

Justice (Sexual Offences and Trafficking Victims) Bill

Oral evidence to the Justice Committee

11 November 2021

Introduction

I would like to thank the Committee for the opportunity to give evidence today regarding the Justice (Sexual offences and Trafficking Victims) Bill and to welcome the commitment of the Committee to ensuring the Bill will provide the highest standards of protection for victims of sexual offences and trafficking. I am mindful of the range of legislation which the Minister, officials and the Committee are seeking to progress in the limited window of this mandate and warmly welcome legislation which seeks to better protect victims of sexual offences and of trafficking being progressed as part of this.

As you are aware, the legislation which established my office, 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003) established my statutory duty to safeguard and promote the rights and best interests of children and young people in Northern Ireland. Under Articles 7(2) and (3) of this legislation, I have a mandate to keep under review the adequacy and effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities. And under Article 7(4), NICCY has a statutory duty to advise any relevant authority on matters concerning the rights or best interests of children and young persons. My remit includes children and young people from birth up to 18 years, or 21 years if the young person is disabled or is care experienced. In exercising my functions, I have regard to all relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).

My evidence today is not intended to be comprehensive across all clauses of the Bill but to instead address the key aspects of the draft legislation which most directly engage children and young people's rights and best interests and which were highlighted in NICCY's written submission. My remarks today will therefore focus on two themes:

- Ensuring provisions protect all children and young people up to the age of 18; and
- Ensuring all relevant matters are considered within the scope of the Bill.

Children's Rights

Before commenting on these in detail I would like to highlight the children's rights

obligations that are placed upon our government and statutory agencies in this area. The United Nations Convention on the Rights of the Child (UNCRC) sets out that, in addition to all other rights of the Convention, children have special rights to protection from all forms of harm, violence and abuse and to be supported in their recovery from such abuse. Government has duty to ensure that appropriate measures and procedures, such as, a robust legal framework as well as effective investigatory and judicial processes, are in place to realise these rights.

In 2016 following examination of the UK and devolved governments, the Committee on the Rights of the Child stated that in Northern Ireland the recommendations of the 2014 Independent Inquiry into Child Sexual Exploitation (CSE) must be implemented and we note that this includes the Inquiry's key recommendation number 14 on strengthening the law in order to better protect children and young people from sexual abuse and exploitation.¹ On this point, Members may be aware of NICCY's Reviews of Government CSE Progress Reports on the implementation of Inquiry recommendations and our concerns about the lack of evidence that this has resulted in improved outcomes for children or more effective pursuit of perpetrators.²

The 2016 Concluding Observations of the Committee on the Rights of the Child also noted that, across the UK, the capacity of law enforcement bodies and the judiciary to detect and prosecute sexual abuse and exploitation cases and to grant effective remedies to victims should be strengthened and recommended that video recorded interviews with child victims and witnesses be used in court as evidence rather than children attending in person and being subject to cross-examination.³ On this last issue, the Committee may also be aware that in NICCY's submission to Sir John Gillen's Review into law and procedure in cases of serious sexual offences we recommended that Northern Ireland take forward the Barnahus model of child centred justice for child victims of sexual violence and abuse.⁴ This approach ensures that child victims can give their best evidence and meet

¹ K. Marshall (2014) Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry. Available at: <https://www.rqia.org.uk/RQIA/files/37/379f52ad-b99e-4559-847e-e2688e0648c6.pdf>

² NICCY (2018) Reflections on Government CSE Progress Reports (Third and Fourth Composite Reports) Available at: <https://www.niccy.org/publications/2018/december/14/niccy-review-cse-progress-reports/>

³ Committee on the Rights of the Child (2016) Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, paras 45 and 81. Available at: <https://www.ohchr.org/en/countries/enacaregion/pages/gbindex.aspx>

⁴ NICCY (2018) Advice to the Review of arrangements to deliver justice in serious sexual offences cases. Available at: <https://www.niccy.org/publications/2018/september/07/review-of-sexual-offences-cases/>

the requirements of cross-examination through pre-recorded testimony led by a forensic interviewer and undertaken with minimal delay.

In now turning to the Bill, I welcome the intent, as set out in the Explanatory and Financial Memorandum, to improve the operation and effectiveness of the justice system by enhancing public safety through the strengthening of sexual offences legislation and improving services for victims of trafficking and exploitation.

Protections for children and young people up to 18

The UN Committee on the Rights of the Child is instructive in reminding governments that all children aged up to 18 years are considered vulnerable until completing their neural, psychological, social and physical growth and development.⁵ The Committee highlights the requirement that, while respecting children’s developing autonomy, young people under 18 must be afforded robust safeguards. For example, in General Comment 20 on the rights of the child during adolescence, they emphasise that as children become older their “right to exercise increasing levels of responsibilities does not obviate the State’s obligation to guarantee protection” to them as they mature.⁶ International standards are clear that children up to the age of 18 are entitled to continuing protection from all forms of sexual violence, abuse and exploitation. In 2014, the Committee concluded that the Sexual Offences (Northern Ireland) Order 2008 did not provide adequate levels of protection for all children up to the age of 18 years against all sexual offences and that the defence of reasonable belief should be amended⁷. We also note that the Independent Inquiry into CSE in Northern Ireland recommendations reiterated these concerns.⁸

In addition to this, following the UK Government’s ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

⁵ Committee on the Rights of the Child (2016) General Comment 20: On the implementation of the rights of the child during adolescence. Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11

⁶ Committee on the Rights of the Child (2016) General Comment 20: On the implementation of the rights of the child during adolescence, para 19.

⁷ Committee on the Rights of the Child (2014) Concluding observations on the UK report on the Optional Protocol on the Rights of the Child on the sale of children, child prostitution and child pornography. Committee on the Rights of the Child (2016) Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, para 82.

⁸ K. Marshall (2014) Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry. Belfast: RQIA.

(the Lanzarote Convention) in 2018, we note the requirement placed on Government to ensure that domestic legislation and procedures reflect the obligations of the Convention including Article 3 which states that provisions and protections should apply to all persons under the age of 18 years.⁹

Clause 2: Sexual grooming

Examples of my concerns in this area can be seen in clause 2 which relates to grooming. While we broadly welcome the intention of the clause (and welcome the intent to ensure that offences capture adults masquerading as a child and communicating with a child or group of children with the intent to groom, ensuring this is not confined to online abuse) we note that that protections of the offence should apply fully to all children under 18 (not 16) and that the 'reasonable belief' or 'rebuttal defence' whereby a defendant is afforded access to a defence that they did not believe a child was under a certain age if the child is 13 years old and under 16 years should be amended to, at least, reverse the burden of proof. We highlight that the intention to address the defence of reasonable belief had been set out on the Department's 2019 consultation and draw attention to concerns regarding the current defence that have been raised by the UN Committee on the Rights of the Child, the 2014 Independent Inquiry into CSE in Northern Ireland and, more recently, the 2020 CJINI Inspection into CSE.¹⁰

In our response to the Department's 2019 consultation, we welcomed the proposals to address this issue and were supportive of the Department's consideration of both reversing the burden of proof for the defence and limiting the circumstances in which defendants could access the defence. We ask the Committee to consider this issue in detail.

Clause 3: Miscellaneous amendments to sexual offences

In another example, while I again welcome the intention of the provisions in clause 3 regarding miscellaneous amendments to sexual offences (which apply up to the age of 18) we again highlight concerns regarding the defence of reasonable belief and the need to address this in order to ensure that legal protections apply equally and evenly to all children up to the age of 18.

⁹ <https://www.coe.int/en/web/children/lanzarote-convention>

¹⁰ CJINI (2020) [Child Sexual Exploitation: An inspection of the criminal justice system's response \(cjini.org\)](https://www.cjini.org)

In other comments on the proposals within this clause we welcome the move to amend references to ‘child prostitution’ and ‘child pornography’ to better reflect the abuse and exploitation that is represented by these offences and note that the Committee may wish to ensure that in relation to sexual abuse and exploitation reference to ‘payment’ in Schedule 2 Part 1 full reflects the dynamics of sexual exploitation whereby such abuse may take tangible forms of exchange (such as, exchange for accommodation or debt payment) or may be non-tangible (such as, exchange to secure protection of self or others). This should fully take account of the definition of CSE set out in Co-operating to Safeguard Children.¹¹ In relation to clause 3(b) NICCY welcomes the intention to ensure provisions relating to sexual communication with a child are brought into arrangements regarding extra territorial jurisdictions and in 3(c) to ensure that online and other remote forms of abuse are within scope of provisions.

Clause 18 SOPOs

In a final example of the importance of making sure provisions apply to all children, while I am supportive of the proposal in clause 18 to ensure offences under Article 68 of The Children (Northern Ireland) Order 1995 are within scope of Sexual Offences Prevention Orders (including the abduction of a child in care or who is subject to an emergency protection order or police protection) I am disappointed that the Bill does not address wider concerns regarding the need to ensure that all children up to the age of 18 are afforded safeguards under abduction and recovery arrangements, regardless of age, care or other status (current arrangements apply fully to children up to age 18 until if they are in care, otherwise applying to children up to 16 years).¹²

As with other areas of the Bill, concerns have been repeatedly raised on this point, including by the 2014 Independent Inquiry into CSE and more recently by both the 2020

¹¹ Child sexual exploitation is a form of child sexual abuse. It occurs where an individual or group takes advantage of an imbalance of power to coerce, manipulate or deceive a child or young person under the age of 18 into sexual activity (a) in exchange for something the victim needs or wants, and/ or (b) for the financial advantage or increased status of the perpetrator or facilitator. The victim may have been sexually exploited even if the sexual activity appears consensual. Child sexual exploitation does not always involve physical contact; it can also occur through the use of technology.

¹² This includes Child Abduction Warning Notices and abduction offences. The Child Abduction (Northern Ireland) Order 1985 applies to children up to age 16.

CJINI CSE Inspection report¹³ and the 2020 Leonard Report into the effectiveness of the Safeguarding Board's member agencies in responding to CSE.¹⁴

Clause 1: voyeurism

In a separate point on how the provisions of the Bill engage with children under 18, NICCY notes the Committee may wish to consider how children who display harmful sexual behaviour may be within scope of clauses such as clause 1 which relates to voyeurism. As with all such provisions which may apply to children, it is of central importance that arrangements effectively address harmful or abusive behaviour while also seeking to divert children from the criminal justice system and ensure that they have access to therapeutic support.

Scope of Bill

I turning to the scope of the Bill, as stated in our written submission, while I welcome moves to enhance legislative safeguarding protections through the Bill, I also note my deep disappointment that the intended scope of the planned Miscellaneous Justice Bill have not been brought forward, particularly in relation to bail and remand reform and the potential to address the Minimum Age of Criminal Responsibility and I highlight the lost opportunities to address these important issues within the current mandate.

In relation to sexual offences and protections in law, NICCY also notes disappointment that all areas included in the Department's 2019 consultation on CSE and law reform are not being brought forward, including proposals regarding the defence of reasonable belief as highlighted above.

Abuse of trust

In relation to planned amendments to the Bill we welcome the commitment of the Minister to bring forward proposals regarding threat to publish intimate images or 'revenge pornography', the 'rough sex defence' that consent is a defence to serious harm for sexual gratification and, importantly, provisions to extend current abuse of trust protections. On this last proposal, our 2019 advice to the Department expressed serious concern that

¹³ CJINI (2020) [Child Sexual Exploitation: An inspection of the criminal justice system's response \(cjini.org\)](https://www.cjini.org/child-sexual-exploitation-report)

¹⁴ Leonard Consultancy (2020) Report into the effectiveness of the Safeguarding Board's member agencies in responding to CSE.

[SBNI CSE Report PDF 0.pdf \(safeguardingni.org\)](https://www.safeguardingni.org/SBNI-CSE-Report-PDF-0.pdf)

‘abuse of trust’ offences required amendment in order to offer effective protection to children and young people. Legislation must both reflect contemporary configurations of how services to children are delivered on behalf of, or are funded by, statutory and government agencies (through for example, voluntary, community, youth, sporting, arts and faith based organisations) and must demonstrate a clear understanding of the power dynamics of sexual abuse when this is perpetrated by a person in a position of trust, regardless of the setting. As highlighted in our written submission to the Committee and 2019 advice to the Department, there is clear evidence of the vulnerability to exploitation and abuse of older children in such settings.

We also note that following the UK ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse European (Lanzarote Convention) that Article 18(1b) of this sets out that necessary legislation must be in place to ensure that abuse of a recognised position of trust, authority or influence over a child is criminalised.¹⁵ The Lanzarote Committee who monitor implementation of the Convention provide detailed direction on this and define ‘the circle of trust’ as including a relationship of trust which has been established with the child in the context of a professional activity and where unequal physical, economic, religious or social power is exploited and abused. The Committee highlights the Convention’s Explanatory Report which sets out that such relationships, including within voluntary and youth organisation settings, are within the remit of the Convention and “that children in certain relationships must be protected, even when they have already reached the legal age for sexual activities, even when the person involved does not use coercion, force or threat”.¹⁶ We ask the Committee to further explore how such abuse of trust protections can be secured within the Bill.

Equal Protection

In final comment on the scope of the Bill, we request that as part of legislation which seeks to improve public safety and better safeguard children and young people from harm, that the Committee give full consideration to ensuring that Equal Protection under the law for children from all forms of assault, including physical punishment, is addressed within the Bill. We draw attention to the repeated recommendation of the UN Committee on the

¹⁵ <https://www.coe.int/en/web/children/lanzarote-convention>

¹⁶ Council of Europe (2007) Explanatory report to the Council of Europe Convention on the Protection of Children against sexual exploitation and Sexual Abuse, para 123 and 124.

Rights of the Child that this be addressed as a priority¹⁷ and we highlight the well-established evidence base which demonstrates that physical punishment is: not effective in managing challenging behavior; that it results in poor outcomes for children; and, of particular concern, that it can escalate into injurious abuse and maltreatment.¹⁸ There has been much progress in Northern Ireland in strengthening measures to protect children, and others, from many forms of harm, abuse and violence and the Bill represents an important opportunity to ensure this significant gap in legal protection for children is addressed.

Conclusion

Thank you for the opportunity to make these remarks and I happy to respond to any comments or questions they Committee may have.

¹⁷ CRC (2016) Concluding Observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, para 41.

¹⁸ See NICCY (2021) Equal Protection:

<https://www.niccy.org/publications/2021/may/12/equal-protection-update/>

NICCY (2020) Equal Protection for Children - Improving Outcomes:

<https://www.niccy.org/publications/2020/june/24/equal-protection-for-children-improving-outcomes/>

Additional notes on clauses

Clause 1: voyeurism

We welcome the intention to strengthen offences regarding voyeurism to ensure that actions, such as, up-skirting and down-blousing are within scope and note that the Committee may wish to seek clarification on the application of intention (including where harm may be caused regardless of initial intent) and consent within the clause. We also note the Committee may wish to examine how children under 18 years who display harmful sexual behaviour may be within scope and, as with all such provisions, seek to ensure that arrangements effectively address harmful or abusive behaviour while also seeking to divert children from the criminal justice system while ensuring that they have access to therapeutic support. NICCY also notes that the Committee may wish to consider current arrangements for ensuring that all children have access to healthy relationships and RSE education.

Clause 2: Sexual grooming

While NICCY welcomes the intent to ensure that grooming offences capture masquerading as a child and communicating with a child or group of children with the intent to groom and that this is not confined to online abuse. We note the challenges of seeking to establish evidence and intent in such cases but highlight the importance of ensuring that the law takes account of the complex dynamics of abuse, including where this is facilitated by technology, and that it provides an effective basis for early intervention to protect children and disrupt offenders. We note that the Department has not extended the offence to include 'enticing', which had been raised during the Independent Inquiry into CSE and that the Committee may wish to seek further clarification on this.

Clauses 4-15: Anonymity and privacy

NICCY is not providing detailed comment on clauses relating to anonymity but notes that we are supportive of proposals which will seek to ensure that proceedings in such cases are conducted in a manner which better protects victims and witnesses while ensuring the principles of fair trial and the interests of justice for all are served. This reflects the advice we provided to Sir John Gillen's Review into law and procedures in cases of serious sexual offences¹⁹ and the Committee may wish to consider how this could apply to all proceedings (whether in Crown or Magistrates Courts). NICCY looks forward to implementation of the full range of Gillen Review recommendations, particularly those in

¹⁹ NICCY (2018) Advice on the Review of arrangements to deliver justice in serious sexual offence cases. <https://www.niccy.org/publications/2018/september/07/review-of-sexual-offences-cases/>

relation to children and young people including proper consideration of a Barnahus model being developed in Northern Ireland to ensure a child centred safeguarding and justice response to child victims. In relation to Schedule 3 we note that Committee may wish to ensure appropriate action can be taken against Internet Service Providers where anonymity and privacy are not protected.

Clause 16 Trafficking and exploitation

We welcome moves to ensure protections and supports for potential adult victims of modern slavery and trafficking where trafficking is not an element of the abuse and are content with proposals to that Department publish a Tackling Modern Slavery strategy every three years rather than annually.

Clause 19 VOPOs

In relation to Violent Offences Prevention Orders, we are broadly supportive of proposals to extending the timeframes of complaints which fall within scope of the Orders.

Additional notes on other matters within scope

Abuse of trust

In noting the view of the Department at the time that there is no evidence of abuse committed against older children in such settings, we cited a number of sources for this including: work undertaken by NSPCC in England which found that police were unable to investigate over 650 complaints made to local authorities concerning adults having sex with children aged 16 and 17 years in their care as their roles were not within the scope of position of trust definitions²⁰; the ongoing Independent Commission into Child Abuse in England and Wales which has heard testimony from victims subjected to sexual abuse in a wide range of settings, including sporting organisations and uniformed bodies²¹; and the reviews and investigations into Scouting Ireland which identified over 317 alleged victims and 212 alleged perpetrators with one review author noting that allegations include victims and perpetrators living in Northern Ireland.²²

Equal protection

Over the last number of years an international evidence base regarding physical

²⁰ <https://www.nspcc.org.uk/what-we-do/news-opinion/abuse-of-position-of-trust/>

²¹ <https://www.iicsa.org.uk/>

²² <https://www.dcy.gov.ie/docs/EN/Press-Releases-copy-dcya-gov-ie-2019/81/5071.htm>
<https://www.thejournal.ie/scouting-ireland-abuse-cases-4351408-Nov2018/>

punishment has been further developed²³ and documents that:

- There is strong and consistent evidence that physical punishment is associated with **increased childhood aggression and antisocial behaviour**. Physical punishment is not effective in achieving parenting goals and its use can exacerbate existing problem behaviour.
- There is good evidence that it is related to **depressive symptoms and anxiety** amongst children.
- Most studies which considered the 'loving smack' hypotheses found that the harmful effects of physical punishment were not reduced by high levels of parental warmth.²⁴
- There is consistent evidence of an association between **physical punishment and child maltreatment**. In this context, it is important to note that Northern Ireland has the highest rate per 10,000 children placed on the Child Protection Register in the UK with over half of registrations being due to physical abuse or physical abuse combined with other forms of abuse.²⁵
- There is evidence that legal reform accelerates decline in the use of physical punishment with suggestion there is also a decline in severe physical abuse.²⁶

²⁷In 2017, NICCY published research which showed that in Northern Ireland:

- 70% of adults thought that positive parenting was much more effective or a little more effective than physical punishment. This rose to 76% amongst parents.
- Just under one in four adults (24%) and **only 18% of parents stated that physical**

²³ Heilmann A., Kelly Y. and Watt R. (2015) Equally Protected? A Review of the Evidence on the Physical Punishment of Children, Children and Young People's Commissioner Scotland, Children 1st, Barnardo's and NSPCC. Available at: <https://www.nspcc.org.uk/services-and-resources/research-and-resources/2015/equally-protected/>

²⁴ In addition to Heilmann A. et al (2015) see also research which outlines that smacking and physical abuse are associated with the same negative child outcomes just to a lesser degree: Gershoff E.T. and Grogan-Kaylor A. (2016) Spanking and child outcomes: Old controversies and new meta-analyses. *Journal of Family Psychology* June 30(4):453-469.

References updated August 2021 to also note Heilmann et al (2021) Physical punishment and child outcomes: a narrative review of prospective studies. *The Lancet* July 398(10297): 355-364.

²⁵ Department of Health (2021) Children's Social Care Statistics for Northern Ireland 2019/20. <https://www.health-ni.gov.uk/publications/childrens-social-care-statistics-northern-ireland-201920>

²⁶ In addition to Heilmann A. et al (2015) see also research which shows an association between legal prohibition of physical punishment and lower prevalence of adolescence violence: Elgar F.J. et al (2018) Corporal punishment bans & physical fighting in adolescents: an ecological study of 88 countries. *BMJ Open* September 8(9).

²⁷ NICCY (2017) Changing Perceptions: Equal Protection for Children, NICCY's work and survey results on attitudes to physical punishment. Available at: www.niccy.org/equalprotection

punishment was acceptable. This demonstrates a large decrease in the acceptability of physical punishment reported in previous research.

- **63% of adults said they would definitely support or would tend to support changing the law** to give children the same protection from hitting and smacking that adults have. This indicates an increase in support from similar questions in earlier studies.
- Only one in five parents (20%) said they had been given information about positive parenting or alternatives to physical punishment. This is a decrease from 2008 when 1 in 3 parents reported they had been given information and highlights the need for improved information and support for families.

Children should be fully protected in law from all forms of assault and should be afforded the same protections as their parents, grandparents and adult siblings. Northern Ireland has achieved significant progress in addressing many forms of violence across our communities and it should be made clear no form of violence is acceptable in our homes. This must go hand in hand with ensuring that parents and carers receive the support and guidance they need as they undertake one of the most important jobs in our society. Our commitment to giving children the best start in life and our growing awareness of the negative impact of physical punishment as well as our obligation to act under the UNCRC, all demonstrate that it is time for the Northern Ireland Government to ensure that the **law is reformed, through the repeal of the defence of reasonable punishment.**

RSE and healthy relationships

NICCY also notes that the Committee may wish to consider current arrangements for ensuring that all children have access to healthy relationships and RSE education. This has been a theme across a number of important publications, including the Gillen Review and the Independent Inquiry into CSE and relates not only to this area of safeguarding but, as highlighted in our evidence to the Committee at the time, also domestic abuse.