Review of the law on Child Sexual Exploitation

12 April 2019

*“Children have suffered adult violence unseen and unheard for centuries. Now that the scale and impact of all forms of violence against children is becoming better known they cannot be kept waiting any longer for the protection to which they have an unqualified right.” (2006 UN Study on Violence against Children)*

Introduction

The Commissioner for Children and Young People (NICCY) was created in accordance with ‘The Commissioner for Children and Young People (Northern Ireland) Order’ (2003) 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, NICCY has 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. 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.

The Commissioner’s 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 carrying out her functions, the Commissioner’s paramount consideration is the rights of the child or young person, having particular regard to their wishes and feelings. In exercising her functions, the Commissioner has regard to all relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).

NICCY welcomes the opportunity to provide advice to the Department of Justice (DoJ) on the Review of the law in relation to Child Sexual Exploitation (CSE). The Commissioner has expressed concern on a number of occasions about the delay in the Department progressing the elements of this consultation which address the conclusions of the 2014 Independent Inquiry into CSE in Northern Ireland (Inquiry key recommendation 14). However, given the relevance of the work of Sir John Gillen’s Review into law and procedures in cases of serious sexual offences it is surprising that the consultation process has not been planned in a way which ensures it can take account of the now completed Review and relevant recommendations. NICCY is disappointed that opportunities to fully reflect the findings of the Review, alongside Inquiry recommendations, have not been realised.

We note that this response is not comprehensive and addresses the proposals which are most relevant to the Commissioner’s work.

Children’s Rights

In 2016 following examination of the UK and devolved governments, the UN 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 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. The Committee also 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.[[1]](#footnote-1) On this last point, the Department will be aware that in NICCY’s submission to Sir John Gillen’s Review we recommended that Northern Ireland take forward the Barnahus model of child centred justice for child victims of sexual violence and abuse.[[2]](#footnote-2) This approach, which is promoted by the Council of Europe, ensures that child victims can give their best evidence and meet the requirements of cross-examination through pre-recorded testimony led by a forensic interviewer and undertaken with minimal delay.

NICCY notes that the UN Committee Concluding Observation calling for implementation of the Independent Inquiry’s recommendations includes key recommendation 14 which relates to strengthening the law in order to better protect children and young people from sexual abuse and exploitation and more effectively disrupt, pursue and prosecute those who seek to harm them. The Department will be familiar with NICCY’s 2018 Review of Government CSE Progress Reports which highlighted a wide range of concerns about the lack of evidence that the implementation process to take forward the Inquiry’s recommendations had resulted in improved outcomes for children or the more effective pursuit of perpetrators.[[3]](#footnote-3)

In addition to the UN Committee’s 2016 Concluding Observations, we draw attention to the Committee’s 2014 examination of the UK and devolved governments in their compliance with the Optional Protocol on the sale of children, child prostitution and child pornography which highlighted 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. The Committee has recommended that this be rectified on a number of occasions[[4]](#footnote-4) and we note that the Independent Inquiry’s recommendations reflected and reiterated these concerns.

Following the UK Government’s ratification of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention) in June 2018, we highlight 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 apply to all persons under the age of 18 years.[[5]](#footnote-5) NICCY fully expects the Department to incorporate these obligations in proposals for legislative reform and does not share the view of DoJ set out in section 11 of the document that current arrangements are acceptable or are in line with child rights obligations.

The UN Committee on the Rights of the Child is instructive in reminding governments that all children aged 0-18 years are considered vulnerable until completing their neural, psychological, social and physical growth and development.[[6]](#footnote-6) Across a number of General Comments (which provide authoritative guidance on the implementation duties placed on Convention signatories) they highlight 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, the Committee emphasises that as children have increasing agency that their “right to exercise increasing levels of responsibilities does not obviate the State’s obligation to guarantee protection” to them as they mature.[[7]](#footnote-7) 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.

This consultation addresses measures that must be taken to safeguard some of children and young people’s most fundamental rights - to safety and protection from sexual violence and abuse and to remedies, recovery and justice for child victims of sexual offences - and it has the potential to strengthen these significantly. While we acknowledge that ensuring legal protections are properly afforded to children of all ages across this area of law is complex, it is important that safeguards while taking proper account of children and young people’s evolving capacity, their development towards adulthood and independence and the domestic age of consent for sexual activity, effectively protect all children up to the age of 18.

NICCY recommends that the Department reviews current proposals to ensure that proposed changes meaningfully and fully meet international obligations to all children and young people.

Consultation policy proposals for legislative reform

‘Child prostitution’ and ‘child pornography’

NICCY welcomes the intended aim underpinning proposals to remove legislative references to ‘child prostitution’ and ‘child pornography’ in order to ensure that the language of the law takes account of our developing understanding of child sexual abuse and the power dynamics of this as well as ensuring there is a safeguarding response to child victims rather than a focus on criminalisation.

However, we understand from the consultation document that the Department intends to replicate the changes introduced in England and Wales under the Serious Crime Act 2015 (Section 68) and wish to highlight a number of concerns in relation to this. For example, the proposal to replace terms with the phrase ‘sexual exploitation of a child’ is introducing a form of words the meaning of which may extend beyond the scope of ‘child prostitution’ and ‘child pornography’. We also note with concern that the proposed definition of ‘sexual exploitation of a child’ set out in paragraph 4.6 of the document does not fully reflect the policy definition of CSE in Northern Ireland which is outlined in the regional guidance Co-operating to Safeguard Children 2016. For example, the policy definition states that CSE “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.” [[8]](#footnote-8) It is recognised that the exchange aspect of CSE can include exchange or payment for material goods (for instance, accommodation, alcohol or drugs, rent) and non-material (such as, the protection of the victim or others, affection).

It is important that any unintended consequences of such changes which may cause significant tension between the definition in law of offences and the definition in guidance and procedures which underpin the operational practices of safeguarding and policing agencies are carefully considered. NICCY recommends that DoJ undertake this assessment urgently. We understand that this issue is a source of concern in England and Wales[[9]](#footnote-9) following the introduction of the Serious Crime Act 2015 and advise that DoJ should discuss this with Ministry of Justice and Department for Education (who are responsible for the policy definition[[10]](#footnote-10)) colleagues in England.

NICCY also notes that as our understanding of the many forms that child sexual abuse can take develops and as the range of ways technology can play a part in this evolves, the development of particular offences which relate to only specified categories of abuse should be well considered. Indeed, this debate may be indicative of the need to more fundamentally consider the adequacy and effectiveness of current law regarding sexual offences against children more broadly.

Live streaming

NICCY welcomes the proposal to clarify that images which are streamed or otherwise transmitted as well as recorded for the purposes of ‘child prostitution’ or ‘child pornography’ are included within these offences.

Grooming

In relation to the proposals regarding grooming and the recommendation of the Independent Inquiry into CSE to extend this to include ‘enticing’ we acknowledge that in the period since the Inquiry, Article 22 of the Sexual Offences (Northern Ireland) Order 2008 has been amended by lowering the threshold for meeting the offence and that Article 22A on an offence of sexual communication with a child has been introduced. While such changes are welcome, we highlight that they do not apply to all children up to the age of 18 years and that this must be addressed through the appropriate legislative measure. As discussed earlier, ensuring such legal protections are afforded to all children regardless of age is in line with the obligations of the UN Convention on the Rights of the Child, the Council of Europe Lanzarote Convention and recommendation 14(a) of the Independent Inquiry.

In relation to the proposal not to extend the offence further by including ‘enticing’ within its scope and the Department’s view that the above amendments now provides an adequate basis to ensure that statutory authorities can intervene at early stages of grooming, NICCY seeks further information on the evidence used by DoJ to support this conclusion as well information on the Department’s engagement with PSNI who raised specific concerns regarding the need for extension of offences to ‘enticing’ with the independent Inquiry.

Defence of ‘reasonable belief’

As has been referenced earlier, the uneven application of legal safeguards to children under 18 years based on their age and, in this instance, the related access to a defence of reasonable belief afforded to alleged perpetrators (where children are aged over 13 years but under either 16 or 18 years) has resulted in recommendations for change from a range of bodies including the UN Committee on the Rights of the Child.[[11]](#footnote-11) NICCY therefore welcomes the proposal to reverse the burden of proof in such cases and notes the ruling of the UK Supreme Court which found similar law reform in Scotland did not breach defendants rights to a fair trial.[[12]](#footnote-12)

In relation to considering limiting the circumstances in which a defendant is able to access the defence of reasonable belief, NICCY is supportive of the Department considering this further, including for individuals who have been previously convicted of a sexual offence against a child, have been made subject to a Risk of Sexual Harm Order as well as where defendants have been charged with a relevant sexual offence (although we note the above ruling of the UK Supreme Court in regard to this latter circumstance).

Abuse of trust

NICCY acknowledges the Department’s view that the ‘abuse of trust’ offences contained within the Sexual Offences (Northern Ireland) Order 2008 were concerned with statutory role and settings (such as teachers in schools). However, we note that this does not reflect either contemporary configurations of how services are delivered on behalf of or are funded by statutory and government agencies (through for example, voluntary, community, sporting and faith based organisations) or demonstrate a clear understanding of the power dynamics of sexual abuse when perpetrated by a person in a position of trust. We highlight that the Government holds clear obligations to protect children and young people in such circumstances.

In relation to the Department’s conclusion that there is no evidence of abuse committed against older children in, for example, faith, Scouts or Guides groups we request further detail on the evidence reviewed by DoJ in making this assessment. For example, the Department should be aware that the NSPCC in England 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 current position of trust definitions (these included complaints against those working in sports, faith settings and youth work).[[13]](#footnote-13) DoJ should also be aware of the ongoing Independent Commission into Child Abuse in England and Wales which during its investigation and Truth Project strands of work has heard testimony from victims subjected to sexual abuse in a wide range of settings, including sporting organisations and uniformed bodies, such as Scouts.[[14]](#footnote-14) Finally, the Department should be aware of the ongoing safeguarding reviews and investigations into Scouting Ireland which are reported to have identified over 317 alleged victims and 212 alleged perpetrators with the author of one of the reviews noting that, in line with Scouting Ireland’s status as an all-island body, allegations include victims and perpetrators living in Northern Ireland.[[15]](#footnote-15) NICCY seeks assurances that DoJ along with colleagues in the Department of Health have been liaising as appropriate with Government Departments and statutory agencies in the Republic of Ireland in relation to this.

In regard to Government’s European and international obligations in this area, we point to the requirement of Article 18(1b) of the Lanzarote Convention that the necessary legislation be in place to ensure that abuse of a recognised position of trust, authority or influence over a child is criminalised.[[16]](#footnote-16) The Lanzarote Committee who monitor implementation of the Convention provide detailed direction on this and draw attention to the ‘the circle of trust’ whereby a relationship of trust which has been established with the child in the context of a professional activity and where there is 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 scope of the Convention and that it “provides 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”.[[17]](#footnote-17) DoJ must ensure that sexual offences legislation in Northern Ireland complies with the Lanzarote Convention.

The Department’s proposal not to extend abuse of trust offences and not to address the protection and 16 and 17 year olds is disappointing and NICCY recommends that this is reconsidered.

Indecent ‘self’ images of children under 18

NICCY has repeatedly expressed concern about the current situation regarding user generated images whereby children and young people who share images of themselves by ‘sexting’ with no malicious intent are at risk of criminalisation which can consequently significantly inhibit their ability to report concerns and fears about the potential further sharing and use of the image by others. As the Department recognises, this can lead to children being increasingly vulnerable and isolated and, in turn, at greater risk of further abuse, exploitation and harm.

While we acknowledge that the stated position of PSNI is that such cases will be treated sensitively and on an individual basis to minimise risks of criminalisation and that cases will be discussed with PPS at an early stage without a formal investigation being established, NICCY does not view this as an adequate response to ensuring that children feel safe to report concerns regarding the sharing of images or to seek support in cases of threat or blackmail. We also note that the stated position of PSNI does not represent guidance which PPS are directed to follow in their decision making regarding prosecution.

NICCY does however recognise the complexity of this issue and notes the importance of, for instance, ensuring that young people who share images with malicious intent and/or to cause distress are appropriately responded to and that children are protected from being bullied or groomed into sharing images by young people under 18 years old. We also recognise concerns that images taken by children ‘sexting’ could then be acquired and distributed by adults who pose a risk to children.

NICCY followed the debate of the Justice Committee on this issue with interest, particularly in regard to the use of a ‘malicious intent’ requirement.[[18]](#footnote-18) We note that the Department has explored the potential application of such a requirement with PSNI and PPS and are disappointed that neither this, or other exceptions, are being further examined. We also seek clarification on whether the Department has examined the development of PPS guidance to provide further clarity on this area. Such guidance could highlight that the intention of legislation is to protect (rather than inappropriately punish) children and that it would generally not be in the public interest to prosecute the consensual sharing of images (where ‘sexting’ was not abusive or persistent and there was no evidence of bullying, grooming, exploitation or malicious intent) as has been issued by the Crown Prosecution Service in England and Wales.[[19]](#footnote-19)

NICCY also requests information on whether DoJ has consulted with colleagues in England and Wales on the application of ‘outcome 21’ which was introduced by the Home Office, supported by the Policing College, to enable reported incidents of ‘sexting’ to be recorded without formal action being taken and the record being unlikely to be disclosed in criminal records checks.[[20]](#footnote-20) Finally, we ask that the Department updates NICCY on consideration being given to the development of a contact point, as recommended by the UN Committee on the Rights of the Child, which would allow children to report self-generated sexual content to a relevant authority which then ensures the removal of prejudicial or harmful content involving children.[[21]](#footnote-21)

It is the Commissioner’s view that the current position on indecent ‘self’ images does not achieve balance between protecting children and ensuring that they can be confident in seeking help while allowing offences which should be investigated to be progressed. While we are mindful of the need to make sure that any proposals do not create an unintended legislative gap and that statutory agencies should be able to act in cases where images have been shared on an unsolicited basis with other children or malicious intent or exploitation is a factor, NICCY does not feel that full range of possible measures to ensure that children can be confident that they can seek help and report the sharing of images without fear of criminalisation has been considered.

NICCY recommends that the Department reviews its position and properly considers the full range of measures that can be put in place to ensure such balance is better achieved. The Commissioner requests further engagement with DoJ on this matter.

Up-skirting

NICCY welcomes proposals to ensure this is recognised as a sexual offence and that victims and perpetrators will therefore by subject to appropriate measures, for example victim anonymity and civil prevention orders for perpetrators of sexual harm.

Child sex dolls

Whilst acknowledging recognising the importance of a UK wide response to concerns about the manufacturing, importation and possession of ‘child sex dolls’ NICCY notes with concern that a recognised legislative gap exists and urges the Department to ensure this is addressed (whether within a specific Northern Ireland context or more broadly with other UK jurisdictions through Westminster legislation) as a matter of urgency.

Abduction offences

As noted by the Department, the Independent Inquiry into CSE recommended that protections for children up to 18 years were strengthened by ensuring 16 and 17 year olds were within the scope of abduction offences and PSNI are supportive of this in recognition it can provide additional measure to protect children from sexual abuse and exploitation.

We have already highlighted that the legislative framework for safeguarding in Northern Ireland should reflect the standards and obligations of, for example, the UNCRC, the UN Optional Protocol on the sale of children, child prostitution and child pornography and the Council of Europe Lanzarote Convention. We have discussed that, while taking account of the evolving capacity of the child, the age of consent and young people’s increased decision making as they move towards adulthood and independence, Government should afford protection to all children under 18 years. This should be reflected in all relevant legislation including the Child Abduction (Northern Ireland) Order 1985 and we again note that it is not the view of NICCY, the UN Committee on the Rights of the Child or the Lanzarote Committee that such protections would either contravene or are unnecessary due to the evolving capacity and increasing autonomy of 16 and 17 year olds, as suggested in the Department’s consultation document. We request further detail on DoJ’s assessment of this proposal.

In relation to the issue of early marriage (for children aged 16 and 17 years) which is cited by the Department as a factor in considering that no legislative change is necessary, DoJ should be aware of the standard expressed by the UN Committee on the Rights of the Child that the minimum age for marriage should be 18 years and their 2016 recommendation that the UK has in place effective measures to ensure marriages at earlier ages only take place in exceptional circumstances and are based on the full, free and informed consent of the children concerned.[[22]](#footnote-22)

NICCY is of the view that the current inconsistency in legislative protections, whereby some 16 and 17 year olds (for example based on care status) are within scope of current arrangements and others are not, does not recognise the vulnerability of all children to sexual abuse and exploitation.

Recovery orders

Following on from our comments regarding abduction offences, in relation to the use of recovery orders under the Child Abduction (Northern Ireland) Order 1985, NICCY is not of the view that the case for not extending these to all children under 18 has been made. We are keen to understand the evidence which underpins the Department’s concerns that such orders, in exception to other similar measures, would be subject to vexatious claim and/or that statutory agencies would not be in a position to ensure that only orders with a credible basis were pursued. We are also unclear that concern about application of orders in jurisdictions beyond Northern Ireland would, in itself, provide the basis of a decision not to further consider the proposal.

Hotel type accommodation information requests concerning guests

NICCY welcomes the proposal to introduce similar powers to those contained in the Anti-Social Behaviour, Crime and Policing Act 2014 (Sections 116-118) to enable police to request information regarding guests where it is suspected that the accommodation is or will be used for the purposes of the sexual abuse and exploitation of children.

Other comments

NICCY seeks clarification from the Department that the Sexual Offences (Northern Ireland) Order 2008 properly reflects the full range of circumstances and aggravating factors required by the Lanzarote Convention, including that the offence was committed within the framework of a criminal organisation.[[23]](#footnote-23)

NICCY notes that Government has previously committed to undertaking a legislative review of the full range of the current uneven patchwork of safeguards, protections and legal liabilities that children up to the age of 18, and particularly 16 and 17 year old, are subject to. This was most notably discussed during the early stages of the joint Mental Capacity Act Northern Ireland) 2016 legislative scrutiny process and we request an urgent update on the status of this review.

Finally, the Commissioner again wishes to remind the Department of the importance of including the legislative proposals resulting from Sir John Gillen’s Review in the next stages of this process.

1. 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> [↑](#footnote-ref-1)
2. 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/ [↑](#footnote-ref-2)
3. 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/ [↑](#footnote-ref-3)
4. 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, para 12(b).

   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 83. [↑](#footnote-ref-4)
5. https://www.coe.int/en/web/children/lanzarote-convention [↑](#footnote-ref-5)
6. 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> [↑](#footnote-ref-6)
7. Committee on the Rights of the Child (2016) General Comment 20: On the implementation of the rights of the child during adolescence, para 19. [↑](#footnote-ref-7)
8. DoH (2017) Co-operating to Safeguard Children in Northern Ireland, section 7.2.7. Available at:

   <https://www.health-ni.gov.uk/publications/co-operating-safeguard-children-and-young-people-northern-ireland> [↑](#footnote-ref-8)
9. Beckett H. and Walker J. (2017) Words Matter: Reconceptualising the conceptualisation of child sexual exploitation in (eds) Beckett H. and Pearce J. (2017) Understanding and Responding to Child Sexual Exploitation. London: Routledge. [↑](#footnote-ref-9)
10. Beckett H., Holmes D., and Walker J. (2017) Definition and Guide for professionals: Extended Text, University of Bedfordshire. Available at:

    <https://www.beds.ac.uk/ic/publications> [↑](#footnote-ref-10)
11. 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, para 27. [↑](#footnote-ref-11)
12. AB v Her Majesty’s Advocate (Scotland) [2017] UKSC 25. [↑](#footnote-ref-12)
13. https://www.nspcc.org.uk/what-we-do/news-opinion/abuse-of-position-of-trust/ [↑](#footnote-ref-13)
14. https://www.iicsa.org.uk/ [↑](#footnote-ref-14)
15. <https://www.dcya.gov.ie/docs/EN/Press-Releases-copy-dcya-gov-ie-2019/81/5071.htm>

    <https://www.thejournal.ie/scouting-ireland-abuse-cases-4351408-Nov2018/> [↑](#footnote-ref-15)
16. https://www.coe.int/en/web/children/lanzarote-convention [↑](#footnote-ref-16)
17. 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. [↑](#footnote-ref-17)
18. Committee of Justice (2016) Justice in the 21st Century (NIA313/11-16). Available at:

    http://www.niassembly.gov.uk/assembly-business/committees/2016-2017/justice-2/reports/ [↑](#footnote-ref-18)
19. https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media [↑](#footnote-ref-19)
20. https://news.npcc.police.uk/releases/police-responding-proportionately-to-rising-number-of-sexting-incidents [↑](#footnote-ref-20)
21. Committee on the Rights of the Child (2014) General Day of Discussion on children’s rights and digital media, para 105(g). Available at:

    <https://www.ohchr.org/en/hrbodies/crc/pages/discussion2014.aspx>) [↑](#footnote-ref-21)
22. 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 47(a). [↑](#footnote-ref-22)
23. See Article 28(g), https://www.coe.int/en/web/children/lanzarote-convention [↑](#footnote-ref-23)