed under Article 71B are: for summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; and on indictment, imprisonment for a term not exceeding two years.

## ***Section 2: Sending etc.an unwanted sexual image (Cyber-flashing)***

This section amends the Sexual Offences (Northern Ireland) Order 2008 to add a new Article 72A (Sending etc. an unwanted sexual image).

Under Article 72A a person (A) commits an offence if they intentionally send or give a sexual image to another person (B), without the consent of B and where they reasonably know B had not consented; with the intention that B will look at the image and be humiliated, alarmed or distressed by it or; for the purpose

of obtaining sexual gratification and are reckless as to whether B is humiliated, alarmed or distressed.

A sexual image means a photograph or film of any person engaging in sexual activity or of any person's genitals. References to a photograph or film include an image made by computer graphics, or in any other way, which appears to be a photograph or film or; a copy of the image. Data stored by any means which is capable of conversion into a photograph or film is also included.

References to sending or giving include sending by any means whether electronically or otherwise; sending it to another person and; placing it for another person to find.

The penalties proposed for offences committed under Article 72A are: for summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; and on indictment, imprisonment for a term not exceeding two years.

### ***Section 3: Consequential amendments***

This section amends the Sexual Offences (Northern Ireland) Order 2008 by inserting new Article 72(1B) which introduces new Schedule 1 which lists the consequential amendments required by the introduction of the offences of up-skirting, down-blousing and, sending an unwanted sexual image.

### ***Section 4: Sexual grooming: pretending to be a child***

This section amends the Sexual Offences (Northern Ireland) Order 2008 to include new Articles 22B to 22G. This provision is not limited to online communication.

Under new **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.

A's intention in communicating with B must be to establish or participate in a communication exchange with a 'particular person' (C) who they have in mind with a view to committing a relevant offence against C. An example may be that A knows C and is acutely aware that they are under 16. Equally, A may not be personally acquainted with C, or know they are under 16. Regardless of the scenario, A must reasonably believe that the person is 16 or over to have committed an offence.

B (the person with whom A first communicates) does not have to be a child (under 16), but the particular person with whom A seeks to engage (C) must be a child and A must reasonably believe that C is a child.

'Relevant offence' is defined at Article 22F.

Under new **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 a child.

The key difference with this provision and that provided for under Article 22B is the perpetrator's approach.

Under Article 22B, the perpetrator is communicating with a particular individual (who may or may not be a child) to reach a child they have in mind (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.

However, with Article 22C, the perpetrator is communicating with a group specifically to find a child they have in mind. It is considered that the inclusion of this additional provision ensures a more robust protection should a perpetrator approach a particular child they have in mind, but where they seek to do so by means of communicating with a group.

Under new **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 intention 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 at the time of the communication.

This particular provision differs 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 in the hope 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 to have a particular child in mind.

This provision differs 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. They are communicating with a group and not an individual person.

New **Article 22F** (communication with a view to grooming: interpretation) 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.

Relevant offence is defined at Article 22F as an offence under the 2008 Order, a human trafficking offence under the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 in so far as it relates to sexual exploitation or anything done outside Northern Ireland which is not such an offence, but would be if done in Northern Ireland.

New **Article 22G** (communication with a view to grooming: sentencing) sets out the penalties for an offence committed under Articles 22B to 22E whereby those convicted summarily would be liable to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; and on indictment, they would be liable to imprisonment of a term not exceeding two years.

### ***Section 5: Abuse of position of trust: relevant positions***

This section amends existing provision made for abuse of position of trust of a child in Part 3, Articles 23 to 31, of the Sexual Offences (Northern Ireland) Order 2008.

Section 5(2) makes minor amendment to existing Article 2 of the 2008 Order (interpretation) by inserting new paragraph (4A) to clarify that reference to the Department means the Department of Justice.

Section 5(3) amends existing Article 28 (1)b) (positions of trust) by substituting "an order made by the Secretary of State" with "regulations made by the Department (of Justice)".

Section 5(4) inserts new Article 29A into the 2008 Order.

New Article 29A(1) provides that, for the purpose of the offences contained in Articles 23 to 26 of the Order, a person (A) is in a position of trust in relation

to another person (B) if A (knowingly) coaches, teaches, trains, supervises or instructs B on a regular basis in a sport or a religion.

Paragraph (2) defines sport and religion for the purpose of paragraph (1).

Sport includes “any game in which physical skill is the predominant factor or 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 or a religion which does not involve belief in a god”.

Paragraph (3) provides that paragraph (1) does not apply where A holds a position of trust as already provided for in existing Article 28 provision (within the statutory sector).

Paragraph (4) allows the Department of Justice to amend paragraphs (1) and (2) by regulations, but only in so far as this relates to the settings involved (not the activities).

Paragraph (5) amends Article 80 of the 2008 Order. It changes the Article 80 heading to read “Orders and regulations” and inserts new paragraphs Article 80(4) and (5).

New Article 80(4) provides that regulations made under Article 28(1)(b) or 29A(4) may not be made unless a draft of them has been laid before and approved by a resolution of the Assembly.

New Article 80(5) provides that such regulations may include any incidental, supplementary, consequential, transitory, transitional or saving provision which the Department of Justice considers necessary or expedient.

Paragraph (6) provides that the Department (of Justice) must annually review Article 29A(1) and (2) of the Sexual Offences (Northern Ireland) Order 2008 so as to inform the Department on whether the power in Article 29A (4) of that Order should be exercised.

### ***Section 6: Private sexual images: threatening to disclose***

Section 6 amends provision in section 51 of the Justice Act (Northern Ireland) 2016 (disclosing private sexual photographs and films with intent to cause distress) to extend the scope of the existing disclosure offence to provide for a new offence of threatening to disclose a private sexual photograph and film with intent to cause distress.

Under section 6(2) a new section 51(1) is substituted for existing section 51(1) of the 2016 Act to make it an offence where a person threatens to disclose a private sexual photograph or film in which ‘the relevant individual’ appears, without consent and with the intent to cause distress to that individual..

Subsection 51(2) is amended to provide that it will not be an offence to threaten to disclose the image to the individual involved.

Subsections 51(4) and (5) are amended to apply the defences available for the disclosure offence to the offence of threats to disclose. These include that the threat to disclose in the course of publication of journalistic material was in the public interest, or that there was a previous disclosure for reward.

A new subsection 51(7A) is inserted after subsection (7) which provides that where a person is charged with an offence of threats to disclose, it is not necessary for the prosecution to prove that the photograph or film referred to in the threat exists, or if it does exist, that it is in fact a private sexual photograph or film.

A new subsection 51(8) is substituted for the existing subsection (8) to provide that a person charged with threats to disclose is not to be taken to have intended to cause distress merely because this was a natural and probable consequence of having made the threat. (This provision already applies to the disclosure offence.)

Section 6(3) involves a consequential amendment to section 53 to take account of substituted new section 51(1).

Section 6(4) amends Schedule 4 to the 2016 Act to bring within scope of the new offence the protections already afforded to online service providers from prosecution for the disclosure offence where they are merely storing, hosting or caching information, and are unaware of illegal content.

The Schedule is also amended to remove reference to the E-Commerce Directive [2000/31/EC](#) which has ceased to have effect in the UK.

Similar consequential amendment has been made to remove references to the E-Commerce Directive in section 11 and Schedule 3 (Special rules for providers of information society services) to the Act which relate to the offences of breach of anonymity of the victim or complainant in a sexual offence and breach of anonymity of the suspect in a sexual offence case.

### ***Section 7: Miscellaneous amendments as to sexual offences***

Section 7 introduces Schedule 2 to the Act which:

- (1) makes certain amendments to references in the Sexual Offences (Northern Ireland) Order 2008 to certain forms of child abuse;
- (2) extends offences that relate to the recording of indecent images so that they apply also to streaming or other transmission of such images;
- (3) makes minor amendments regarding the offences of engaging in sexual communication with a child; and
- (4) makes a clarifying minor amendment relating to the offence of paying of sexual services of a person.