



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**NIHRC Response to Committee for Justice Call  
for Evidence on the Justice (Sexual Offences  
and Trafficking Victims) Bill**

**September 2021**

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## Summary of Recommendations

### **The NIHRC recommends:**

- **the Committee ensure the proposed legislation complies with human rights standards including recognition of gender-based violence, using the UN CEDAW, UN CAT and Istanbul Convention as a framework.**
- **that the Committee for Justice asks the Department to continue to monitor relevant EU Directives and relating CJEU jurisprudence to ensure there is no diminution of victims' rights in keeping with Article 2 of the Protocol.**
- **The NIHRC welcomes the creation of the offence of voyeurism in NI however, the Committee may wish to recommend as a minimum, equal protection for victims in NI to those in other UK jurisdictions.**
- **the Committee ensures that all recommendations of the review of the law on child sexual exploitation are implemented, as well as recommendations of the Criminal Justice Inspectorate NI report into child exploitation in NI, including developing an approach modelled on 'Barnahus' for children subjected to sexual violence.**
- **the Committee reconsider the proposed blanket approach to exclusion of the public from particular forms of criminal trials, rather than a case-by-case consideration of the merit of a closed hearing. The Commission recommends that the Committee consider the adoption of an individualised approach within a structured framework, which could include a judicial decision at the commencement of the trial. This should be accompanied by training for the judiciary on trauma-informed approaches and secondary victimisation.**
- **that the Department and Committee consider all recommendations of the Gillen Review and whether more can be included within the Bill.**
- **the Committee take into consideration the Criminal Justice Inspectorate NI report into modern slavery and human trafficking to ensure that provisions within the draft Bill meet the required recommendations.**

- **the Committee for Justice refer to the Commission's response to the consultation on 'Consent to Serious Harm for Sexual Gratification: Not a Defence' to ensure this is implemented in a way that is compliant with human rights law.**
- **the Bill includes an amendment to introduce provision for image based sexual abuse, including for the threat of publication. The proposed legislation should ensure comprehensive consideration of human rights obligations including the disproportionate impact on women and girls, and recognise image based sexual abuse as a new form of gender-based violence.**
- **that the Committee ensure that any new legislation regarding the abuse of trust extends the definition outlined at Article 18 of the Lanzarote Convention to include other relationships of trust, i.e., that it does not just apply to children in state care.**
- **the Committee ask the Minister to indicate what consideration is being given to the reversal of the burden of proof and if the Department proposes bringing forward the necessary legislative changes to address this in the future.**

## 1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(4) of the Northern Ireland Act 1998, shall advise the Assembly whether a Bill is compatible with human rights. Further, the Commission, pursuant to section 78A(6) of the Northern Ireland Act 1998, must advise the Assembly whether a Bill is compatible with Article 2(1) of the Ireland/Northern Ireland Protocol. In accordance with these functions, the following statutory advice is submitted to the Committee of Justice regarding the Justice (Sexual Offences and Trafficking Victims) Bill.

1.2 The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:

- European Convention on Human Rights (ECHR);<sup>1</sup>
- UN International Covenant on Civil and Political Rights (UN ICCPR);<sup>2</sup>
- UN Convention on Elimination of Discrimination against Women (UN CEDAW);<sup>3</sup>
- UN Convention against Torture (UN CAT);<sup>4</sup>
- UN Convention on the Rights of the Child (UN CRC);<sup>5</sup>
- European Convention on Compensation for Victims of Violent Crimes 1983;<sup>6</sup>
- European Convention on Cybercrime;<sup>7</sup>
- European Convention on Action against Trafficking in Human Beings;<sup>8</sup>
- European Convention on the Protection of Children and Young People against Sexual Exploitation and Sexual Abuse (Lanzarote Convention);<sup>9</sup>
- CoE Convention Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention);<sup>10</sup>

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<sup>1</sup> Ratified by the UK 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECtHR).

<sup>2</sup> Ratified by the UK 1966.

<sup>3</sup> Ratified by the UK 1986.

<sup>4</sup> Ratified by the UK 1988.

<sup>5</sup> Ratified by the UK 1989.

<sup>6</sup> Ratified by the UK in 1990.

<sup>7</sup> Ratified by the UK in 2011.

<sup>8</sup> Ratified by the UK in 2007.

<sup>9</sup> Ratified by the UK in 2018.

<sup>10</sup> Signed by the UK in 2012. The UK has not yet ratified this Convention but has committed to do so with the enactment of the Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017.

- EU Directive on combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography;<sup>11</sup>
- EU Directive on establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime (EU Victims Directive).<sup>12</sup>
- EU Directive on preventing and combatting trafficking in human beings and protecting its victims.<sup>13</sup>
- Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC Optional Protocol);<sup>14</sup>

1.3 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN CAT Committee Concluding Observations 2019;<sup>15</sup>
- UN CEDAW Committee Concluding Observations 2019;<sup>16</sup>
- UN CEDAW Committee General recommendation No. 35 on Gender-Based Violence against Women;<sup>17</sup>
- UN Declaration on the Elimination of Violence against Women;<sup>18</sup>
- CoE Committee of Ministers Recommendation concerning sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults;<sup>19</sup>
- CoE Parliamentary Assembly resolution on the sexual exploitation of children;<sup>20</sup>

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The UK Mission at Geneva has also stated, "the UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow-up with ratification in a short time thereafter". See UK Mission at Geneva, 'Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations Agreed in June 2008' (UKMIS), at recommendation 22 (France).

<sup>11</sup> EU Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

<sup>12</sup> EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

<sup>13</sup> EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims.

<sup>14</sup> Ratified by the UK in 2009.

<sup>15</sup> CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019.

<sup>16</sup> CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report', 8 March 2019.

<sup>17</sup> CEDAW/C/GC/35, 'UN CEDAW Committee General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19', July 2019.

<sup>18</sup> UN General Assembly, 'Declaration on the Elimination of Violence against Women', 20 December 1993.

<sup>19</sup> Recommendation Rec(91)11 of the Committee of Ministers to Member States concerning sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults, 9 September 1991.

<sup>20</sup> Doc/9535, 'Council of Europe Parliamentary Assembly, Resolution on the Sexual Exploitation of Children: Zero Tolerance', 5 September 2002.

- CoE Committee of Ministers Recommendation concerning the protection of children against sexual exploitation;<sup>21</sup>
- EU Agenda for the Rights of the Child 2011;<sup>22</sup>
- Resolution of the European Parliament on the 25th anniversary of the UN Convention on the Rights of the Child 2014.<sup>23</sup>

- 1.4 The Commission welcomes the Committee's request for advice in respect of its call for evidence on the Justice (Sexual Offences and Trafficking Victims) Bill. This submission will cover both the contents of the proposed Bill, as introduced, and a number of planned amendments on issues such as the abolition of the rough sex defence and provisions to widen the scope of protection around the law on abuse of trust.
- 1.5 The proposed Bill contains provisions to address some legislative gaps previously identified by the Commission. The Commission therefore welcomes provisions within the Bill to introduce legislation for offences of voyeurism, child sexual exploitation and the implementation of certain recommendations contained within the Gillen Review. The Commission also welcomes the Department's proposals for additional amendments to include legislation for the abolition of the rough sex defence, abuse of trust and image based sexual abuse. The Commission is, however, disappointed that further measures initially proposed for the Justice Bill have not been progressed, including for example issues relating to the retention of biometric data, reversal of the burden of proof in cases of sexual exploitation involving minors and the minimum age of criminal responsibility.
- 1.6 The Commission's submission highlights areas which it recommends the Committee should consider, to ensure full compliance with human rights standards. It also highlights a number of omissions and areas for further consideration.

## 2.0 Human Rights Standards

- 2.1 International human rights law places a number of specific positive obligations on the Northern Ireland (NI) Executive to safeguard the rights of individuals who have been a victim of serious sexual offences. There is

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<sup>21</sup> Recommendation Rec (2001)16 of the Committee of Ministers to Member States concerning the protection of children against sexual exploitation, 31 October 2001.

<sup>22</sup> COM(2011)60, 'EU Agenda for the Rights of the Child', 15 February 2011.

<sup>23</sup> RES 289/57, 'Resolution of the European Parliament on the 25th anniversary of the UN Convention on the Rights of the Child', 27 November 2014.

also a positive obligation on the State to ensure that an appropriate legal framework is in place to protect individuals from human rights abuses and violations.

- 2.2 Serious sexual offences engage a number of rights under the European Convention of Human Rights (ECHR): for example, Article 2 which protects the right to life; Article 3 which guarantees freedom from torture, inhuman and degrading treatment; and Article 8 which protects the right to a private and family life including bodily integrity.
- 2.3 The European Court of Human Rights (ECtHR) has held that the State has a responsibility to protect individuals from violence by third parties. This has been particularly true in cases involving victims of sexual violence. The ECtHR has provided that there are positive obligations under Article 2 ECHR to take appropriate steps to safeguard the lives of those within its jurisdiction to apply in the context of any activity, whether public or not, in which the right to life may be at stake.<sup>24</sup> This requires public authorities to take reasonable steps when they know of or ought to have known of real and immediate threats to life, including by a third party non-State actor.<sup>25</sup> Article 3 ECHR is absolute which requires that this right must never be interfered with under any circumstances.<sup>26</sup>
- 2.4 While there are often violations of Articles 2 and 3 ECHR in such cases, Article 8 ECHR is also engaged because violence threatens the bodily integrity aspect of the right to respect for private life.<sup>27</sup> Under Article 8 ECHR, States have a duty to protect the physical and moral integrity of an individual from other persons, which requires affording protection against acts of violence by private individuals.<sup>28</sup>
- 2.5 The ECtHR has provided that safeguarding physical integrity under Article 8 ECHR requires an effective criminal investigation.<sup>29</sup> Compliance with Article 8 ECHR in the sphere of protection against acts of individuals is within the State's margin of appreciation, yet effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal law provisions.<sup>30</sup>
- 2.6 In the ECtHR cases *M.A. v. Slovenia* and *N.D. v. Slovenia* the applicants

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<sup>24</sup> *Case of Centre for Legal Resources on Behalf of Valentin Campeanu v Romania* (2014) ECHR 14.

<sup>25</sup> *Osman v the United Kingdom* (1998) ECHR 101, at para 116.

<sup>26</sup> *Chahal v the United Kingdom* (1996) ECHR 413.

<sup>27</sup> *Milićević v Montenegro* (2018) ECHR 6; *ES. and Others v. Slovakia* (2009).

<sup>28</sup> *Sandra Janković v. Croatia* (2008) ECHR 24.

<sup>29</sup> *MC v Bulgaria* (2003) ECHR 646.

<sup>30</sup> *MC v Bulgaria* (2003) ECHR 646, at para 166.



complained that Slovenia had failed to provide an effective system of prosecution and trial against the men whom they had accused of rape, the related criminal proceedings having lasted some 26 years in the first case and over nine years in the second case. In both cases the Court held that there had been a procedural violation of Article 3 ECHR in regards to the criminal proceedings regarding the applicants' rape.

2.7 Specifically in the case of rape, the ECtHR has clarified that the State has a positive obligation under both Articles 3 and 8 ECHR to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.<sup>31</sup> For example, in *MC v Bulgaria* the applicant, who was a girl aged 14 (which was the age of consent for sexual intercourse in Bulgaria), was raped by two men. However, it could not be proved that she had resisted or called for help and the perpetrators were not prosecuted. The ECtHR considered that Bulgaria had not satisfied its positive obligation to effectively investigate, punish and prosecute the rape, finding a violation of both Article 3 ECHR and Article 8 ECHR. The ECtHR stated:

that any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy. In accordance with contemporary standards and trends in that area, the member States' positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.<sup>32</sup>

2.8 The ECtHR noted in particular that the universal trend was towards recognising lack of consent as the essential element in determining rape and sexual abuse. Victims of sexual abuse, especially young girls, often don't resist for psychological reasons (either submitting passively or dissociating themselves from the rape) or for fear of further violence. The ECtHR stressed that States had an obligation to prosecute any non-consensual sexual act, even where the victim had not resisted physically.<sup>33</sup>

2.9 Furthermore, in the recent case of *J.L. v Italy*, which concerned criminal

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<sup>31</sup> *MC v Bulgaria* (2003) ECHR 646.

<sup>32</sup> *MC v Bulgaria* (2003), ECHR 646 at para 166.

<sup>33</sup> *MC v Bulgaria* (2003), ECHR 646.

proceedings against seven men who had been charged but acquitted of the 'gang rape' of the applicant, the ECtHR held that there had been a violation of Article 8 ECHR, as the national authorities had not protected the applicant from secondary victimisation and had failed to do so throughout the entire criminal proceedings. The Court found that:

the language and arguments used by the court of appeal conveyed prejudices existing in Italian society regarding the role of women and were likely to be an obstacle to providing effective protection for the rights of victims of gender-based violence, in spite of a satisfactory legislative framework.<sup>34</sup>

2.10 The UN CAT Committee, in its 2019 Concluding Observations on the UK, raised concerns of sexual and gender-based violence and concerns about reports that within the UK, including NI, there are increasing numbers of domestic abuse crimes and sexual offences, mainly against women, being recorded and yet the prosecution and conviction rates in these cases remain low.<sup>35</sup> The Committee recommended the NI Executive:

take effective measures to address low prosecution and conviction rates for domestic abuse and sexual violence in the State party, and to ensure that all cases of gender-based violence, especially those involving actions or omissions by State authorities or other entities that engage the international responsibility of the State party under the Convention, are thoroughly investigated, that the alleged perpetrators are prosecuted and, if convicted, punished appropriately, and that the victims or their families receive redress, including adequate compensation.<sup>36</sup>

2.11 The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) provides a legal framework at pan-European level to protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence. It can also be used as an indicator of best practice and provide guidance on how to develop legislation in relation to sexual offences. Though signed, the UK has not yet ratified the Istanbul

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<sup>34</sup> J.L. v Italy, 5671/16 [2021], ECHR 169, 27 May 2021.

<sup>35</sup> CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019 at para 56.

<sup>36</sup> CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019 at para 56.

Convention. However, the UK Government has made it clear that it intends to ratify the Istanbul Convention and is currently in the process of addressing existing areas of non-compliance within its domestic legal frameworks.<sup>37</sup> Therefore, the Commission would highlight that the Department must be cognisant of the Istanbul Convention when bringing forward any new relevant legislation.

- 2.12 Relevant to the proposed Bill, Articles 35 and 36 of the Istanbul Convention ensure protection against physical violence and sexual violence, including rape. It provides that the state shall take the necessary legislative or other measures to ensure that the intentional conduct of committing acts of physical violence against another person is criminalised. Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.
- 2.13 Furthermore, Article 49 of the Istanbul Convention provides that the State should take the necessary legislative or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences established in accordance with this Convention. Article 54 of the Convention considers investigations and evidence and requires that state to take the necessary legislative or other measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary.
- 2.14 **The NIHRC recommends that the Committee ensure the proposed legislation complies with human rights standards including recognition of gender-based violence, using the UN CEDAW, UN CAT and Istanbul Convention as a framework.**

### **The Ireland/Northern Ireland Protocol**

- 2.15 Article 2 of the Ireland/Northern Ireland Protocol (the Protocol) requires the UK government to ensure no diminution of rights, safeguards and equality of opportunity, as set out in the Belfast (Good Friday) Agreement 1998, results from the UK's withdrawal from the EU. It further commits the UK government to keep pace with certain provisions of EU law

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<sup>37</sup> Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017; Home Office, 'Ratification of the CoE Convention on Combating Violence against Women and Girls and Domestic Violence (Istanbul Convention) – 2020 Report on Progress' (HO, 2020), at Annex A.

concerning non-discrimination, as listed in Annex 1 of the Protocol. This means that should the EU decide to amend or replace the substantive rights in the Annex 1 Directives to improve the minimum level of protections, those protections in NI will also be enhanced to reflect these improvements.<sup>38</sup>

- 2.16 There are additional EU laws and subsequent jurisprudence that are relevant to the Rights, Safeguards and Equality of Opportunity chapter of the Belfast Agreement, which is given effect in NI through retained EU law or domestic provisions. While the UK Government has said that it does not envisage any rollback of these provisions post-Brexit, it acknowledges that these fall within scope of the Government's no-diminution commitment under article 2.<sup>39</sup> Therefore, any future provision which falls below the standard of protections within the relevant EU laws and jurisprudence as they were on 31 December 2020, would breach article 2 of the Protocol.
- 2.17 Directive 2012/29/EU of the European Parliament and Council establishing minimum standards on the rights, support and protection of victims of crime, known as the Victims' Directive, falls within scope of Article 2 in relation to the no-diminution commitment.<sup>40</sup> The Victims' Directive reinforces existing national measures with minimum standards on the rights, support and protection of victims of crime in all EU countries. The Directive establishes the right for victims, including child victims, to have their case heard in court, review a decision by the state not to prosecute, have their expenses reimbursed, access legal aid and recover stolen property.<sup>41</sup> The Directive also requires that national authorities minimise the difficulties faced when a victim is a resident of an EU country which differs from where the offence was committed.<sup>42</sup>
- 2.18 The Victims' Directive refers to additional provisions of EU law such as Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims and Directive 2011/93/EU on combatting the sexual abuse and sexual exploitation of children and child

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<sup>38</sup> Northern Ireland Office, "Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland" (NIO, 2020), at para 12.

<sup>39</sup> Northern Ireland Office, "Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland" (NIO, 2020), at para 13.

<sup>40</sup> Northern Ireland Office, "Explainer: UK Government commitment to no diminution of rights, safeguards and equality of opportunity in Northern Ireland" (NIO, 2020), at para 13.

<sup>41</sup> Articles 10-15, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>42</sup> Articles 17, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

pornography.<sup>43</sup> The Trafficking Directive lays down the minimum common rules for determining human trafficking offences and punishing offenders, while providing for measures to better prevent human trafficking and strengthen protection for victims.<sup>44</sup> The Child Sexual Exploitation Directive aims to improve the protection of children for sexual abuse and exploitation by obliging EU countries to adopt prevention measure, protect child victims and investigate and prosecute offenders.<sup>45</sup> The Victims Directive will be interpreted in light of these additional Directives, therefore they should be considered as part of the framework that the Bill must comply with.

- 2.19 While currently no breach of the no-diminution requirement under Article 2 of the Protocol has been identified, close attention should be paid to the relevant Directives and related CJEU jurisprudence throughout the development and implementation of this legislation.
- 2.20 **The NIHRC recommends that the Committee for Justice asks the Department to continue to monitor relevant EU Directives and relating CJEU jurisprudence to ensure there is no diminution of victims' rights in keeping with Article 2 of the Protocol.**

## 3.0 Part 1: Sexual Offences

### Voyeurism

- 3.1 The NIHRC welcomes provisions of the Bill to create a new offence of 'up-skirting' and 'down-blousing' in Northern Ireland (NI). In England and Wales, the Voyeurism (Offences) Act 2019 came into force on 12 April 2019. Similar legislative provision has also been made in Scotland through the Sexual Offences (Scotland) Act 2009. The Commission has previously raised concerns that no similar provisions provide for the specific offence of 'up-skirting' and 'down-blousing' in NI.
- 3.2 The Commission remains concerned that the current draft Bill provides for lesser protections for victims of voyeurism in NI when compared to

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<sup>43</sup> Recital 7, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>44</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

<sup>45</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

provision in England; the sentencing for a maximum summary conviction is reduced from 12 months to 6 months.

3.3 Within the current draft Bill, the person guilty of an offence is liable:

- a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
- b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.<sup>46</sup>

3.4 In comparison, within the Voyeurism (Offences) Act 2019, the person guilty of an offence under this section is liable—

- a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine, or to both;
- b) on conviction on indictment, to imprisonment for a term not exceeding 2 years.<sup>47</sup>

3.5 **The NIHRC welcomes the creation of the offence of voyeurism in NI however, the Committee may wish to recommend as a minimum, equal protection for victims in NI to those in other UK jurisdictions.**

## **Child Sexual Exploitation**

3.6 The NIHRC welcomes provisions to give effect to the outcome of the review of the law on child sexual exploitation and sexual offences against children to include live streamed images in the definition of exploitation for sexual purposes and to create a new offence of adults masquerading as children online.

3.7 The Independent Inquiry into Child Sexual Exploitation in Northern Ireland made several recommendations to address the need for legislative reform in a number of areas, including addressing a gap in protection under the Sexual Offences (NI) Order 2008. The Commission made a submission to the Department of Justice's Review of the Law on Child Sexual Exploitation, which the Commission would highlight to the Committee.<sup>48</sup>

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<sup>46</sup> Justice (Sexual Offences and Trafficking Victims) Bill.

<sup>47</sup> Section 67(A), Voyeurism (Offences) Act 2019.

<sup>48</sup> NI Human Rights Commission, 'Submission to the Department of Justice Review of the Law on Child Sexual Exploitation', April 2019.

- 3.8 The UN CRC Committee has raised the need to shift the burden of proof from the prosecution to the defence in legislation governing specific sexual offences. In particular:

The Committee is concerned that, under the Sexual Offences (NI) Order 2008, for certain grave offences of sexual exploitation of children between 13 and 16 years of age, such as meeting a child following sexual grooming, engaging in sexual activity with a child, arranging or facilitating a child sex offence, the defendant may claim that he/she believed the victim to be above 16 years. The Committee is also concerned that it is then for the prosecution to prove that the defendant “did not reasonably believe” this, with the risk of further cross-examinations of child victims and their consequent re-victimization.<sup>49</sup>

- 3.9 The Commission would further highlight the Council of Europe Convention on the Protection of Children and Young People against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention). This imposes obligations on the UK Government and NI Executive to undertake preventative measures to combat child sexual exploitation and to take additional steps to raise awareness of the issue amongst children and those who work with children.

- 3.10 Furthermore, in June 2020 the Criminal Justice Inspection NI published its inspection report on child sexual exploitation, which considers the frontline response and investigation of child sexual exploitation. The report noted concern that little was known about the perpetrators of child sexual exploitation and the criminal justice system was urged to develop its response in this respect. It found that:

a review of a sample of files held by the Public Prosecution Service NI showed that where the Police Service NI had passed files to prosecutors, evidence of case building and identification of factors pertinent to child sexual exploitation was at times good. However, the Public Prosecution Service NI needed to better support prosecutors to reflect how factors

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<sup>49</sup> CRC/C/OPSC/GBR/CO/1, 'UN CRC Committee Concluding Observations on the Report Submitted by the UK of Great Britain and NI under Article 12, Paragraph 1, of the Optional Protocol to the UN CRC on the Sale of Children, Child Prostitution and Child Pornography', 8 July 2014, at para 29; CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 35(g).

related to exploitation and grooming had been weighted in decisions. Myths and stereotypes including about children having 'demonstrated affection' required to be addressed in the planning of cases. Public Prosecution Service NI staff instructions specific to child sexual abuse and exploitation were needed.<sup>50</sup>

- 3.11 The report further found that where cases did progress to court, further support for children was required and that consideration should be given to the Gillen Review recommendations.<sup>51</sup> The report highlighted that:

within the Public Prosecution Service NI and the NI Courts and Tribunals Service, a tailored child safeguarding procedure to enhance internal governance and direction on this, including the considerations that the Equal Treatment Bench Book outlined, would be of benefit.<sup>52</sup>

- 3.12 The Criminal Justice Inspection NI report also highlighted that the Barnahus (children's house) model was proposed as the preferred approach for children subjected to sexual violence. This is essential if we want to ensure our justice system meets the needs of child victims, reduces the risk of re-traumatisation and improves the fairness and quality of justice for all involved.

- 3.13 **The NIHRC recommends that the Committee ensures that all recommendations of the review of the law on child sexual exploitation are implemented, as well as recommendations of the Criminal Justice Inspectorate NI report into child exploitation in NI, including developing an approach modelled on Barnahus for child subjected to sexual violence.**

## **Gillen Review Recommendations**

- 3.14 The Commission welcomes provisions within the draft Bill which introduce a number of recommendations arising from the Gillen Review into the law and procedures in serious sexual offences in Northern Ireland, including

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<sup>50</sup> Criminal Justice Inspection NI, 'Child Sexual Exploitation in NI: An Inspection of the Criminal Justice System's Response', 2020.

<sup>51</sup> Criminal Justice Inspection NI, 'Child Sexual Exploitation in NI: An Inspection of the Criminal Justice System's Response', 2020 at 8.

<sup>52</sup> Criminal Justice Inspection NI, 'Child Sexual Exploitation in NI: An Inspection of the Criminal Justice System's Response', 2020 at 8.



introducing anonymity for defendants pre-charge. However, a significant number of the Gillen Review recommendations have not yet been introduced. Therefore, consideration of all recommendations is required in order to fully address the highlighted inadequacies of the current legislative framework and processes.

- 3.15 The Commission recognises that Chapter Three of the Gillen Review considers restricting access of members of the public to court proceedings, and recommends the exclusion of the public from all serious sexual offence hearings, save for: officers of the court; persons connected with the proceedings; the press; a parent, relative or friend of the complainant. Other persons may be permitted access but it is a matter of the discretion of the Court.<sup>53</sup>
- 3.16 The Commission understands the recommendation intends to protect the anonymity of the complainant. This is particularly relevant in Northern Ireland, which is a small jurisdiction.<sup>54</sup> The NIHRC also recognises that domestic law already enables special measures for victims in sexual offences cases, in particular for a judge to clear a courtroom when a witness is giving evidence.<sup>55</sup> The report however suggests that the provision to clear the court is rarely invoked, suggesting it is too widely drafted in order to be effective.<sup>56</sup> The report does not consider how the ability for discretion could be clarified to ensure it operates more effectively to allow for consideration on a case-by-case basis of the merits of a closed hearing.
- 3.17 The right to a fair and public hearing, as enshrined as an element of Article 6 ECHR, the right to fair trial<sup>57</sup>, is recognised as being one of the foundations of a democratic society<sup>58</sup> and a safeguard of the rule of law<sup>59</sup>. The ECtHR has observed “the public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, a fair hearing”.<sup>60</sup>

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<sup>53</sup> Gillen Review, recommendation 27.

<sup>54</sup> Gillen Review at para 3.76.

<sup>55</sup> Article 13, Criminal Evidence (Northern Ireland) Order 1999.

<sup>56</sup> Gillen Review at para 3.94.

<sup>57</sup> See also Article 14 ICCPR.

<sup>58</sup> *B and P v the United Kingdom*, Appl. Nos. 36337/97 35974/97 (24 April 2001) para 36.

<sup>59</sup> UN Human Rights Committee, General Comment 32: Article 14 on the right to equality before the courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para 1.

<sup>60</sup> *B and P v the United Kingdom*, Application nos. 36337/97 35974/97 (24 April 2001) para 36.

- 3.18 The right to a public hearing is not, however, absolute. The provisions of the ICCPR and ECHR both permit the exclusion of the press or the public from all or part of a trial, “where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.<sup>61</sup>
- 3.19 However, even where there is a high expectation of publicity, the ECtHR has recognised that it may “on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice”.<sup>62</sup> The ECtHR has found a violation of Article 6(1) where the domestic authorities did not provide sufficient reasoning to demonstrate that closure of a court was necessary.<sup>63</sup>
- 3.20 Similarly, the ICCPR requires that a hearing be open to the public “apart from exceptional circumstances”.<sup>64</sup>
- 3.21 Under the Victims’ Directive, States are required to conduct an individualised assessment of the victim in order to identify any specific protection needs and to consider whether special measures could be used in the course of proceedings.<sup>65</sup> Such an assessment needs to take into account the personal characteristics of the victim and the nature and circumstances of the crime, with particular attention to those suffering considerable harm or a victim of a crime committed with a discriminatory motive.<sup>66</sup> Following the identification of a specific protection need, the Directive permits a hearing to take place without the presence of the public.<sup>67</sup>
- 3.22 The UN CAT Committee has also identified the gendered nature of sexual offences, highlighting that “complaint mechanisms and investigations require specific positive measures which take into account gender aspects in order to ensure that victims of abuses such as sexual violence and

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<sup>61</sup> Article 14(1), ICCPR; Article 6(1), ECHR.

<sup>62</sup> *B and P v the United Kingdom*, Application nos. 36337/97 35974/97 (24 April 2001) para 37.

<sup>63</sup> *Chaushev and others v Russia*, Application nos. 37037/03 39053/03 2469/04 (25 October 2016) para 24.

<sup>64</sup> UN Human Rights Committee, General Comment 32: Article 14 on the right to equality before the courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para 29.

<sup>65</sup> Article 22(1), EU Directive 2012/29/EU.

<sup>66</sup> Articles 22(2) and (3), EU Directive 2012/29/EU.

<sup>67</sup> Article 23(3)(d), EU Directive 2012/29/EU.

abuse, rape, marital rape, domestic violence, female genital mutilation and trafficking are able to come forward and seek and obtain redress.”<sup>68</sup>

- 3.23 In respect of criminal proceedings relating to child victims and witnesses, the Lanzarote Convention provides that the State Party shall ensure “according to the rules provided by its internal law, that: (a) the judge may order the hearing to take place without the presence of the public”.<sup>69</sup>
- 3.24 The Istanbul Convention does not make any similar provision, save for enabling victims to testify “without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.”<sup>70</sup>
- 3.25 The Commission recognises the requirement under human rights law to take special measures in order to protect the rights of victims, including the use of closed proceedings in relevant situations. While it is permissible for criminal proceedings to be carried out in the absence of the public, in particular regarding child victims, this is considered a special measure, which should be only be used where such a protective need is identified. This would suggest that the consideration of such a measure should be taken on a case-by-case basis, taking account of the individual circumstances of the case.
- 3.26 The Victims’ Directive provides that Member States should ensure that officials who are likely to come into contact with victims should receive “both general and specialist training to a level appropriate to their contact with victims”.<sup>71</sup> The Directive specifies that this training should include police officers, court officials, judges and prosecutors involved in criminal proceedings and legal practitioners.<sup>72</sup> The Gillen Review has reflected the duty on the state to provide general and specialist training to officials in line with the Victim’s Directive in its recommendations.<sup>73</sup>
- 3.27 **The NIHRC recommends the Committee reconsider the proposed blanket approach to exclusion of the public from particular forms of criminal trials, rather than a case-by-case consideration of the merit of a closed hearing. The Commission recommends that the**

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<sup>68</sup> UN Committee against Torture, General Comment 3: Implementation of article 14 by States parties, CAT/C/GC/3 (13 December 2012) para 33.

<sup>69</sup> Article 36(2), Lanzarote Convention.

<sup>70</sup> Article 56(1)(i), Istanbul Convention.

<sup>71</sup> Article 25(1), EU Directive 2012/29/EU.

<sup>72</sup> Article 25(2), EU Directive 2012/29/EU.

<sup>73</sup> Sir John Gillen, ‘Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland; Recommendations’, (DoJ, 2019), para 222.

**Committee consider the adoption of an individualised approach within a structured framework, which could include a judicial decision at the commencement of the trial. This should be accompanied by training for the judiciary on trauma-informed approaches and secondary victimisation.**

**3.28 The NIHRC continues to recommend that the Department and Committee consider all recommendations of the Gillen Review and whether more can be included with the Bill.**

## **4.0 Part 2: Trafficking and Exploitation**

4.1 The NIHRC welcomes provisions to adjust the modern slavery strategy and improve services for potential victims of slavery and exploitation. However, the Commission would suggest strongly, in regards to moving the strategy from a one year to three-year strategy, that robust monitoring and measurement arrangements are put in place.

4.2 In 2019, the UN CEDAW Committee recommended that the UK Government and Northern Ireland Executive:

- a) Ensure that the definition of human trafficking in its domestic legislation is in line with the internationally agreed definition as set out in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime (the Palermo Protocol);
- b) Adopt a comprehensive national strategy to combat trafficking in women and girls, as previously recommended;
- c) Continue to improve the National Referral Mechanism, including by implementing the reform package announced in October 2017, to ensure that victims of trafficking are properly identified and adequately protected and supported.<sup>74</sup>

4.3 The UN CEDAW Committee further recommended that the UK Government and NI Executive:

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<sup>74</sup> CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 33.

- a) Take effective measures to ensure that women in vulnerable situations have effective access to employment opportunities, housing and social security so that they do not need to resort to prostitution or “sex for rent”;
- b) Take effective measures to reduce demand for commercial sex, including by carrying out educational and awareness-raising measures targeted at men and boys and focused on combating all notions of subordination and objectification of women;
- c) Revise legislation to decriminalise prostitution and clear the criminal records of women who have been convicted for offences related to prostitution to enable them to seek alternative forms of employment;
- d) Ensure the availability of specialist services, which are adequately funded, inclusive and accessible, to assist women and girls to exit prostitution;
- e) Create educational and employment opportunities for women who wish to exit prostitution;
- f) Undertake research into the prevalence and nature of prostitution in Scotland and NI, in addition to the research that is currently underway in England and Wales, to identify necessary changes to legislation and policy.<sup>75</sup>

4.4 In 2019, the UN CAT Committee recommended that the UK Government and NI Executive:

- a) Enhance its efforts to investigate claims of human trafficking and prosecute perpetrators and ensure that victims of trafficking obtain compensation, including by considering creating a civil remedy for victims of trafficking;
- b) Ensure access to sufficient protection and support for all victims of trafficking, and particularly ensure that the State party’s establishment of a child trafficking protection fund results in improving the availability of specialist care and support for child victims of trafficking;
- c) Improve the training of law enforcement officers, prison personnel and other first responders to include statutory training into the identification of potential victims of human trafficking and modern slavery, and continue developing

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<sup>75</sup> CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 14 March 2019, at para 35.

specialised training programmes for support workers and those providing foster care.<sup>76</sup>

4.5 The NIHRC also suggests that the Committee consider the Criminal Justice Inspection NI 2020 report, which looked at how the criminal justice system deals with modern slavery and human trafficking in NI. The report identified further work required to better understand the nature and scale of modern slavery and human trafficking in NI and for a more effective legislative and strategic response to be developed. Specifically, the report “recommended that the full range of enforcement powers available elsewhere in the UK need to be replicated in NI”.<sup>77</sup>

4.6 The Criminal Justice Inspection NI report also made a recommendation in relation to training:

The Police Service of Northern Ireland should complete a Training Needs Analysis for modern slavery and human trafficking, cognisant of the outcome of Strategic Recommendation 1, within nine months of the publication of this report. Training, and its delivery, across all areas should be reviewed against the Training Needs Analysis to identify and address training gaps.<sup>78</sup>

4.7 **The NIHRC recommends the Committee take into consideration the Criminal Justice Inspectorate NI report into modern slavery and human trafficking to ensure that provisions within the draft Bill meet the required recommendations.**

## 5.0 Amendments

5.1 The NIHRC understands that the Department has plans to introduce four amendments to the Bill. However, as these are still in development the Commission is unable to comment on the detail of those provisions. We have therefore provided only brief comments on three of the proposed amendments below. We remain available to the Committee for further advice when the detail of the amendments is available.

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<sup>76</sup> CAT/C/GBR/CO/6, 'UN Committee against Torture, Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019, at para 59.

<sup>77</sup> Criminal Justice Inspection NI, 'Modern Slavery and Human Trafficking: An Inspection of How the Criminal Justice System Deals with Modern Slavery and Human Trafficking in NI', 2020.

<sup>78</sup> Criminal Justice Inspection NI, 'Modern Slavery and Human Trafficking: An Inspection of How the Criminal Justice System Deals with Modern Slavery and Human Trafficking in NI', 2020.

## **Abolition of the 'Rough Sex Defence'**

- 5.2 The Commission welcomes the amendment to include provision for the abolition of the so-called 'rough sex defence'.
- 5.3 In January 2021 the NIHRC responded to the Department of Justice consultation on 'Consent to Serious Harm for Sexual Gratification: Not a Defence'. The NIHRC welcomed the introduction of legislation to outlaw consent to serious harm for sexual gratification in trials as a defence and provided advice on how legislation could be human rights compliant.<sup>79</sup>
- 5.4 **The NIHRC would recommend the Committee for Justice refer to the Commission's response to the consultation on 'Consent to Serious Harm for Sexual Gratification: Not a Defence' to ensure this is implemented in a way that is compliant with human rights law.**

## **Image Based Sexual Abuse "Revenge Porn"**

- 5.5 The Commission welcomes the Department's commitment to an amendment to introduce provision for image based sexual abuse, including an extension to existing revenge porn provisions to include a threat of publication.
- 5.6 The NIHRC recognises that new forms of gender-based violence against women are emerging. This includes forms of online violence against women such as "doxing", "sextortion" and "trolling", as well as the non-consensual distribution of intimate content (or "revenge porn"). Technology has evolved which means different forms of gender-based violence have transformed into offences perpetrated across distance, without physical contact and beyond borders, with anonymous profiles to amplify the harm to the victim.<sup>80</sup>
- 5.7 The NIHRC would highlight the disproportionate impact of these forms of violence against women and girls. Online abuse against women journalists and women in the media is a direct attack on women's visibility and their full participation in public life. The anonymity of perpetrators further

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<sup>79</sup> NI Human Rights Commissions, 'Response to the Department of Justice Consultation on Consent to Serious Harm for Sexual Gratification: Not a Defence', January 2021.

<sup>80</sup> UN Office of the High Commissioner Human Rights, 'News: International Day on the Elimination of Violence against Women', November 2018. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23921>

heightens the fear of violence, resulting in the sense of insecurity and distress experienced by the victims.<sup>81</sup>

- 5.8 The Bill should therefore reflect the disproportionate effect of 'revenge porn' on women and girls, and ensure a gender-based approach.
- 5.9 **The NIHRC recommends the Bill include an amendment to introduce provision for image based sexual abuse including for the threat of publication. The proposed legislation should ensure consideration of human rights obligations including the disproportionate impact on women and girls, and recognise image based sexual abuse as a new form of gender-based violence.**

### **Abuse of Trust**

- 5.10 The Commission welcomes the proposed amendment that widens the scope of the offence to include the abuse of trust in non-statutory settings.
- 5.11 Currently, legislative provision for abuse of positions of trust within statutory settings, such as education and health, is provided for in the Sexual Offences (Northern Ireland) Order 2008. The Commission has previously advised that the current definition of position of trust found at Article 28, Sexual Offences (Northern Ireland) Order 2008 is not consistent with the requirements of the Lanzarote Convention.<sup>82</sup>
- 5.12 The Lanzarote Convention, Article 18, requires States to criminalise the act(s) of engaging in sexual activities with a child where "abuse is made of a recognised position of trust, authority or influence over the child."<sup>83</sup> The Explanatory Report to the Convention is clear that "children in certain relationships must be protected, even when they have already reached the legal age for sexual activities and the person involved does not use coercion, force or threat".<sup>84</sup>
- 5.13 The Explanatory Report to the Lanzarote Convention states that abuse of trust can occur in relation to persons who "have parental or caretaking functions; or educate the child; provide emotional, pastoral, therapeutic or medical care; or employ or have financial control over the child; or

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<sup>81</sup> Ibid.

<sup>82</sup> NI Human Rights Commission, 'Submission to the Department of Justice Review of the Law on Child Sexual Exploitation', April 2019.

<sup>83</sup> Article 18(1b), Lanzarote Convention.

<sup>84</sup> CETS 201 Explanatory Report to the Lanzarote Convention, at para 124.



otherwise exercise control over the child”.<sup>85</sup> The report specifies that “volunteers who look after children in their leisure-time or during voluntary activities, for example at holiday-camps or in youth organisations, can also be viewed as holding positions of trust”.<sup>86</sup> The Commission notes that the list of situations involving relationships of trust is not exhaustive.

- 5.14 In its first implementation report of the Convention, the Lanzarote Committee specified that the concept of relationships of trust should be afforded a “broad interpretation”.<sup>87</sup> The Committee notes that domestic legislation is only in conformity with the Convention if it provides an “open-ended enumeration” of situations involving abuse of trust. This ensures that there is “enough flexibility to determine on a case-by-case basis whether the alleged perpetrator abused his or her position of authority, influence or trust.”<sup>88</sup> The Lanzarote Committee recommends that “legislation be worded in a manner to allow enough margin of appreciation to the judicial authorities to decide on a case-by-case basis”.<sup>89</sup>
- 5.15 Accordingly, the Lanzarote Committee requires State parties to “introduce in their legislation a clear reference to the possible ‘abuse of a recognised position of trust, authority or influence.’”<sup>90</sup> The Committee cautions States to avoid any “rigid listing of very specific situations” as to do so would risk “leaving children in other situations without protection”.<sup>91</sup> The Committee also invites States to “review their legislation to include a reference to the notion of “circle of trust” which would comprise members of the extended family (including new partners), persons having care-taking functions (including trainers of any kind) or exercising control over the child professionally or on a voluntary basis (including persons who look after children in their leisure-time) and any other person trusted by the child (including other children)”.<sup>92</sup> The Committee specifically acknowledges that sexual abuse of children may be perpetrated in the context of sports activities and commends the Greek Criminal Code for making specific reference to protecting children in taking part in sports.<sup>93</sup>

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> T-ES (2015) ‘Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, ‘First implementation report: protection of children against sexual abuse in the circle of trust’, 8 January 2016, at para 19.

<sup>88</sup> T-ES (2015) ‘Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, ‘First implementation report: protection of children against sexual abuse in the circle of trust’, 8 January 2016, at para 19, at para 23.

<sup>89</sup> Ibid, at para 24.

<sup>90</sup> Ibid, at para 36.

<sup>91</sup> Ibid, at para 36.

<sup>92</sup> Ibid, at para 36.

<sup>93</sup> Ibid, at para 29.

- 5.16 The Committee is clear that protections against abuse of trust should apply regardless of the age of the child. Indeed, as a means to “eliminate ambiguity”, the Committee advises that “domestic law should specify that the child’s age is not relevant in the context of the criminal offence of sexual abuse in the circle of trust.”<sup>94</sup>
- 5.17 Articles 23-26 of the Sexual Offences (Northern Ireland) Order 2008 provide for offences where sexual activity occurs with a child through abuse of positions of trust. These offences currently apply to all children under the age of 18 but only where the abuse of a position of trust occurs in the context of a statutory responsibility – i.e., education, state care and criminal justice – as defined in Article 28.<sup>95</sup>
- 5.18 The 2016 report of the Independent Inquiry into Child Sexual Abuse highlighted the need for a wide approach to protecting children, “as recent allegations relating to professional football clubs show, no institution or aspect of institutional life should be beyond our reach.”<sup>96</sup> The Commission agrees with this view and notes that abuse linked to positions of power can occur in a range of settings i.e., it is not limited to the context of statutory responsibility.
- 5.19 **The NIHRC recommends that the Committee ensure that any new legislation regarding the abuse of trust extends the definition outlined at Article 18 Lanzarote Convention to include other relationships of trust, i.e., that it does not just apply to children in state care.**

## 6.0 Omissions

- 6.1 The Commission understands several significant justice issues have not been included within the proposed Bill that were originally intended to be brought into a Miscellaneous Justice Bill. These issues include the need to raise the age of criminal responsibility in line with recommendations by the UN Committee on the Rights of the Child.<sup>97</sup> There is also the requirement

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<sup>94</sup> Ibid, at para 141.

<sup>95</sup> The positions of trust do not include parental responsibility and other family relationships, which are covered by Articles 32-33 of the Sexual Offences (Northern Ireland) 2008 Order (familial sexual offences).

<sup>96</sup> Professor Alexis Jay, OBE, Chair of the Independent Inquiry into Child Sexual Abuse. Report of the internal review, (December 2016), p 4.

<sup>97</sup> CRC/C/GBR/CO/5, ‘UN CRC Committee Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 79; CAT/C/GBR/CO/6, ‘UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 7 June 2019, at para 23. See also, CRC/C/GC/24, ‘UN CRC Committee General Comment No 24: Children’s Rights in the Child Justice System’, 18 September 2019, at para 21.

to address the issue of retention of biometric data as a result of the *Gaughran v the United Kingdom*<sup>98</sup> judgment from the ECtHR. The Commission wishes to highlight to the Committee that these issues should be a priority moving into the new legislative mandate. The Commission remains at the disposal of the Committee should further advice or engagement be required.

- 6.2 In any event, the Commission repeats its concern that the Department has not used the opportunity presented by this Bill to address issues of the reversal of the burden of proof considering its relevance.

### **Reversal of the Burden of Proof**

- 6.3 The burden of proof is, essentially, the requirement on the prosecution to prove elements of the criminal offence. The prosecution must disprove a defendant's defence to the offence of purchasing sexual services from a child that he or she had a reasonable belief that the child victim was between the age of 13 and 18 years. There is also a requirement to disprove, in an offence of sexual grooming, the defence of reasonable belief regarding the age of the child (under 16 years).

- 6.4 Between 2014 and 2019, the UN CRC Committee and UN CEDAW Committee have repeatedly raised the need to reverse the burden of proof from the prosecution to the perpetrator in legislation governing specific sexual offences.<sup>99</sup> In particular:

the Sexual Offences (NI) Order 2008, for certain grave offences of sexual exploitation of children between 13 and 16 years of age, such as meeting a child following sexual grooming, engaging in sexual activity with a child, arranging or facilitating a child sex offence, the defendant may claim that he/she believed the victim to be above 16 years.<sup>100</sup>

- 6.5 This was also a recommendation of the Marshall Report,<sup>101</sup> which stemmed from the Commission's advice.<sup>102</sup>

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<sup>98</sup> *Gaughran v the United Kingdom* (2020) ECHR 144.

<sup>99</sup> CEDAW/C/GBR/CO/8, 'UN Committee on the Elimination of Discrimination against Women Concluding Observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland' 8 March 2019, para 35(g); See CEDAW/C/GBR/7, 'UN Committee on the Elimination of Discrimination Against Women Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' 8-26 July 2013; CRC/C/OPSC/GBR/CO/1, 'UN Committee on the Rights of the Child Concluding observations on the report submitted by the United Kingdom of Great Britain and NI under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 8 July 2014 at VI(a).

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<sup>101</sup> Kathleen Marshall, 'Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry' (November 2014). Key Recommendation 14.

<sup>102</sup> NIHRC, 'Submission to Independent Inquiry into Child Sexual Exploitation in Northern Ireland' (March 2014).

- 6.6 **The NIHRC recommends the Committee ask the Minister to indicate what consideration is being given to the reversal of the burden of proof and if the Department proposes bringing forward the necessary legislative changes to address this in the future.**

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