
Review of the Law on Child Sexual Exploitation

Consultation Response

Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
2. The Bar welcomes the Department of Justice's review of the current law relating to child sexual exploitation and sexual offences against children in Northern Ireland. We recognise that it meets a commitment by former Justice Ministers to consider a wide range of legislative issues arising from the Report of the Independent Inquiry on Child Sexual Exploitation in Northern Ireland from 2014 and the Assembly's Justice Committee Report on Justice in the 21st Century published in 2016.
3. However, we would also point to the relevance of a number of recommendations arising from Sir John Gillen's preliminary report into the law and procedure in serious sexual offences in Northern Ireland published in November 2018 which may be relevant to the scope of this review contained in Chapter 14 on 'the voice of the child' and do not appear to have been taken into consideration as part of this work. We would query whether the Department intends to undertake further work to reflect any of the specific recommendations of the Gillen Review in this area.
4. By way of background, since the publication of the Marshall Report in 2014 the Bar has undertaken a range of actions to address supporting recommendation 46 which called for awareness raising about the dynamics of child abuse and child sexual exploitation in particular to be made available for all legal personnel and should be mandatory for all legal professionals dealing with child abuse cases. The Bar has delivered a programme of specialist training targeting publicly funded barristers which includes child abuse and CSE as well as vulnerable witnesses, violence against women and court users with communications needs. Barristers are independent practitioners yet the Bar provides regular opportunities for members to attend continuing professional development sessions on discrete areas such as children's rights, child protection, child sexual exploitation and the dynamics of child sexual abuse.

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5. In addition, it is also worth noting that the Bar also provides training to practitioners in a range of formats as a support for practitioners. Beyond events, barristers can access resources such as 'Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court' from the Advocacy Training Council, which enables practitioners to engage in dedicated CPD on demand. The Bar has also developed a Vulnerable Witness CPD Resource Pack that highlights best practice training resources on handling vulnerable witnesses, including papers, presentations and podcasts, which practitioners can use to refine their witness handling skills. As highlighted by the recent Gillen Review, the Bar is committed to expanding the catalogue of such specialist CPD content to ensure those practising in the family and criminal courts have an enhanced awareness of child abuse and child sexual exploitation and domestic violence with input from expert organisations as required.

6. The Bar recognises that the current legislative framework in Northern Ireland provides for a range of sexual offences, including some offences which can only be committed against children and which are categorised according to the age of the victim under the Sexual Offences (Northern Ireland) Order 2008. The Bar concurs with the Department's assessment at paragraph 3.22 that the law relating to sexual exploitation and sexual offences is "generally robust and up to date". We welcome the identification of some areas in which the law could be further strengthened to protect children from CSE and sexual abuse. The Bar's response is limited to the proposals which are most relevant to the work of our members across the court system. Our submission also reflects the views of the Criminal Bar Association which represents the views of prosecuting and defence counsel, serving to ensure an independent and quality source of specialist criminal law advocacy in Northern Ireland.

- Do you agree or disagree with the proposal to remove legislative references to 'child prostitute', 'child prostitution' and 'child pornography' and replace these with the term 'sexual exploitation of children'? If you disagree, please explain why

- Do you agree or disagree with the proposed definition of 'sexual exploitation of children' as set out above? If you disagree, please explain why.

7. The Bar welcomes the intended aim which underpins the proposals at paragraph 4.2 to remove legislative references to 'child prostitution' and 'child pornography' in order to ensure that the language used allows for greater recognition of our developing understanding of CSE whilst also ensuring a safeguarding response to

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children as victims rather than criminals in this context. We note the comment at paragraph 4.4. that these terms should be replaced with the term 'sexual exploitation of children' to reflect recent legislative changes in England and Wales under Section 68 of the Serious Crime Act 2015. The Bar would caution that the use of this term may extend beyond the scope of 'child prostitution' and 'child pornography'. This could create the potential for unintended consequences in creating conflict between the definition in law and that contained in the guidance and procedures which reinforce the operational practices of criminal justice and safeguarding agencies.

- Do you agree or disagree with the proposal to amend the law to ensure that images that are streamed or otherwise transmitted are included for the purposes of the child prostitution and pornography offences? If you disagree, please explain why.

8. The Bar welcomes the proposal to clarify that images which are streamed or otherwise transmitted for the purposes of 'child prostitution' or 'child pornography' are included within these offences.

- Do you agree or disagree that the offence of grooming is adequate and appropriate? If you disagree, please explain why.
- Do you agree or disagree that no changes to this offence are required? If you disagree, please explain why.

9. The Bar notes that the offence of meeting a child following sexual grooming under Article 22 of the 2008 Order has been amended to lower the threshold and that Article 22A on an offence of sexual communication with a child has been introduced. The evidence provided at paragraph 4.17 in relation to prosecution decisions made by the PPS between 2015 and 2018 suggests that these offences are operating as intended and therefore we take the view that the current law contains adequate measures to combat grooming and allows for early police intervention.

- Do you agree or disagree with the proposal to change the burden of proof so that, if a defendant wishes to rely on a defence of reasonable belief, the onus would be on the defendant to prove that he or she reasonably believed that the child was over the age specified in the offence? If you disagree, please explain why.

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- Do you agree or disagree with the proposal that an individual with a previous conviction for a sexual offence against a child should not be allowed to use a defence of reasonable belief? If you disagree, please explain why.
- Do you agree or disagree with the proposal that an individual with a previous conviction for a relevant foreign offence against a child should not be allowed to use a defence of reasonable belief? If you disagree, please explain why.
- Do you agree or disagree with the proposal that an individual who is subject to a Risk of Sexual Harm Order should not be allowed to use a defence of reasonable belief? If you disagree, please explain why.
- Are there any other circumstances where you think individuals should not be able to use a defence of reasonable belief in relation to sexual offences against children? Please provide details.

10. The Bar notes the proposal to reverse the burden of proof in these cases and the ruling of the UK Supreme Court in *AB v HM's Advocate (Scotland)* [2017] UKSC 25 which found that similar reforms introduced under the Sexual Offences (Scotland) Act did not violate Article 6 of the ECHR as they did not create an irrebuttable presumption that the defendant lacked a reasonable belief in the victim's consent. We note the comment at 4.26 that it would still be up to the prosecution to prove each element of the relevant offence to the criminal standard, including the age of the victim. However, the consultation document contains no information on whether any potential change might impose a legal burden on an accused which could prevent a fair trial under Article 6 or whether the burden would be read down to be evidentiary only. Consequently, it will be necessary to carefully consider the implementation of any proposal to change the burden of proof in this type of case.

11. However, in broad terms we are concerned at the suggestion that it would be appropriate to introduce prohibitions on the use of certain defences by certain categories of person. The law as it presently exists allows for previous bad character, such as previous convictions, to be used in evidence to counter a defendant's claim, if it is relevant to a matter in issue and does not render the process unfair. The use of these bad character provisions is an existing proportionate measure which can be used to inform a jury as to the reasonableness or honesty of a belief which a defendant claims to hold. No

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evidence is provided in the consultation paper to suggest that these provisions are not operating effectively.

12. The Bar takes the view that the Department needs to undertake further exploratory work in this area before concluding that any change to the law is necessary. It is worth noting the Scottish Government has yet to respond to the substantive issue around prior charges in the case of *AB v HM's Advocate (Scotland)* [2017] UKSC 25. As stated at paragraph 4.29, the Supreme Court held that there was interference with Article 8 of the ECHR and that this was disproportionate because prior charges under Section 39(2)(a)(i) of the 2009 Act did not give the official warning or notice that consensual sexual activity with children between the ages of 13 and 16 was an offence. Therefore the prior charges failed to alert the person charged to the importance of a young person's age in relation to sexual behaviour, and so could not justify depriving that person, if later charged with a sexual offence against an older child of the reasonable belief defence.
13. The Bar is content to agree with the Department's conclusion at paragraph 4.31 that it would not be appropriate to include prior charges in any proposed legislative change. We note that instead it is suggested that an individual with a previous conviction for a sexual offence against a child should not be allowed to use a defence of reasonable belief. It would be helpful for the Department to provide further information around the convictions which would be considered relevant for the purpose of this as part of any future programme of work on this issue. However, the Bar remains concerned that any prohibition is unnecessary and would have the potential of creating injustice, depriving a defendant of a legitimate defence because of a previous conviction.

- Do you agree or disagree that the current law in relation to indecent images of children is appropriate? If you disagree, do you think that the law should not apply to children under 18 who share indecent images of themselves, or who share images of others unless done with malicious intent?

14. The Bar takes the view that the current law in relation to indecent images of children is generally appropriate. We recognise that this is a complex area of law and that cases must be treated sensitively with a focus on safeguarding to minimise the risks of criminalising children. There remains a need to be mindful of ensuring that young people who share images with malicious intent or to cause distress are appropriately responded to and that children are protected from being groomed into sharing images.

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15. However, we would highlight that there does appear to be an illogicality in regard to the distinction between the age of consent at 16 and the age for the purposes of the definition of indecent images of a child being under 18. Consequently, a 16 or 17-year-old can have sex but could not take a sexual photograph of themselves or share such a photograph. A 17-year-old male in a relationship with a 17-year-old female would be guilty of a criminal offence if in possession of a sexual photograph of his partner and vice versa. The reasoning behind this distinction appears to be unclear and the Bar takes the view that there should be consistency around the age relating to all forms of sexual conduct.
16. The Justice Committee's report on Justice in the 21st Century explored the concept of requiring the prosecution to prove a 'malicious intent' in this type of case involving children but we recognise that this presents a potentially difficult evidential hurdle for criminal justice agencies. We would query whether the Department examined the development of PPS guidance to provide further clarity on the public interest element of this, as was referenced in the Committee's report. Whilst we note that there is no intention to take this element forward under the present consultation, if it was to be pursued in the future the term 'malicious intent' might be better replaced with 'intent to cause distress' which is more familiar to juries.

- Do you agree or disagree that there is a need to change the law to make up-skirting a criminal offence? If you disagree, please explain why.
- If you agree that up-skirting should be a criminal offence, do you agree or disagree with our proposal to achieve this by amending the existing voyeurism offence as per the law in Scotland and expected changes to the law in England and Wales? If you disagree, please explain why.

17. The Bar agrees that there would be benefit in exploring the feasibility of evolving our current laws to include up-skirting as a distinct criminal offence. Care will need to be taken in drafting the definition and we note that the Department intends to make provision for a change in the law in this area by amending the existing voyeurism offence under Article 71 of the Sexual Offences (Northern Ireland) Order 2008 in line with the definition of up-skirting used in Scotland and England & Wales. Up-skirting became a criminal offence in England and Wales under the Voyeurism (Offences) Act 2019 in April 2019 and it will be useful to monitor the number of prosecutions taken forward and any future evaluation of its operation in this jurisdiction.