

**Consultation on proposals for a draft Sexual  
Offences  
(Northern Ireland) Order 2007**

**Statement containing a summary of representations**

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draft Sexual Offences Order (Northern Ireland) Order 2007**

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## 1. Introduction

1.1 Consultation on a proposed draft Sexual Offences (Northern Ireland) Order (“the draft Order”) began on 20 November 2007 and lasted until 5 February 2008. A total of 369 responses were received on the draft Order. This included responses from 29 organisations, political parties and elected representatives, in addition to a response in the form of a report from the Northern Ireland Assembly. However, a majority of responses received (340) were from individuals responding in a personal capacity and focused on the reduction in the so called ‘age of consent’ from 17 to 16 years of age.

1.2 This statement summarises the *main* points raised by respondents along the following key themes:

- Equality screening and consultation with children
- The age limit for the offence of sexual activity with a child – the ‘age of consent’
- The age limit for the offences of rape/assault of a child where consent is not an issue
- Protection for those providing advice to young people on sexual health matters and the duty to report
- Breach of rights of a child to a private life
- The defence of mistaken belief in age
- Positions of trust
- Prosecution protocols/guidance.

1.3 There were other matters raised by individual respondents, mostly on matters of detail relating to the operation of the law and the constitution of the various offences. In some cases we have responded to individuals directly about these issues which were not picked up in a thematic way; in other cases they were only raised by one person or organization and did not represent a widely held view. A list of these other issues is given at **annex A**.

1.4 A list of respondent organisations, political parties and elected representatives is included at **annex B**. The names of individual respondents have not been included. This document does not include the detail of the recommendations made by the Northern Ireland Assembly, as that report is available separately and is laid along with the draft Order. However, the list of their recommendations is included in section 8. They have recommended change in many of the same areas as picked up in this report, apart from two issues which are dealt with in that same section.

### Overall response

1.5 Contrary to the impression given by the debate on the ‘age of consent’ issue, there has been, from a vast majority of perspectives, a largely supportive response to the proposed legislative framework. Not only did the Northern Ireland Assembly document their support for the sweep of the legislation and the codification of the law within a single statute, they also welcomed the increased tariffs and the move to gender neutrality. The Northern Ireland Commissioner for Children and Young People commended the Minister on bringing forward proposals to reform the law and broadly welcomed the detailed proposals. The PSNI welcomed the contents of the Order and found it reassuring. The Western Health and Social Care Trust particularly welcomed the fact that children and young people are at the centre of the proposals and that perpetrators of child sexual abuse will be appropriately punished. The NSPCC and Barnardos were also generally supportive, and Sinn Fein said it contained many welcome provisions. Both Brook and the Family Planning Association welcomed the review of the legislation and many of the changes relating to children. Many more made similar supportive comments.

1.6 It is within this context of overall support for the aims and objectives of the proposals, and for the resulting legislative framework, that we have had to engage with a small number of concerns, in the main relating to the constitution of the cohort of offences against children and young people, including concerns raised by the NI Assembly and other respondents on the

proposal to make the strict liability offence of sexual activity with a child apply only to those under the age of 16.

## **2. Representations made about equality screening and consultation with children**

2.1 Of the 369 responses received, three (0.8%) expressed concern about the conclusions reached following screening of the policy review under section 75. In particular, the decision that a full equality impact assessment of the review of the law on sexual offences in Northern Ireland was not necessary. These respondents considered that certain proposed changes had the potential to lead to adverse impact on grounds of age, for example the proposal that the issue of consent will not apply to the offence of rape only where the victim is under the age of 13.

2.2 One respondent organisation expressed concern that the draft Order would breach children and young people's rights under the Human Rights Act. This body referenced the work of the Joint Human Rights Committee in Westminster, which expressed concern about clauses similar to those in the draft Order in the Sexual Offences Act 2003. It advised that the Committee identified a breach of Article 8.2 of the Human Rights Convention, the right to 'private life' and expressed concern that there were insufficient safeguards against violation.

2.3 The lack of any consultation directly with children and young people during the review, along with the need to produce an easy read version of the guide to the legislation, were also highlighted.

### **RESPONSE**

2.4 We fully acknowledge and welcome the responses made to the consultation, recognising the suggested positive and negative impacts the proposals may have on different groups. Of particular note were the very diverse and conflicting opinions in relation to the impact of some of the proposed changes highlighted by the review, particularly the proposal to

replace the current offence of unlawful carnal knowledge with a girl under 17 with an offence of sexual activity with a child under 16.

2.5 While taking due cognisance of these differing views, we remain committed to discharge our responsibility to ensure, as far as possible, that the criminal law does not create an adverse impact on any of the groups listed in section 75, unless it is a proportionate response to criminal behaviour and necessary for the fair and just implementation of the law, either to protect the public in general or a particular group who are specifically at risk from the criminal actions of others.

2.6 Our position has followed closely the policy objectives of the Sexual Offences Act 2003, some of which is already law in Northern Ireland. In turn this statute was based on a fundamental review of the law in England and Wales which recommended a new legislative framework that would create clear and coherent offences in order to protect individuals, particularly children and the more vulnerable, from abuse and exploitation, enable abusers to be punished and be fair and non-discriminatory in accordance with the ECHR and Human Rights Act. Protection, fairness and justice were the three key themes which underpinned the work of the review in England and Wales and led to the current body of law. The review of policy in Northern Ireland took as its cornerstone the principles and findings of the review in England and Wales and the subsequent decisions of the Westminster Parliament which gave us the Sexual Offences Act 2003.

2.7 As a result, we asked the people of Northern Ireland to look at the legislative framework which was already tried and tested in England and Wales, and to let us know if there were reasons specific to this part of the UK which would require a different approach. Given that the criminal justice systems in both jurisdictions are essentially the same, and have many overlapping laws, we needed to see specific evidenced-based reasons for delivering an alternative approach. We were also conscious of our commitment to Section 75 principles and statutory obligations to promote equality of opportunity and good relations. Indeed, one of the reasons for

adopting this approach was to put in place in Northern Ireland a body of law which had already passed the test of fairness and justice and had been subjected to human rights scrutiny. This was evidenced by the period of time that elapsed after the introduction of the Sexual Offences Act before embarking on reform of the law here. We were then able to take account of the outcome of the Home Office review of the legislation after 3 years.

2.8 In short, over the last five years, through successive phases of implementation, we have continued to mainstream our responsibilities under section 75 into policy development, so as to ensure that we were not subjecting any groups to unfair treatment or to inadequate protection from sexual crime. At the same time, along with a duty to promote equality of opportunity, we have an equal duty to ensure that the criminal law only penalizes those who are guilty of criminal behaviour and that a number of lines had to be drawn at the best possible level to ensure this was the result.

2.9 We acknowledge that specific concerns have been raised in relation to the promotion of equality of opportunity on grounds of age, particularly over the age bar for the offence of rape of a child under 13 (where there is no requirement to consider consent). There are, however, similar differences in the law as it is presently constituted, where unlawful carnal knowledge of a girl under 14 attracts a maximum penalty of life imprisonment but the same offence in relation to a girl under 17 has a maximum sentence of 2 years. Although not constituted as statutory rape, the lengthy sentence for the younger age group reflects the irrelevance of any consent to the act given by the younger child. This same objective underpins the new offences of rape of a child under 13 (maximum life) and sexual activity with a child under 16 (maximum 14 years). However, in order to ensure that the law does not have an adverse impact, particularly on young males, there has to be a recognition that young people aged 13 to 15, typically beyond the age of puberty, may have a better awareness of their sexuality and the act to which they are consenting. To ignore this increasing awareness and growing sexual maturity could result in massive miscarriages of justice if a young person was found guilty of rape when the 15 year old in question had in fact consented and had

a capacity to understand what that consent meant. Similarly, the presence of a defence to allow a defendant to show that there had been a mistaken belief that the other person was 16 is there to meet the objective of justice and fairness. It should always be remembered that any defence must be good enough to persuade a jury beyond reasonable doubt that the person had reasonably made a genuine mistake.

2.10 It should be apparent that our approach throughout has always been to meet the protection agenda whilst maintaining justice and fairness for all, and mindful of section 75 duties in particular. The law cannot be allowed to meet only one of these objectives at the expense of the other, the principle of equity demands that both are given due consideration and regard. This has been our overall aim.

2.11 Against these priorities, we have been keen to engage with the concerns expressed by various respondents and to look again at our underlying policy objectives. We have carefully considered the various responses, held a round table discussion focusing on child protection issues and questions surrounding implementation, and we have met with the Children's Law Centre, who expressed greatest concern over section 75 and equality of opportunity issues relating to children. All the concerns expressed by all consultees are understandable. However, it would be an impossibility to accommodate all competing concerns, many of which are diametrically opposed. Instead we must accept the need to change and to harmonise with equivalent legislation across the UK. Hence there is a need to review the proposed legislative framework in a holistic manner, to ensure the criminal law in this regard is fit for purpose - to protect against unacceptable sexual behaviour, punish appropriately those who offend against the code, whilst making sure that fairness and justice have their place. There has also been the underlying objective to ensure that all fully consensual activity between adults should not attract opprobrium, whatever the sexual orientation and gender of the individuals. In this regard, the proposals fully meet the principles enshrined in section 75.

2.12 Other actions taken to ensure that we achieve equality of opportunity include plans to engage directly with young people to discuss with them the impact of the proposals, and to ensure that implementation of the new law takes into account their point of view. Also, we intend to publish easily understood information about the new legislative framework as it affects young people. Indeed a first draft of an easy read version was circulated to all those involved in the round table discussion in March. As a result, more work is needed before it is ready for publication.

2.13 We will also publish on the NIO website copies of any screening exercises carried out on the review of the law on sexual offences in Northern Ireland and the proposals for new legislation. On the basis of these detailed screening exercises, the fundamental nature of the policy being screened, the extensive public consultations already undertaken, the prior review of legislation in England and Wales and its current implementation, and more generally for the various reasons set out above, we have concluded that we have met our statutory obligations under section 75 and that further assessment of the policy's impact on the promotion of equality of opportunity is not required.

### **3. Representations made about the age limit for the offence of sexual activity with a child - the 'age of consent'**

3.1 The issue of equalising with the rest of the UK the age at which young people's consent to sexual activity is recognized as legally valid, thereby decriminalising having sexual activity with a young person of that age, was the single biggest issue raised by a majority of respondents. As already stated, 340 individuals wrote to voice concern at the proposed change. Of the 29 responses from organizations, 7 specifically supported a change and 6 did not. Those who opposed the proposed change from 17 to 16 did so on the grounds that such a change would:

- Reduce the level of protection the law afforded to children;
- Send out a dangerous permissive signal to teenagers;
- Seek to fix something which was not considered broken and for which there was no public appetite for change.

#### Reduce the level of protection the law afforded to children

3.2 In the various submissions made we were advised that if the 'age of consent' was lowered to 16 there were fears that, in practice, older teenagers who manipulated 14 and 15 year olds into sexual activity would not face prosecution because of the fact that their 'victims' were just slightly below the age when to give consent was deemed a legally valid decision. A lower 'age of consent' would also mean that 16 year old teenagers would be exposed to predatory advances and would not receive protection from the law on a strict liability point, i.e. there would need to be additional factors present other than the act itself for an offence to have taken place. There were concerns that this would apply even below 16 when the practical enforcement of the law was taken into account. Framing offences against children under 16 would expose 26,000 young people to the legal, but potentially predatory, advances of adults. A lower 'age of consent' would provide encouragement to both paedophiles and adolescents living in the Republic of Ireland to cross the border and engage in sexual activity with younger children.

### Send out a dangerous permissive signal to teenagers

3.3 The proposals would send out completely the wrong signal by saying that sex is normal at a younger age. Respondents considered that this would lead to an increase in teenage pregnancies, sexually transmitted infections, including HIV.

### Seek to fix something which was not considered broken and for which there was no public appetite for change

3.4 The current age of 17 was considered to be working and the onus was on those who sought to bring about change to provide a compelling case for doing so. It was not considered in the public interest to proceed with the proposed change at this time.

### In support of change

3.5 However, a number of organizations, including the major children's organisations, those who engage with young people on sexual health matters and criminal justice agencies, supported the proposed change, welcoming parity with the rest of the UK. The view was expressed that there was no evidence to suggest that setting the bar at 16 for the offences of sexual activity with a child, which would decriminalise consensual sexual activity, except in certain circumstances, involving young people over 16, is likely to lead to more pressure on young people to begin having sexual activity earlier. It was suggested that research has found that the strongest factors influencing the age at which young people begin sexual activity are their socio-economic status, educational achievement, and the source of their sex education (with young people who cite friends as their main source of information being more likely to have early sexual intercourse).

3.6 We were also advised more generally that criminalization of young people who engage in sexual activity will have the effect of making children feel that their sexual development and behaviour is a negative thing and will make them feel guilty and furtive about sex, which could have a detrimental effect on their psychological development.

3.7 The need for a comprehensive education campaign about the changes in the law and, in particular, what is meant by the 'age of consent', was emphasised by a number of respondents.

## **RESPONSE**

3.8 Our response hinges on the belief that a case for a change in the law to strengthen the statutory framework and modernise out of date and anachronistic offences has been made. The fundamental policy considerations underpinning these changes were made in the original review of sexual offences carried out by the Home Office and the subsequent Sexual Offences Act, passed by Parliament in 2003. The Northern Ireland public were invited to engage with these policy basics in the consultation document on reform of the law on sexual offences in Northern Ireland, published in July 2006. As a result of this consultation, there were a range of opinions on various matters, but a general welcome and support for the overall statutory framework being proposed.

3.9 These proposals have resulted, amongst other things, in a new range of offences to protect children against sexual abuse. The framework designed to achieve this strengthened protection is holistic in nature and must be judged in that context. There are new offences to protect younger children under 13 from sexual abuse, particularly a new offence of rape of a child under 13 which does not require an absence of consent to be proved. For children under the age of 18, there are familial child sex offences, offences relating to the abuse of a position of trust and offences of abuse through prostitution or pornography. It is also a generic strict liability offence to have any sexual activity with a child under the age of 16. All of these offences are designed to protect the most vulnerable in society from sexual exploitation and abuse. None are designed to criminalise young people who engage, whether rightly or wrongly, on personal, moral or other grounds, in fully consensual sexual activity.

3.10 The Government considers that the proposed new statutory framework setting out the boundaries of legitimate sexual behaviour and promoting protection for vulnerable groups requires that the strict liability offence of sexual activity with a child is set to apply to those under the age of 16. In cases where the young person is aged 16 or 17, other offences are available to deal with circumstances where there is evidence of abuse or exploitation, such as abuse of a position of trust, familial sex offences and abuse through prostitution and pornography. That is the basis on which the offence was introduced for England and Wales, the age is similar in Scotland, and we see no evidence to suggest that children and young people should have different arrangements in Northern Ireland.

#### **4. Representations made about the age limit for the offences of rape/assault of a child where consent is not an issue**

4.1 There was strong support for the principle of framing rape and assault offences against children below a certain age where absence of consent did not have to be proved before the offence was committed. However, a number of respondents considered the proposed age threshold of 13 to be too low, preferring instead the age of 14. The reasons expressed for a preference for 14 were either that age 14 was considered more appropriate from the viewpoint of a child's development and capacity to understand the nature of sexual activity, or continued adherence to current established child protection policy and procedures, where cases involving children under the age of 14 were subject to more onerous investigation than for those over 14.

4.2 One respondent organisation recognised that the younger the young person was the greater would be the concern to ensure that sexual activity was not abusive or exploitative. However, they expressed concern that setting a minimum age at 13 below which the law states a child does not have any capacity to consent could deter young people under that age, who are often the most vulnerable, from seeking help for fear of being reported to the police or child protection services.

#### **RESPONSE**

4.3 Our policy position is based directly on the position taken in the passage of the Sexual Offences Act through Parliament, where the age was debated and the Government position remained that it would be wrong for the criminal law to penalise consensual sexual activity with all 13 year olds as rape or sexual assault. It was considered wrong to not differentiate in these circumstances between consensual sex, still unlawful but with a lesser maximum penalty, especially for someone under the age of 18, and non consensual sex, which would be charged as rape but would require the issue of consent to be tested in court. The tenet of the argument is that the issue of consent is not irrelevant in all cases involving 13 year olds and that there can

be a difference in justice terms between having sex illegally with a 13 year old and committing the offence of rape.

4.4 We heard at the round table discussion that an argument for raising the age is not, however, borne out of how the criminal law would impact on those convicted of such crimes, but out of the application of current child protection policies, where a differentiation is made currently between procedures in relation to under 14s and under 17s. This differentiation in turn takes its position from the current law where there is a different penalty for sex with a girl under 14 (life maximum) than for a girl under 17 (2 years maximum).

4.5 However, there is no overwhelming reason why the procedures should have to be tied to the criminal law to this extent. They need to reflect the fact that it is a *criminal offence* of strict liability to engage in sexual activity with *anyone under the so-called 'age of consent'* – the fact that there will be stiffer penalties for offences committed against under 13s (as there are now for offences committed against girls under 14) does not make it essential that the procedures for protecting those children need to be different than for those under 14. In other words there is nothing to stop the current age differentials for child protection purposes remaining as they are now, even with the proposed changes to the criminal law.

## **5. Representations made about protection for those providing advice to young people on sexual health matters and the duty to report**

5.1 Respondents welcomed the recognition in the draft Order of the importance of professionals working in sexual health services not being subject to prosecution if they provide services to young people. However, there was some confusion among professionals as to how this protection related to the obligation to report criminal activity.

5.2 The view was expressed that requiring professionals to report sexually active young people to the police or other authorities removes young peoples' rights to confidential services. It was considered that young people would not access services if they feared their confidentiality would be breached. Respondents considered it imperative that young people, including those under 13, were able to access confidential services to enable them to protect their sexual health.

5.3 The need for very clear guidance and protocols between the police, prosecution service, and area child protection committees to ensure cases receive an appropriate response was highlighted. Any *investigation* into teenage sexual activity was liable to lead to much anxiety even if no prosecution ensued. One respondent organisation expressed concern that a blanket offence prohibiting any consensual activity among teenagers under the proposed new definition of 'sexual touching' was highly impracticable and totally unenforceable.

5.4 One faith based respondent organisation called for the retention of the duty to report under section 5 of the Criminal Law Act 1967 as a guarantor of reporting of alleged or actual abuse to the police. All other respondents, who commented on this issue, called for its repeal or disapplication to consensual activity between young people under 18. Concern was expressed that to retain the duty to report in such circumstances may compel a police investigation of matters that would not be prosecuted by reason of guidance to prosecutors.

## RESPONSE

5.5 There has been much discussion about whether or not there is a need to retain the mandatory reporting requirement under section 5 of the Criminal Law Act (NI) 1967 as it applies to the offence of sexual activity with a child under 16 committed by someone under 18 (Article 20 of the proposed draft Order). As a result of the responses to the consultation, and the view expressed by the Assembly Committee, we have looked again to see if the benefits of disapplying the provision outweigh any disadvantage.

5.6 The NSPCC provided evidence, based on the findings of dedicated research, that section 5 was not needed to protect children, particularly from peer sexual activity. This research looked at local, national and international arrangements for the mandatory reporting of child abuse and the implications for NI. Crucially, it recommended the repeal of section 5 as it relates to child protection interfaces. Instead, it advocated:

- strengthening information sharing protocols and clarifying reporting processes for different professional groups, and opening a debate about how best to balance confidentiality and protection to more effectively meet the needs of children and young people;
- continued education and training in order to tackle non-reporting amongst professionals coupled with increased public awareness raising, regardless of the reporting system in operation.

5.7 At present there is a statutory requirement under section 5 of the Criminal Law Act (NI) 1967 which places a duty on everyone who knows or believes that a 'relevant' offence has been committed (i.e. one for which the maximum penalty is 5 years or more) and has information which might help to find and/or prosecute the offender, to give that information to the police. If the person doesn't, and doesn't have a reasonable excuse why not, penalties up to 10 years can be awarded. This provision would attach to *all* sexual activity involving children under the age of 16. However, in light of the views

expressed in this consultation and by the Assembly, we have explored the possibility of disapplying the section 5 provision to Article 20 of the proposed Order. This means there would no longer be a statutory reporting requirement for cases of sexual activity under 16 if the other party was under 18, unless of course there was evidence of exploitation, abuse etc where other offences might be more appropriate, e.g. where there was a chance that the activity was not fully consensual or where there was a familial connection. And if there is a doubt about the circumstances of the activity and where there is a belief that exploitation and abuse is present, then the section 5 requirement is still valid because the non consensual offences might be more relevant and they are still subject to the statutory requirement to report information to the police.

5.8 We therefore put forward the view that the application of section 5 should be removed from the offence at Article 20 of the proposed draft Order (sexual offences against children committed by children or young persons) to ensure that young people are not inappropriately penalised *for consensual and non-abusing sexual activity*. This action would be taken on the basis that current child protection policies spearheaded by DHSSPS do not rely on the existence of section 5, and that such a course will not have a detrimental effect on such policies. We also know that there is a low rate of convictions for the offence of non reporting and that most, if not all, of these convictions are likely to have been outside the sexual offence category.

5.9 We also believe that child protection polices and inter agency procedures should operate without the need to invoke section 5 of the CLA.

5.10 As a consequence, an amendment to section 5 of the Criminal Law Act 1967 has been added in Article 79 of the draft Order to remove the application of section 5 from offences committed against young people by children or young persons. However, because of concerns expressed by the Department of Health, Social Services and Public Safety that the provision should remain in place to underpin and reinforce the arrangements for reporting possible

incidents of child sexual abuse, the provision will not be commenced until new safeguarding legislation is enacted, planned for 2009.

## **6. Representations made about the introduction of a defence of mistaken belief in age**

6.1 Two respondent organizations, and the NI Assembly, expressed opposition to the introduction of a defence of mistaken belief in age for a number of offences against children under 16 but over 13, particularly those arising from commercial sexual exploitation.

### **RESPONSE**

6.2 The aim of this proposal is to allow a defendant to prove that, even though the child was of an age which made the activity a criminal offence, the defendant genuinely believed him or her to be over the upper age threshold for the offence. In relation to all of these offences, the defence will not be available where the child was aged under 13 at the time of the alleged offence.

6.3 Existing law in Northern Ireland does not provide a mistaken belief in age defence. The Sexual Offences Act 2003 in England and Wales introduced such a defence which replaced a limited defence in defined circumstances in relation to unlawful sexual intercourse between a man aged under 24 and a girl under 16. The law needed to be gender-neutral so that the defence applies equally to defendants of either sex in relation to the unlawful sexual activity with a child of either sex.

6.4 The defence would mean that, where it is proven that the defendant engaged in unlawful sexual intercourse with a child aged 13 or over but under 16 or 18, as stipulated in the criminal offence, in circumstances where the defendant held an honest and reasonable mistaken belief that the child was aged 16/18 or over, the case would result in an acquittal.

6.5 One of the key themes underpinning this change and the other proposals was that the law must be fair to both victims and defendants. Sex offences are very serious crimes and the penalties are severe. The law

therefore owes a duty to defendants to allow them to put forward all reasonable defences in mitigation of their apparent disregard for the criminal law.

6.6 The outward appearance and perceived maturity of children, especially girls, varies enormously and it is not uncommon for mistakes to be made about their age. Whilst it is not unreasonable for the law to expect someone to make certain of the age of a potential partner before engaging in sexual activity, it must nevertheless recognise that there may be circumstances in which someone can be genuinely mistaken about a child's age. Examples could include cases where a young person has used fake ID to gain access to a club that only admits people over 16; or indeed over 18, where the child is in a pub late at night, drinking and smoking; where the child claims to be over 16/18 and his or her conversation and behaviour clearly gives that impression; or where a child lies about their age and gives false and misleading information about their social activities in electronic conversations over the internet.

6.7 However, the policy aim is to restrict the mistaken belief in age defence only to those cases where the victim is over 13. The intention is for the criminal law to provide the maximum protection for children under 13.

## **7. Representations made about positions of trust**

7.1 One respondent expressed support for the position put forward previously by the NSPCC and Barnardo's to the Assembly Committee on the draft Order, which also backed this change, for the extension of positions of trust to include sports coaches. Another respondent organisation wished to see positions of trust widened to include non statutory positions, including sports coaches and faith based organisations, and aligned to other legislation such as the Protection of Children and Vulnerable Adults (NI) Order 2003.

### **Response**

7.2 The motivation for the abuse of trust offence is the need to protect young people aged 16 and 17 who, even though they are over the age of consent for sexual activity, are considered to be vulnerable to sexual abuse and exploitation from any person who holds a position of trust or authority in relation to them and thereby has a considerable amount of power and influence in their lives. The policy justification for the abuse of trust offence is the additional protection needed for children in circumstances where they are likely to be alone with an adult over a significant period of time during which that adult could abuse their position of power and authority to secure sexual activity - the definition of "looks after" in the offence being that a person is "regularly involved in caring for, training, supervising or being in sole charge of". The situations that are included in legislation are therefore all ones in which an adult has a particularly powerful role in relation to the care and control of the child.

7.3 The offence covers three main categories of children and young people: (i) those in residential settings away from parental support, on the grounds of their particular vulnerability; (ii) those in full time education, where the relationship of trust is particularly strong; (iii) young people in the criminal justice system under an order of the court. Thus it currently covers custodial or residential care settings, medical institutions and situations in which a child is being supervised or trained in an educational or training establishment.

7.4 In early 2005, the Department of Culture, Media and Sport undertook a separate consultation on the scope and implementation of the Sexual Offences Act in relation to sports coaches. Following analysis of the responses and follow up meetings with the sports National Governing Bodies, the joint conclusion of DCMS and Home Office officials was that there was insufficient evidence to warrant extending the legislation to sports coaches.

7.5 However, given that the Assembly has recommended this change for Northern Ireland, we would suggest that a similar consultation exercise is undertaken in Northern Ireland. We will invite the Department for Culture, Arts and Leisure to engage with the sports bodies with a view to advising on whether the offences should extend to sports coaches. If there is support for such a change this can be done by adding a further position of trust to Article 28 of the draft Order at a later date by order of the Secretary of State. However, any change needs to be subject to further debate and could not happen within the context of the current legislation.

## **8. The NI Assembly recommendations**

8.1 As mentioned in the introduction, this document does not include the detail of the recommendations made by the Northern Ireland Assembly, as that report is available separately and is laid along with the draft Order. However, for completeness we have included the list of their recommendations. They have recommended change in many of the same areas as picked up in this report, apart from two issues which are dealt with in this section.

### List of recommendations

- The Committee believes that in general terms the sweep of the legislation is sound and that it is the right approach to take, with the exception of the age of consent issue. Because of our view on the age of consent, we would wish to see the special regime applying to 13 – 17 year olds.(para 28)
- The Committee welcomes the codification of the law on sexual offences within a single statute and we welcome increased tariffs for offences, and the move to gender-neutral offences.(para 29)
- The Committee welcomes the removal of consent as a defence for sexual activity with a child under 13 and the fact that this now will be regarded as rape.(para 30)
- The Committee is averse to the proposed defence of reasonable belief where a child is between the ages of 13 and 18.(para 31)
- We welcome the fact that the Order brings clarity to the law on rape, and has an in-built presumption that if violence is used, or if an overpowering drug is administered, that the presumption will be that a rape and not a consensual act has occurred.(para 32)
- We believe that there is merit in the development of prosecution protocols so that effective guidance is provided to the Public Prosecution Service.(para 33)
- Prosecution protocols should also provide a role for diversionary youth conferencing arrangements.(para 34)

- The Committee was persuaded by arguments in favour of equalising the penalties for causing or inciting abuse of a child through prostitution and paying for the sexual services of a child, and strongly recommends that the draft Order be amended to reflect this.(para 35)
- An offence of advertising for sexual activity in a public lavatory should form part of this Order.(para 36)
- The Committee is of the view that section 5 of the Criminal Law (Northern Ireland) Act 1967 should be amended to ensure that young people are not inappropriately penalised for consensual and non-abusing sexual activity.(para 37)
- We strongly recommend that the NIO, DHSSPS and key professionals and NGOs establish a forum to develop and take forward policies and practices in this area.(para 38)
- With regard to positions of trust referred to in the draft Order not including sports coaches, the Committee, while content to acknowledge the difficulties, would strongly urge the Minister to give further serious consideration to the inclusion of sports coaches within the legislation.(para 40)
- The majority view of the Committee is that the case for a change in the age of consent has not been made. It is the Committee's view that the burden of proof rests with those who seek change and not, as has been suggested, with those who oppose it.(para 49)
- The Committee strongly recommends that there be no change to the current age of consent of 17.(para 50)

8.2 It is welcome to see the extent of the support for the overall sweep of the legislation, and for particular specific provisions. We have addressed the concerns over a number of the recommendations for change in the body of this report, particularly on the 'age of consent' issue.

8.3 There are two additional recommendations, however, which have not been covered:

(i) Penalties for child prostitution offences

NI Assembly recommendation: The Committee was persuaded by arguments in favour of equalising the penalties for causing or inciting abuse of a child through prostitution and paying for the sexual services of a child, and strongly recommends that the draft Order be amended to reflect this. The perpetrators of both offences each bear a heavy burden of guilt and this should be recognised in the legislation. It is anomalous that a perpetrator of the latter offence could conceivably receive life imprisonment, whereas a person who controls the child might receive only 14 years.

## **Response**

8.4 Paying for the sexual services of a child only attracts a life sentence (i.e. a longer sentence than causing or inciting child prostitution) if the child is under 13 and penetrative activity was involved. Rape of a child under 13 and paying for the sexual services of a child under the age of 13 where this involves penetrative sexual activity are special cases (i.e. due to the age of the child and the fact that sex was penetrative).

8.5 An offender can be convicted of rape of a child under 13 regardless of the issue of consent or whether he believed the child was older than 13. It is logical, therefore, that a life sentence is available for an offender who pays for the sexual services of a child where this involves penetrative activity.

8.6 It is also the case that causing or inciting a child under the age of 13 to engage in sexual activity carries a life sentence if the activity was penetrative. So, a person who deliberately arranges paid sex with a 12 year old, where penetrative activity occurs, will be guilty of this offence and could face a possible life sentence on the same basis as the person who actually paid for

the sexual services of the 12 year old child and engaged in penetrative activity.

8.7 For the offence of causing or inciting child prostitution etc, the prosecution need do no more than show a person incited, unsuccessfully, the prostitution of a child under 18. However, where the incitement was successful and a child under 13 was abused as a result, then the offence of causing a child under 13 to engage in sexual activity would also apply, with a maximum life sentence where the activity was penetrative.

8.8 There is therefore no pressing need to change the penalty for causing or inciting child prostitution or pornography.

(ii) Advertising for sex in public toilets

Recommendation: Article 76 covers sexual activity in a public lavatory and does so using a modified definition of sexual activity. We believe that in light of evidence an offence of advertising for sexual activity in a public lavatory should form part of this Order.

## **Response**

8.9 It is our view that it is unnecessary to include in the proposed Order an offence of advertising, in public toilets, children for sex.

8.10 This activity is already captured in the proposed legislation within the offences contained at sections 38 (causing or inciting child prostitution/pornography), 39 (controlling a child prostitute) and 40 (arranging or facilitating child prostitution). The fact that a person placed such an advertisement would be evidence to support charges for one or other of these offences.

## **9. Representations made about prosecution protocols/guidance**

9.1 A theme which underpinned a number of responses to the consultation was the need for clear protocols between the police, the prosecution service and area child protection committees to ensure professionals involved in child protection had clarity and confidence in how cases involving children would be handled.

9.2 Respondents advised of the need for comprehensive guidance and public education about the new legislation. The potential conflict with the duty to report under section 5 of the Criminal Law Act 1967 and young people engaging in normative sexual developmental behaviour was considered the most significant issue needing addressed in guidance.

### **RESPONSE**

9.3 A round table discussion was held on 6 March which addressed action points relevant to child protection policies and procedures and prospective amendments and inter-agency understanding in relation to the level of mandate to report sexual activity and suspected abuse. There will also be further consultation on guidance to be issued prior to the enactment of the legislation.

**OTHER ISSUES RAISED IN INDIVIDUAL RESPONSES**

The definition of sexual assault in Article 7 does not allow for recklessness

Exposure should not require alarm or distress to be caused

Arranging or facilitating sexual offence against a child under 13

Kerb crawlers should be imprisoned

The offence of voyeurism should include certain acts in a public place

List of evidential presumptions in Article 9 should be amendable by order

There should be no irrebuttable presumptions

There needs to be a comprehensive consultation on prostitution

Sex in public toilets should not be a 'sexual' offence

Possession of indecent photographs of 16 and 17 year olds should not be an offence

There should be minimum terms for certain offences

There should be a definition of 'regularly' in Article 29

Clarification of non-blood siblings is needed in family relationships

Include in list of evidential presumptions in Article 9 that 13 to 16 year olds are taken not to have consented

There should be a statutory definition of capacity to consent

There should be a definition of mental disorder

Offences relating to prostitution should target demand not supply

## ANNEX B

### **LIST OF ORGANISATIONS, POLITICAL PARTIES OR POLITICAL REPRESENTATIVES WHO RESPONDED TO THE CONSULTATION ON THE PROPOSAL FOR A DRAFT SEXUAL OFFENCES (NORTHERN IRELAND) ORDER.**

Ards Borough Council

Jim Allister MEP

Ballymena Borough Council

Brook

Castlereagh Borough Council

Children's Law Centre

Christian Institute

Crown Court Judicial Committee

Down District Council

Family Planning Association

Arlene Foster MLA – Minister of the Environment

Free Presbyterian Church of Ulster – Government and Morals Committee

Lady Sylvia Hermon MP

Lisburn City Council

Love for Life

Newtownabbey Borough Council

Northern Ireland Association for the Care and Resettlement of Offenders

Northern Ireland Commissioner for Children and Young People

Northern Ireland Human Rights Commission

NSPCC

Police Federation for Northern Ireland

Police Service of Northern Ireland

Presbyterian Church in Ireland – Board of Social Witness

Probation Board for Northern Ireland

Public Prosecution Service Northern Ireland

Sinn Fein

Southern Health and Social Services Board  
Superintendents' Association of Northern Ireland  
Western Health and Social Care Trust