



Department of
Justice

An Roinn Dlí agus Cirt
Máinnystrie O tha Laa

**JUSTICE (SEXUAL OFFENCES AND TRAFFICKING VICTIMS) ACT
(NORTHERN IRELAND) 2022**

GUIDANCE

**Department of Justice
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INTRODUCTION

This document contains guidance on the [Justice \(Sexual Offences and Trafficking Victims\) Act \(Northern Ireland\) 2022](#) (referred to in the guidance as the 2022 Act). The 2022 Act received Royal Assent on 27 April 2022.

The guidance, which has been developed in liaison with criminal justice partners, should be read in conjunction with the 2022 Act and with the [Sexual Offences \(Northern Ireland\) Order 2008](#) (referred to in the guidance as “the 2008 Order”).

Under [Chapter 3](#) the Department is required to issue guidance about the effect of Part 1 of the 2022 Act. The guidance is not statutory. However, under section 20(2) of Chapter 3, ‘*a person exercising functions to whom guidance issued under this section relates must have regard to it in the exercise of those functions*’.

In line with good practice, this document includes guidance on other provisions in the Act relating to the criminal law.

PART 1 SEXUAL OFFENCES

CHAPTER 1 – CRIMINAL CONDUCT

Summary of New Offences

Chapter 1 of Part 1 creates the following new offences:

- **Voyeurism: additional offences (genitals and buttocks)** - two offences have been created to capture the highly intrusive behaviour more commonly known as 'up-skirting'. An offence will occur where a person operates equipment, or takes a picture, beneath a person's clothing in order to observe, or record an image, of the person's genitals, buttocks or underwear without the person's consent.
- **Voyeurism: additional offences (breasts)** - two offences have been created to capture the highly intrusive behaviour more commonly known as 'down-blousing'. An offence will occur where a person operates equipment, or takes a picture, beneath or above a person's clothing in order to observe, or record an image, of the person's breasts or underwear without the person's consent.
- **Sending etc an unwanted sexual image** – this offence captures the increasingly prevalent behaviour more commonly known as 'cyber-flashing'. The offence will occur where a person intentionally sends an image of sexual activity or genitals to another person without that person's consent.
- **Sexual Grooming: pretending to be a child** - four offences have been created, all of which seek to deal with an adult masquerading as a child and making a communication with a view to sexually grooming a child under 16. The new offences are unique to Northern Ireland and build upon existing child grooming and sexual communication with a child offences of the 2008 Order (Articles 21, 22 and 22A). Specifically, the provisions seek to address behaviour of adult offenders at an earlier stage in the child grooming process, where the offender pretends to be a child as a precursor to grooming or carrying out other offences and where this behaviour would constitute an indicator that they present a risk to children. This was identified as a legislative gap in safeguarding children by the PSNI in its [response](#) to the Department's [Consultation on the review of the law on child sexual exploitation](#)

Section 1: Voyeurism: additional offences (genitals and buttocks) – “Up-skirting”

Nature of offending

1. The use of the term ‘up-skirting’ in the guidance to refer to this offence is not in any way intended to diminish the seriousness of the behaviour or the impact of this behaviour on those who are its victims. While there are criticisms of its use, it is a term that is widely used and recognised, both by the media and those who provide support to victims. We use it in this guidance simply to distinguish it from the voyeurism offence in Article 71 of the 2008 Order and to reflect familiarity with the recognised behaviour.
2. Anyone, of any gender, can be a victim of up-skirting, though victims are predominantly female. However, the behaviour is not confined to victims wearing skirts or dresses and equally applies when men or women are wearing kilts, cassocks, shorts or trousers¹. Up-skirting can take place in any, usually public, space. Supermarkets and public transport feature in examples of perpetrators convicted in England where up-skirting has been an offence since 2019. There is evidence that some men are taking extensive measures to take up-skirt images, including hiding cameras in shopping baskets and shoes.
3. In 2021, London Transport and National Rail introduced posters on trains and in train stations which address sexual harassment, including up-skirting. Details of the campaign can be found here: [stamp-out-sexual-harassment-on-public-transport](#) and [report sexual harassment - Transport for London](#)
4. [Data](#) issued by the Crown Prosecution Service in December 2021 stated that between 1 April 2020 and 30 June 2021, 46 men and one teenage boy were prosecuted for 128 offences. Its analysis found that at least a third of offenders (15) are also committing other serious sexual crimes, including child abuse,

¹ [Voyeurism | The Crown Prosecution Service \(cps.gov.uk\)](#)

sexual assault, extreme pornography and wider voyeurism offences. In one case, two men who arranged a visit to a shopping centre to up-skirt women together and swapped images over WhatsApp, were also found to have been sharing indecent images of children.

5. [In a case in New Zealand](#), an offender had built a device specifically to take covert up-skirt videos, using a boxed remote control helicopter.
6. The Safeguarding Board NI has advised that they have identified children taking images of each other in school changing rooms as an increasing issue. Swim Ireland, in its [Safeguarding Report 2020-2022](#), reference that it has recorded rises in inappropriate use of devices mainly connected with taking images in private areas such as changing rooms. While such behaviours may fall under Article 71 (voyeurism) of the 2008 Order, some of the behaviours may constitute an offence under the up-skirting provisions.
7. The impetus for the introduction of a specific offence of up-skirting came from a [case](#) in Enniskillen, where a pupil was convicted, under the common law offence of Outraging Public Decency (OPD), of taking up-skirt images. There was considerable coverage of the case at the time, calling for a change in the law, citing OPD as inadequate legislation to cover all instances of up-skirting. OPD is committed by a person carrying out a lewd, obscene or disgusting act capable of outraging public decency. The act must be done in a place which is accessible to or within view of the public, with at least two people present who are capable of seeing the act, even if they did not actually see it. The focus of this offence is on protecting the public from potential exposure to lewd behaviour rather than protecting the individual victim. It is not a sexual offence.
8. In February 2023, [Stephen McIlrath](#) was convicted, under OPD, of up-skirting. He also pleaded guilty to 11 charges of making or possessing a total of 176 indecent photographs of children.

The Up-skirting Offences

9. [Section 1\(2\) of Part 1, Chapter 1](#) of the 2022 Act amends the 2008 Order to add new Article 71A Voyeurism: additional offences (genitals and buttocks).

New [Article 71A](#) deals with “up-skirting” and includes two offences of ‘operating equipment’ and ‘recording images’. Under Article 71A(1) a person (A) commits an offence if they: operate equipment (e.g. a phone camera) beneath another person’s (B’s) clothing with the intention of enabling them or another person (C) to observe B’s genitals or buttocks, whether exposed or covered with underwear, or the underwear covering the genitals or buttocks, where they wouldn’t ordinarily be visible; with the intention of A or another person (C) looking at the image for the purpose of sexual gratification (for A’s or C’s) or; to humiliate, alarm or distress B or; are reckless as to whether B is humiliated, alarmed or distressed and B is, in fact, humiliated, alarmed or distressed; and without the consent of B and where they reasonably know that B had not consented.

10. Under Article 71A(4) a person (A) commits an offence if they: record an image beneath another person’s (B’s) clothing; the image is of B’s genitals or buttocks, whether exposed or covered with underwear, or the underwear covering the genitals or buttocks, where they wouldn’t ordinarily be visible; with the intention of A or another (C) looking at the image for the purpose of sexual gratification (for A’s or C’s) or; to humiliate, alarm or distress B or; are reckless as to whether B is humiliated, alarmed or distressed and B is, in fact, humiliated, alarmed or distressed; and without the consent of B and where they reasonably know that B had not consented.
11. It will also be an offence where B has consented to the operation of equipment or the recording of an image for a particular purpose, and A operates the equipment or records the image for a different or additional purpose. For example, for a surgical procedure, and the person who has taken the image uses it for another purpose.

12. To clarify, the offences are 'made out' when the following elements are present:

- where the perpetrator operates equipment or records an image with the intention of enabling him/herself or another person to observe an image of the genitals or buttocks of the victim or the underwear covering them, and
- in circumstances where they would not otherwise be visible, and
- either of the following two conditions are met:

Condition 1

- The perpetrator, without the victim's consent or a reasonable belief in consent, operates equipment or records an image to enable the observation of the image *for the purpose of*
- his/her own sexual gratification or the sexual gratification of another person, or
- to humiliate, alarm or distress the victim.

Condition 2

- The perpetrator, without the victim's consent, or a reasonable belief in consent, operates equipment or records an image to enable the observation of the image, and
- the perpetrator is reckless as to whether the victim is humiliated, alarmed or distressed, and
- the victim is humiliated, alarmed or distressed.

13. It is important to note that, in condition 2, the recklessness element of the offence is not related to a particular purpose, as is required in Condition 1.

Recklessness

14. The inclusion of recklessness in the offence is to help minimise the risk of over-criminalisation, particularly of the young and vulnerable who have not fully thought through the consequences of their actions.

15. The general definition of recklessness as applied to law is:
“A person acts recklessly with respect to – (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.”
16. Recklessness requires proof that the perpetrator was aware of the risk (risk of a result that result being harm) and that, in the circumstances as known to the perpetrator, it was unreasonable to take the risk.

Recklessness: Relevant Case Law

17. In [R v G and R \[2003\] UKHL 50 - Case Summary](#) two boys aged 11 and 12 were camping without their parents' permission. They entered a yard at the back of a shop and set fire to newspapers under a bin. They left while the newspapers were still burning. The bin caught fire and the fire spread to other rubbish bins against the wall of the shop. The fire spread to the shop causing around £1 million worth of damage.
18. The boys were convicted of reckless arson under [section 1 Criminal Damage Act 1971](#) which states:

“A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.”
19. The convictions were appealed at the Court of Appeal and subsequently referred to the House of Lords. The full judgment is available at [House of Lords - R v. G](#)
20. The House of Lords held that the boys were not guilty of arson as they had not been reckless; they had been unable to appreciate the risk due to their

immaturity. The ruling stated 'It is neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself had no such apprehension.'

'Operating equipment'

21. [Article 72](#) (Voyeurism: interpretation) of the 2008 Order has been amended by [s1\(3\)](#) of the 2022 Act to clarify that the up-skirting offence is not limited to instances where the offender is present or is physically operating equipment. It can apply to cameras installed to run at certain times or that are activated by movement. It also applies to equipment that is not capable of activation, such as 'selfie sticks' or mirrors.

'Not otherwise visible'

22. The offence provides that the image taken must be in circumstances where the genitals, buttocks or the underwear covering them would not otherwise be visible. There may be instances where, for example, on stairs, a person (A) is behind another person on the stairs, and depending on the angle, the underwear of the person in front is visible. If A records an image of the underwear, it is considered, subject to the presence of other elements in the offence, that such behaviour would be caught by the provisions.

'Underwear'

23. Case law relating to what is considered underwear may be relevant to instances of up-skirting. In [PSNI v MacRitchie \[2008\] NICA 26](#) the defendant had been charged with the offence of voyeurism under [s67 Sexual Offences Act 2003](#) . He had placed his phone, having first activated the video record facility and pressed the record button, on the floor of the adjoining cubicle in the changing room of a swimming pool, in which a woman was changing out of her swimwear.
24. When arrested, the camera recordings from the phone showed that the complainant had been wearing her swimsuit, a bikini, at the time that the recordings were made. The basis of the charge under section 67(3) was that the defendant had recorded the complainant doing a private act; that he had done so intending to view the image of her doing that private act; and that he

intended to obtain sexual gratification from viewing the image. The argument made on the defendant's behalf was that she could not be said to have been doing a private act since swimwear was not underwear.

25. While not applied in the defendant's case, the Court of Appeal concluded that swimwear can sometimes be worn as underwear for the purposes of the voyeurism offence. It stated:

'Swimwear is not in its normal function underwear. But it seems to us clear that some items of swimwear could be worn as underwear. A woman may choose to wear, for instance, bikini bottoms as underpants. While wearing them for this purpose we are satisfied that if a woman were to be filmed in circumstances where she was entitled to expect privacy, this would constitute an offence under section 67.'

Consent for a particular purpose

26. There may be occasions where a person has consented to an image being taken for a particular purpose, for example, a surgical procedure, and the person who has taken the image uses it for another purpose. [New Article 71A \(7\) & \(8\)](#) clarifies that the subject of the image is not to be taken as having consented where the image is used by the perpetrator for a different purpose.

Penalties

27. The penalties for offences committed under Article 71A are: for summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; and on indictment, imprisonment for a term not exceeding two years.

Public protection sentences

28. [Paragraph 5 of Schedule 1](#) to the 2022 Act amends [Part 2 of Schedule 2](#) to the Criminal Justice (Northern Ireland) Order 2008 (specified sexual offences) by inserting new [Article 71A](#) into the Schedule to bring it within scope of an extended custodial sentence. Where the perpetrator is convicted under Article 71A and where the court considers that he/she poses a risk of serious sexual

harm from the commission of further specified offences, the court must impose an extended custodial sentence, as provided for in [Article 14](#) of the 2008 Order. Under an extended custodial sentence, the court sets a custodial period and an extended licence period. The prisoner will be considered for release, by the Parole Commissioners, at the halfway point of the custodial term imposed by the court. If not considered suitable for release at that point, the prisoner can, where considered necessary for the protection of the public, be kept in custody for the remainder of the custodial period. On release, the offender will be on licence for an extended period of up to 8 years.

Notification Requirements

29. A perpetrator convicted for an offence under Art 71A, but only where sexual gratification is proven, will be subject to notification requirements. [Paragraph 4 of Schedule 1](#) to the 2022 Act amends [Schedule 3 to the Sexual Offences Act 2003](#) (*sexual offences for purposes of notification requirements*). It inserts new paragraph 92VA to bring the Art 71A offences within scope of notification requirements. This is applied automatically to the offender and the period of notification is dependent on the conviction term.

30. Failure to comply with the notification requirements, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment of up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

Application of civil prevention orders

31. An offence under Art 71A can attract a civil prevention order used to manage risk from sexual offending.

32. There are three orders available in Northern Ireland, the provision for which is contained in the Sexual Offences Act 2003: a Sexual Offences Prevention Order (SOPO); a Foreign Travel Order (FTO); and a Risk from Sexual Harm

Order (RoSHO). Only two of the three orders can be sought in relation to Article 71A where sexual gratification is proven: the SOPO and the FTO.

SOPO

33. Provision for the SOPO is included at [section 104](#) of the UK-wide Sexual Offences Act 2003. It is designed to protect the public from the risk of serious sexual harm. Relevant offences which qualify for a SOPO application are contained within Schedule 3 (and [Schedule 5](#)) to the 2003 Act.

34. As Article 71A has been added to the offences listed at Schedule 3, a person who is convicted of an Article 71A offence would qualify for a SOPO, where sexual gratification is proven. A court can make a SOPO, either on application by the Chief Constable, or on conviction. Breach of a SOPO, or an interim SOPO, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

FTO

35. Provision for the FTO is included at section 114 of the 2003 Act. It is designed to protect children generally or any child from serious sexual harm from a qualifying offender outside the UK. Certain offences of Schedule 3 to the 2003 Act have been prescribed at section 116, which does not extend to Art 71A. However, section 116(2)(d) provides that an offender qualifies for an FTO if they have been convicted of an offence contained within any paragraph of Schedule 3, where the victim of that offence was under 18 at the time of the offence. A court can only make a FTO upon application by the Chief Constable.

36. Breach of a FTO, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

Anonymity of victims of sexual offences

37. Paragraph 2 of Schedule 1 to the 2022 Act brings new Article 71A within scope of the [Sexual Offences \(Amendment\) Act 1992](#) ('the 1992 Act'), which provides lifelong anonymity to victims of the offence. This is specified at section 2(3)(hb)(ii) of the 1992 Act (*offences under law of Northern Ireland to which the Act applies*).

38. [Section 8](#) (*Extended anonymity of victims*) of the 2022 Act amends section 1 of the 1992 Act to extend this lifelong anonymity for 25 years after death.

Anonymity of Suspects in sexual offence cases

39. [Section 12](#) (*Restriction on reports as to suspects of sexual offences*) of the 2022 Act provides anonymity to suspects up to the point of charge in Article 71A cases. Where a suspect is not subsequently charged, this anonymity will be lifelong and will continue for 25 years after death.

Section 1: Voyeurism: additional offences (breasts) – “Down-Blousing”

40. As with ‘up-skirting’, the use of the term ‘down-blousing’ in the guidance to refer to this offence is not in any way intended to diminish the seriousness of the behaviour or the impact of this behaviour on those who are its victims. While there are criticisms of its use, it is a term that is widely used and recognised. We use it in this guidance simply to distinguish it from the voyeurism offence in Article 71 of the 2008 Order and to reflect familiarity with the recognised behaviour.

The Down-Blousing Offences

41. [Section 1\(2\) of Part 1, Chapter 1](#) of the 2022 Act amends the 2008 Order to add new Article 71B Voyeurism: additional offences (breasts).
42. [Article 71\(B\)](#) deals with down-blousing and includes two offences of ‘operating equipment’ and ‘recording an image’.
43. Under Article 71(B)(1) a person (A) commits an offence if they: operate equipment (e.g. a phone camera) beneath or above another person’s (B’s) clothing with the intention of enabling them or another person (C) to observe B’s breasts whether exposed or covered with underwear, or the underwear covering the breasts, where they would not ordinarily be visible; they do so for the purpose of sexual gratification (for A or C’s); to humiliate, alarm or distress B or; are reckless as to whether B is humiliated, alarmed or distressed and B is, in fact, humiliated, alarmed or distressed; and without the consent of B and where they reasonably know B had not consented.
44. Under Article 71B(4) a person (A) commits an offence if they: record an image beneath or above another person’s (B’s) clothing; the image is of B’s breasts whether exposed or covered with underwear, or the underwear covering the breast, where they would not ordinarily be visible; with the intention of A or another person (C) looking at the image for the purpose of sexual gratification (for A’s or C’s); to humiliate, alarm or distress B or; are reckless as to whether B is humiliated, alarmed or distressed and B is, in fact, humiliated, alarmed or

distressed; and without the consent of B and where they reasonably know that B had not consented.

45. It will also be an offence where B has consented to the operation of equipment or the recording of an image for a particular purpose, and A operates the equipment or records the image for a different purpose. For example, where images have been taken for a medical procedure.

46. To clarify, the offences are made out when the following elements are present:

- where the perpetrator operates equipment or records an image with the intention of enabling him/herself or another person to observe an image of the breasts of the victim or the underwear covering them, and
- in circumstances where they would not otherwise be visible, and
- either of the following two conditions are met:

Condition 1

- The perpetrator, without the victim's consent or a reasonable belief in consent, operates equipment or records an image to enable the observation of the image *for the purpose of*
- his/her own sexual gratification or the sexual gratification of another person, or
- to humiliate, alarm or distress the victim.

Condition 2

- The perpetrator, without the victim's consent, or a reasonable belief in consent, operates equipment or records an image to enable the observation of the image, and
- the perpetrator is reckless as to whether the victim is humiliated, alarmed or distressed, and
- the victim is humiliated, alarmed or distressed.

47. It is important to note that, in condition 2, the recklessness element of the offence is not related to a particular purpose, as is required in Condition 1.

Breast feeding

48. In [Section 48](#) of the Police, Crime, Sentencing and Courts Act 2022, the UK Government amended the Sexual Offences Act 2003 to provide for a specific offence, in England and Wales, of operating equipment to observe, or record an image of, a woman breast feeding, without consent. During the passage of the then Justice (Sexual Offences and Trafficking Victims) Bill through the Assembly the introduction of a similar offence in Northern Ireland was raised by the Justice Committee but the issue was not pursued. Images taken here of a woman breast feeding would only be an offence if it met the elements of the Article 71B offence.

'Beneath or above'

49. It is the intention that the words 'beneath' or 'above' will cover all space for the offence of down-blousing. For example:
- where the offender (A) was standing beside a person (B) seated on a bus and took an image down B's top;
 - where A was sitting opposite (B) and B bent over to pick something up from the ground and A took an image;
 - where A took an image from underneath (B's) loose fitting top.

Recklessness

50. As with the 'up-skirting' offence, the inclusion of recklessness in the offence is to help minimise the risk of over-criminalisation, particularly of the young and vulnerable who have not fully thought through the consequences of their actions. For further detail on recklessness see paras 14 - 20.

'Not otherwise visible'

51. An Article 71B offence is limited to the observation and/or recording of images of breasts or the underwear covering the breasts in circumstances where they

would not otherwise be visible. Images taken of visible cleavage are not captured by the provisions.

52. For example, where an image was taken of a woman wearing a loose fitting top which (intentionally) showed cleavage – the image of the cleavage would not be caught by the offence. However, an image taken of the breasts underneath the T-shirt, say by a hidden shoe camera, would be caught by the provisions, provided the other elements of the offence were present.

Definition of ‘breasts’ and scope of the offence

53. ‘Breasts’ are not further defined in the offence. The definition is gender neutral.
54. Art 2(6) (*Interpretation*) of the 2008 Order, which applies to the down-blousing offences, states that:
“References to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery)”.
55. As the definition is gender neutral there is the potential for it to be interpreted more widely. For example, could images taken of men and boys suffering from gynaecomastia (more commonly known as ‘man boobs’) fall within scope of the offence? Would images taken of a woman who had had a mastectomy fall within scope of the offence? Would images taken of a trans woman who did not have surgically constructed breasts or who, though taking gender affirming hormones, has not yet developed breasts?
56. Decisions on prosecutions are for the PPS, depending on the circumstances of the case. Where a relevant case was prosecuted, it would be for the courts to determine the scope of the offence. Relevant case law will help determine scope.
57. In this context, a Court of Appeal case [R v Bassett](#) is relevant. This case related to a man who filmed a man washing his 3 year old daughter’s hair in a shower in a swimming pool changing room. Originally it was thought the man’s interest was in the child but it was the man he was interested in. The charge was

voyeurism of the man contrary to section 67(1) of the Sexual Offences Act 2003 (equivalent to the Northern Ireland Article 71 offence in the 2008 Order). In the Court of Appeal case, there was no issue about the elements of (a) observation by the accused, (b) his purpose being for sexual gratification, and (c) his knowledge that the man who he was observing did not consent to being observed for sexual gratification. The issue was whether the man was "doing a private act". The court considered that for an offence of voyeurism to be committed within the definition in section 67 of the Sexual Offences Act 2003, there had to be a private act which involved parts of the body for which people would conventionally or normally expect privacy, as defined by section 68(1) (of the 2003 Act).

58. The Court of Appeal found that, in determining whether an offence of voyeurism had been committed it was for the jury to decide on a case-by- case basis whether a person had a reasonable expectation of privacy, and *the nature of the observation, as opposed to the purpose of the observation, might be relevant to that determination. It also found that the word 'breasts' in [s68\(1\)\(a\) Sexual Offences Act 2003](#) did not extend to the exposed male chest stating 'we have no doubt that this Act did not in section 68(1)(a) mean to refer to the male chest but only to female breasts.'*
59. The Northern Ireland equivalent provision to section 68(1)(a) Sexual Offences Act is [Article 72\(1\)\(a\)](#) of the 2008 Order.

Penalties

60. The penalties for offences committed under Article 71B are: for summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; and on indictment, imprisonment for a term not exceeding two years.

Public Protection Sentences

61. [Paragraph 5 of Schedule 1](#) to the 2022 Act amends [Part 2 of Schedule 2](#) to the Criminal Justice (Northern Ireland) Order 2008 (specified sexual offences) by inserting new [Article 71B](#) into the Schedule to bring it within scope of an extended custodial sentence. Where the perpetrator is convicted under Article 71B and where the court considers that he/she poses a risk of serious sexual harm from the commission of further specified offences, the court must impose an extended custodial sentence, as provided for in [Article 14](#) of the 2008 Order. Under an extended custodial sentence, the court sets a custodial period and an extended licence period. The prisoner will be considered for release, by the Parole Commissioners, at the halfway point of the custodial term imposed by the court. If not considered suitable for release at that point, the prisoner can, where considered necessary for the protection of the public, be kept in custody for the remainder of the custodial period. On release, the offender will be on licence for an extended period of up to eight years.

Notification Requirements

62. A perpetrator convicted for an offence under Article 71B, but only where sexual gratification is proven, will be subject to notification requirements. [Paragraph 4 of Schedule 1](#) to the 2022 Act amends [Schedule 3 to the Sexual Offences Act 2003](#) (*sexual offences for purposes of notification requirements*). It inserts new paragraph 92VA to bring the Article 71B offences within scope of notification requirements. This is applied automatically to the offender and the period of notification is dependent on the conviction term.
63. Failure to comply with the notification requirements, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment of up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

Application of civil prevention orders

64. An offence under Article 71B can attract a civil prevention order used to manage risk from sexual offending.
65. There are three orders available in Northern Ireland, the provision for which is contained in the Sexual Offences Act 2003: a Sexual Offences Prevention Order (SOPO); a Foreign Travel Order (FTO); and a Risk from Sexual Harm Order (RoSHO). Only two of the three orders can be sought in relation to Article 71B where sexual gratification is proven: the SOPO and the FTO.

SOPO

66. Provision for the SOPO is included at section 104 of the UK-wide Sexual Offences Act 2003. It is designed to protect the public from the risk of serious sexual harm. Relevant offences which qualify for a SOPO application are contained within Schedule 3 (and 5) to the 2003 Act.
67. As Article 71B has been added to the offences listed at Schedule 3, a person who is convicted of an Article 71B offence would qualify for a SOPO, where sexual gratification is proven. A court can make a SOPO, either on application by the Chief Constable, or on conviction. Breach of a SOPO, or an interim SOPO, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

FTO

68. Provision for the FTO is included at section 114 of the 2003 Act. It is designed to protect children generally or any child from serious sexual harm from a qualifying offender outside the UK. Certain offences of Schedule 3 to the 2003 Act have been prescribed at section 116, which does not extend to Article 71B. However, section 116(2)(d) provides that an offender qualifies for an FTO if they have been convicted of an offence contained within any paragraph of Schedule 3, where the victim of that offence was under 18 at the time of the offence. A court can only make a FTO upon application by the Chief Constable.

69. Breach of a FTO, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment of up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

Anonymity of victims of sexual offences

70. Paragraph 2 of Schedule 1 to the 2022 Act brings new Article 71B within scope of the [Sexual Offences \(Amendment\) Act 1992](#) ('the 1992 Act'), which provides lifelong anonymity to victims of the offence. This is specified at section 2(3)(hb)(ii) of the 1992 Act (*offences under law of Northern Ireland to which the Act applies*).
71. [Section 8](#) (Extended anonymity of victims) of the 2022 Act amends section 1 of the 1992 Act to extend this lifelong anonymity for 25 years after death.

Anonymity of suspects in sexual offence cases

72. [Section 12](#) (Restriction on reports as to suspects of sexual offences) of the 2022 Act provides anonymity to suspects up to the point of charge in Article 71B cases. Where the suspect is not subsequently charged, this anonymity will be lifelong and will continue for 25 years after death.

Section 2: Sending etc. an unwanted sexual image - “Cyber-flashing”

Nature of offending

73. ‘Cyber-flashing’ typically involves offenders sending an unsolicited sexual image to another person via social media (e.g. Snapchat) or dating apps, but an image can also be sent via data sharing services such as Bluetooth and Airdrop. In some instances, a preview of the photo can appear on a person’s device – meaning that even if the transfer is rejected, victims are forced into seeing the image.
74. There is no research on the prevalence of cyber-flashing in Northern Ireland, but [Research](#) by Professor Jessica Ringrose from 2020 found that in Britain, 75 percent of girls aged 12-18 had been sent unsolicited nude images of male genitals. Advice on supporting young victims of cyber-flashing can be found at [Cyberflashing - UK Safer Internet Centre](#). [Research](#) by YouGov found that 4 in 10 women in Britain aged 18 to 34 had received unsolicited sexual images from someone who was not a sexual partner.
75. Much of the media coverage on cyber-flashing focuses on unsolicited sexual images being sent via Airdrop, with the perpetrator able to target the victim because of the way that Airdrop works. Users can send images and files via Airdrop to any iPhone user who has the function turned on within a 30 feet radius – the sender simply selects an iPhone name from the list of available devices. Due to the short range, victims are often targeted on public transport.
76. However, the research by YouGov found that the majority of unsolicited sexual images were sent by text message or a messaging service such as WhatsApp or by social media.
77. London Transport and National Rail have recently introduced new posters on trains and in train stations which address sexual harassment, including cyber-flashing. Details of the campaign can be found here: <https://tfl.gov.uk/info-for/media/press-releases/2021/october/new-campaign-launches-to-stamp-out-sexual-harassment-on-public-transport>

78. Across the rest of the UK, an offence of coercing a person into looking at a sexual image was made in Scotland in the Sexual Offences (Scotland) Act 2009. During the period 2011-12 to 2020-21, there were a total of 131 convictions made under the 2009 offence, which averages 13 convictions per year. Data shows that in all but one case, the offender carrying out the offence was 60 years old or younger, with the majority falling into the 21 to 30 year old age bracket. An offence of *sending etc photograph or film of genitals* was only recently made in England and Wales in the Online Safety Act 2023.

The Cyber-flashing Offences

79. [Section 2](#) of the 2022 Act amends the 2008 Order to add a new Article 72A (Sending etc. an unwanted sexual image), more commonly referred to as “cyber-flashing”.
80. Under new [Article 72A](#) of the 2008 Order, a person (A) commits an offence if they intentionally send or give a sexual image to another person (B), without the consent of B and where they reasonably know B had not consented; with the intention that B will look at the image and be humiliated, alarmed or distressed by it or; for the purpose of obtaining sexual gratification and are reckless as to whether B is humiliated, alarmed or distressed.
81. To clarify, the offences are made out when the following elements are present:
- where the perpetrator intentionally sends or gives a sexual image to another person, and
 - without that person’s consent or without a reasonable belief in that person’s consent, and
 - either of the following two conditions are met:

Condition 1

- The perpetrator intends that the victim will look at the image and that doing so will cause humiliation, alarm or distress.

Condition 2

- The perpetrator's purpose is to obtain sexual gratification, and
- he or she is reckless as to whether the victim is humiliated, alarmed or distressed.

It should be noted that the recipient of the image does not have to have looked at the image for the offence to be made out.

Recklessness

82. It is important to note that the recklessness provision in this offence differs from that in the up-skirting and down-blousing offences. Here, recklessness is linked to purpose, that purpose being for sexual gratification.
83. Under the provisions, it would be an offence to send, show or give a sexual image to another person intending to cause that person alarm, distress or humiliation, or, where the image was sent for a sexual purpose, reckless as to whether it would cause alarm, distress or humiliation.
84. The recklessness provision applies only where the purpose in sending the image is for sexual gratification. The offender sends the image for their own sexual gratification and is reckless as to whether, but not necessarily intending that, the victim will suffer alarm, distress or humiliation.
85. The inclusion of recklessness is to help avoid the risk of over-criminalisation. In this context, provided below is a useful extract from the Law Commission Report on [Reform of the Communications Offences](#) which consulted on and made recommendations for the introduction of a cyber-flashing offence in England and Wales (now included in the Online Safety Act 2023) which is similar to the Northern Ireland offence made in the 2022 Act.

86. *'Recklessness requires proof of an awareness of the risk of a result coupled with the risk being unreasonable to take. Importantly, this would cover the paradigmatic cases where a stranger on public transport sends a relevant image; few adults would be unaware of the risk of harmful consequences when sending genital images to strangers, and it would seem highly unlikely that a defendant could run successfully an argument that it was nonetheless reasonable to take such a risk. It would likely also avoid criminalising those instances where someone sent a message uncertain of whether there was consent but where they genuinely believed that no harm would result (such as a loving relationship) or where, through lack of maturity, they were entirely unaware of such a risk (such as, perhaps, with youths).'*

For further detail on recklessness see paragraphs 14 – 20.

'Sexual Image'

87. Articles 72A(4), (5) and (6) clarify that sexual image means a photograph or film of any person engaging in sexual activity or of any person's genitals. It is not the intention that a drawing or an animated film will be caught by the provisions.
88. A photograph includes the negative as well as the positive version.
89. A film means a moving image.
90. References to a photograph or film include an image made by computer graphics, or in any other way, which appears to be a photograph or film or; a copy of a photograph, a film or an image.
91. Data stored by any means which is capable of conversion into a photograph or film is also included.

‘Sending or giving’

92. Article 72A(7) has been constructed to ensure that the offence covers all possible means of ‘sending or giving’ and also to ensure that, with advances in technology, should the means of sending an unwanted sexual image change over the years, the provision is also future proofed. The provision states:
- (7) References to sending or giving such a photograph or film to another person include, in particular—
- (a) sending it to another person by any means, electronically or otherwise,
 - (b) showing it to another person, and
 - (c) placing it for a particular person to find.
93. Examples of what is included in references to ‘sending or giving’ are provided ‘in particular’ but these are not exclusive. It will be an offence to send or give an image by any means whether electronically or otherwise. The inclusion of otherwise demonstrates the scope of this provision.
94. It also includes showing the image to another person or placing it for a particular person to find.

Penalties

95. The penalties for offences committed under Article 72A are: for summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; and on indictment, imprisonment for a term not exceeding two years.

Public Protection Sentences

96. [Paragraph 5 of Schedule 1](#) to the 2022 Act amends [Part 2 of Schedule 2](#) to the Criminal Justice (Northern Ireland) Order 2008 (specified sexual offences) by inserting new [Article 72A](#) into the Schedule to bring it within scope of an extended custodial sentence. Where the perpetrator is convicted under Article 72A and where the court considers that he/she poses a risk of serious sexual harm from the commission of further specified offences, the court must impose

an extended custodial sentence, as provided for in [Article 14](#) of the 2008 Order. Under an extended custodial sentence, the court sets a custodial period and an extended licence period. The prisoner will be considered for release, by the Parole Commissioners, at the halfway point of the custodial term imposed by the court. If not considered suitable for release at that point, the prisoner can, where considered necessary for the protection of the public, be kept in custody for the remainder of the custodial period. On release, the offender will be on licence for an extended period of up to eight years.

Notification Requirements

97. A perpetrator convicted for an offence under Article 72A will be made subject to notification requirements, but only where the offence is committed for the purpose of sexual gratification (i.e. Condition 2 is met).

98. [Paragraph 4 of Schedule 1](#) to the 2022 Act amends [Schedule 3 to the Sexual Offences Act 2003](#) (*sexual offences for purposes of notification requirements*). It inserts new paragraph 92VB to bring the Article 72A offence within scope of the notification requirements. Notification requirements are applied automatically to the offender and the period of notification is dependent on the conviction term applied.

99. Where the offence is committed to humiliate, alarm or distress i.e. where Condition 1 is met, the perpetrator will not be subject to notification requirements.

100. Failure to comply with the notification requirements, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment of up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

Application of civil prevention orders

101. An offence under Article 72A can attract a civil prevention order used to manage risk from sexual offending.
102. There are three orders available in Northern Ireland, the provision for which is contained in the Sexual Offences Act 2003: a Sexual Offences Prevention Order (SOPO); a Foreign Travel Order (FTO); and a Risk from Sexual Harm Order (RoSHO). Only two of the three orders can be sought in relation to Article 71A where sexual gratification is proven: the SOPO and the FTO.

SOPO

103. Provision for the SOPO is included at section 104 of the UK-wide Sexual Offences Act 2003. It is designed to protect the public from the risk of serious sexual harm. Relevant offences which qualify for a SOPO application are contained within Schedule 3 (and 5) to the 2003 Act.
104. As Article 72A has been added to the offences listed at Schedule 3, a person who is convicted of an Article 72A offence would qualify for a SOPO, where sexual gratification is proven. A court can make a SOPO, either on application by the Chief Constable, or on conviction.
105. Breach of a SOPO, or an interim SOPO, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

FTO

106. Provision for the FTO is included at section 114 of the 2003 Act. It is designed to protect children generally or any child from serious sexual harm from a qualifying offender outside the UK. Certain offences of Schedule 3 to the 2003 Act have been prescribed at section 116, which does not extend to Article 72A. However, section 116(2)(d) provides that an offender qualifies for an FTO if they have been convicted of an offence contained within any paragraph of

Schedule 3, where the victim of that offence was under 18 at the time of the offence. A court can only make a FTO upon application by the Chief Constable.

107. Breach of a FTO, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

Anonymity of victims of sexual Offences

108. Paragraph 2 of Schedule 1 to the 2022 Act brings new Article 72A within scope of the [Sexual Offences \(Amendment\) Act 1992](#) ('the 1992 Act') which provides lifelong anonymity to victims of the offence. This is specified at section 2(3)(hb)(ii) of the 1992 Act (*offences under law of Northern Ireland to which the Act applies*).
109. [Section 8](#) (Extended anonymity of victims) of the 2022 Act amends section 1 of the 1992 Act to extend this lifelong anonymity for 25 years after death.

Anonymity of suspects in sexual offence cases

110. [Section 12](#) (Restriction on reports as to suspects of sexual offences) of the 2022 Act provides anonymity to suspects up to the point of charge in Article 71B cases. Where the suspect is not subsequently charged, this anonymity will be lifelong and will continue for 25 years after death.

Section 4: Sexual Grooming: pretending to be a child

111. [Section 4](#) of the 2022 Act inserts new Articles 22B to 22G into the [Sexual Offences \(Northern Ireland\) Order 2008](#) ('the 2008 Order'). These Articles introduce four offences, all of which seek to deal with an adult masquerading as a child and making a communication with a view to sexually grooming a child under 16. The new offences are unique to Northern Ireland and build upon existing child grooming and sexual communication with a child offences of the 2008 Order (Articles 21, 22 and 22A). Specifically, the provisions seek to address behaviour of adult offenders at an earlier stage in the child grooming process, where the offender pretends to be a child as a precursor to grooming or carrying out other offences and where this behaviour would constitute an indicator that they present a risk to children. This was identified as a legislative gap in safeguarding children by the PSNI in its [response](#) to the Department's [Consultation on the review of the law on child sexual exploitation](#)
112. [Article 22A](#) of the 2008 Order already criminalises sexual communication with a child. These new Articles criminalise any communication made with a view to communicating with a child (whether a known child or not) where the intention is to commit a future 'relevant' offence. Where that is the intent, masquerading as a child is an offence regardless of the nature of the communication.
113. Important to note too is that the provision has been constructed to capture all types of communication modes: online, face-to-face, and written/letter. However, it is most likely that the offender would demonstrate this behaviour through online activity, which is arguably an easier way to conceal their physical identity, but the behaviour could also be demonstrated through face-to-face communication, where, for example, the offender could be mistaken for being younger than their actual age.
114. It is also important to note that the communication does not have to be reciprocated.

115. The four offences, collectively, are structured to cover all possible angles of approach that might be used by an adult aiming to communicate with a child. These are: communicating with an individual; communicating with a group; communicating with a view to grooming a particular child under 16 and; communicating with a view to grooming any child under 16.
116. A relevant offence (defined at [Article 22F](#)) is: an offence under the 2008 Order; a human trafficking offence under the [Human Trafficking and Exploitation \(Criminal Justice and Support for Victims\) Act \(Northern Ireland\) 2015](#) in so far as it relates to sexual exploitation; or anything done outside Northern Ireland which is not such an offence, but would be if done in Northern Ireland.

The Offences

Article 22B: Communicating with a person with a view to grooming a particular person

117. This offence is designed to cover the scenario where an adult offender has a particular child in mind whom he/she wishes to begin grooming.
118. Under new [Article 22B](#) a person (A) commits an offence if they: are aged 18 or over; communicate with another person (B); and intentionally present to B, to a group including B, or to the public at large, as being under 18.
119. The offender (A's) intention in communicating with B must be to establish or participate in a communication exchange with a 'particular person' (C) who they have in mind with a view to committing a relevant offence against C. C is under 16 and A must have no reasonable belief that C is 16 or over to have committed an offence. It should be noted that B (the person with whom A first communicates) does not have to be a child (under 16), but the particular person with whom A seeks to engage (C) must be a child and A must reasonably believe that C is a child.

120. In Article 22B the following scenarios would be captured:

Scenario 1

An adult 'A' communicates with Sarah (B) who is 18 (though B can be under 16 or over 16). A's intention is to get to Emily, the particular child under 16 (C) that A has in mind, and thinks that Sarah may help him get to Emily. He has presented himself to Sarah as being under 18 and may or may not intend to present to Emily as under 18. He has no reasonable belief that Emily is over 16.

All elements of the offence must be satisfied for the offence to be made out. Taking this scenario through the elements of the offence:

- Is Article 22B(a) satisfied?

Yes. This element requires a person 18 or over to communicate with another person. As highlighted 'another person' doesn't have to be a child.

- Is Article 22B(b) satisfied?

Yes. This element requires that the adult intentionally presents themselves to B as being under 18. There is no requirement in the offence that the offending adult intends, should he/she end up making contact with the particular child they have in mind, to present to that child in any subsequent communication as being under 18. The presentation requirement applies in relation to B, which in this scenario is Sarah (Sarah could be under 16 or over 16), in order to get to the particular child in mind.

- Is Article 22B(c) satisfied?

Yes. This element requires that the offending adult's intention in communicating with B is to establish or participate in an exchange of communications with a particular person they have in mind 'C' with a view to subsequently committing a relevant offence against C. In this case the offending adult communicated with Sarah in a bid to get to Emily with whom he wants to communicate with a view to committing a relevant offence.

- Is Article 22B(d) satisfied?

Yes. This element requires that the particular child in mind is under 16 and that the offending adult does not reasonably believe that the child is 16 or over. The offending adult's intention in this scenario is to communicate with Emily—who is a child under 16—with a view to committing a relevant offence against her. Emily is under 16, and the offending adult does not believe otherwise.

Scenario 2

An adult 'A' communicates with Emily 'B' who is 15 and the daughter of a neighbour. The offending adult knows the family well enough to know Emily is under 16. The offending adult communicates directly to Emily through Facebook private messenger. He intentionally pretends to Emily that he is under 18 with the intention of committing a relevant offence specifically against her.

In this scenario, Article 22B(2) is key. B and C can be the same person.

Taking this scenario through the elements of the offence. **All elements of the offence must be satisfied for the offence to be made out:**

- Is 22B(a) satisfied?

Yes. This element requires a person 18 or over to communicate with another person 'B'. The offending adult has communicated with Emily – he has sent a message on Facebook.

- Is 22B(b) satisfied?

Yes. This element requires that the adult intentionally presents themselves to B as being under 18. The offending adult pretends to be under 18 to Emily 'B'.

- Is 22B(c) satisfied?

Yes. This element requires that the offending adult's intention in communicating with B is to establish or participate in an exchange of communications with a particular person they have in mind 'C' with a view to subsequently committing a relevant offence against C. (Article 22B(2) is of particular note in this scenario: B and C may be the same person) In this case the offending adult's intention is to communicate with Emily - the particular person he has in mind - with a view to committing a relevant offence against her.

- Is 22B(d) made out?

Yes. This element requires that the child in mind is under 16 and that the offending adult does not reasonably believe that the child is 16 or over. A's intention is to communicate with Emily – who is under 16 – with a view to offending against her. He knows Emily is under 16.

Scenario 3

The focus in this scenario is Article 22B(3).

Section 22B(3) requires that if A communicates with a group of persons and the group contains a person to whom A intentionally presents himself or herself as being under 18, A is to be regarded as communicating with that person.

An adult offender 'A' communicates with a group, but in some way filters his profile so as to intentionally present as under 18 to a certain person or persons in the group, in this case Sarah. The adult offender has not presented as under 18 to the whole group (or to the public at large). A's intention in filtering his profile so as to intentionally present as under 18 to Sarah is to establish or participate in an exchange of communication with a particular person A has in mind 'C'. C is under 16 and A has no reasonable belief that C is 16 or over.

In this scenario, all the elements of 22B (1) and 22B (3) would be made out.

All elements of the offence must be satisfied for the offence to be made out: Taking this scenario through the elements of the offence:

- Is 22B(a) satisfied?

Yes. This element requires a person 18 or over to communicate with another person 'B'. In this case A has communicated with a group of persons.

- Is 22B(b) satisfied?

Yes. This element requires that the adult intentionally presents themselves to B as being under 18. In this scenario, the offending adult has filtered his profile so as to intentionally present as under 18 to the particular person or persons he has in mind – in this case Sarah 'B'.

- Is 22B(c) satisfied?

Yes. This element requires that the offending adult's intention in communicating with Sarah is to establish or participate in an exchange of communications with a particular person they have in mind 'C' with a view to subsequently committing a relevant offence against C.

- Is 22B(d) made out?

Yes. This element requires that the child in mind is under 16 and that the offending adult does not reasonably believe that the child is 16 or over. A's intention is to establish or participate in an exchange of communication with a particular person A has in mind 'C' – in this case, Sarah. C is under 16 and A has no reasonable belief that C is 16 or over.

The offence is made out as under Article 22 B(3) where an offending adult communicates with a group of persons which contains a person to whom he intentionally presents as under 18, he is to be taken as communicating with that person. In this scenario A communicated with a group of persons so as to intentionally present as under 18 to Sarah, a particular person in the group. In such a scenario, A is regarded as communicating with that person

Article 22C: Communicating with a group with a view to grooming a particular child

121. This offence is designed to cover the scenario where an adult offender has a particular child in mind and seeks to reach them through fishing within the context of a group in order to find the particular child.
122. Under new [Article 22C](#) a person (A) commits an offence if they are aged 18 or over and they communicate with a group of persons with a view to establishing, or participating in, an exchange of communication with a particular person whom they have in mind (B), with a view to subsequently committing a relevant offence against B.
123. At the time of the communication, A must intentionally present to the group or to the public at large as being under 18 and B must be a child (under 16) and A must reasonably believe B is a child.
124. The key difference with this provision and that provided under Article 22B is the perpetrator's approach. Under Article 22B, the perpetrator is communicating with a particular individual (who may or may not be a child) to reach a child they have in mind (who may or may not be the same person as the individual communicated with). This may or may not be within the context of a group setting.
125. However, in Article 22C, the perpetrator is communicating with a group specifically to find a child they have in mind. The inclusion of this additional provision ensures a more robust protection should a perpetrator approach a particular child they have in mind, but where they seek to do so by means of communicating with a group.
126. The offence would capture the following behaviours:

Scenario 1

An adult offender 'A' communicates with a group, presenting himself to a WhatsApp chat group as being under 18. His purpose in using the group is to establish contact with Emily who is 15, and the particular person he has in mind. He believes that Emily may be part of the group and knows that she is under 16.

All elements of the offence must be satisfied for the offence to be made out. Taking this scenario through the elements of the offence:

- Is 22C(a) satisfied?

Yes. This element requires a person 18 or over to communicate with a group of persons. The offending adult has communicated with a group.

- Is 22C(b) satisfied?

Yes. This element requires that the adult intentionally presents himself or herself to the group or to the public at large as being under 18. In this case, the offending adult pretends to be under 18 to the group.

- Is 22C(c) satisfied?

Yes. This element requires that the offending adult's intention in communicating with the group is to establish or participate in an exchange of communications with a particular person they have in mind 'B', with a view to subsequently committing a relevant offence against B. In this case the offending adult's intention is to communicate with the group to establish an exchange of communications with Emily 'B' who is the particular person he has in mind, with a view to committing a relevant offence against her. It does not matter whether B's presence in the group is known to the offending adult or not. His intention is the important element. It also does not matter whether he may or may not have intended to subsequently present himself to the person in mind as being under 18 (in this case Emily). He has already presented himself as being under 18 to the group.

- Is 22C(d) made out?

Yes. This element requires that the person in mind 'B' is under 16 and that the offending adult does not reasonably believe that B is 16 or over. A's intention is to reach Emily through the group. Emily is under 16

Scenario 2

An adult offender 'A' communicates with a group, presents himself to a Facebook chat group as being under 18 and does so intending to use the group to establish, or participate in, an exchange of communication with a particular person he has in mind. This particular person is Emily, who is 15 and he knows she is 15. Emily is not in the group, but the offender thinks she may be and is trying to find her. ('A' may or may not intend to subsequently present himself to the person in mind as under 18).

All elements of the offence must be satisfied for the offence to be made out. Taking this scenario through the elements of the offence:

- Is 22C(a) satisfied?

Yes. This element requires a person 18 or over to communicate with a group of persons. The offending adult has communicated with a group.

- Is 22C(b) satisfied?

Yes. This element requires that the adult intentionally presents himself or herself to the group or to the public at large as being under 18. In this case, the offending adult pretends to be under 18 to the group.

- Is 22C(c) satisfied?

Yes. This element requires that the offending adult's intention in communicating with the group is to establish or participate in an exchange of communication with a particular person they have in mind 'B', with a view to subsequently committing a relevant offence against B. In this case the offending adult's intention is to communicate with the group to establish an exchange of communications with Emily 'B' who is 15 and the particular

person he has in mind, with a view to committing a relevant offence against her. It does not matter whether or not Emily's presence in the group is known to the offending adult, or that she isn't part of the group. His intention is the important element. It also does not matter whether he intends to subsequently present himself to Emily as being under 18. He has already done so to the group.

- Is 22C(d) made out?

Yes. This element requires that the person in mind 'B' is under 16 and that the offending adult does not reasonably believe that 'B' is 16 or over. The offending adult's intention is to reach Emily through the group. Emily is under 16.

Article 22D: Communicating with a person with a view to grooming any child

127. This offence is designed to cover the scenario where an adult offender does not have a particular child in mind and seeks to reach any child under 16 through fishing with an individual.
128. Under new [Article 22D](#) a person (A) commits an offence if they are 18 or over and A communicates with another person (B) who may or may not be a child (under 16).
129. At the time of the communication, A must intentionally present to B (who does not have to be under 16), or to a group of persons that includes B, or to the public at large, that they are under 18.
130. A's intention in communicating with B must be to establish, or participate in, an exchange of communication with any child with a view to subsequently committing a relevant offence against them. In this case, A does not have a particular child in mind at the time of the communication.

131. This provision differs from Articles 22B and 22C in that the perpetrator does not have a particular child in mind, rather, they are communicating with a person and presenting as under 18 to that person for the purposes of conducting a fishing exercise in the hope of finding any child with whom they can communicate. The driving motivation is that the perpetrator wants to commit a relevant offence against any person under 16.
132. Article 22 (D)(2) provides that if an offending adult 'A' communicates with a group of persons and the group contains a person to whom he intentionally presents himself as being under 18, he is to be regarded as communicating with that person.
133. The offence would capture the following behaviours:

Scenario 1

An adult offender 'A' communicates with Clare ('B') who is 15. At this point 'A' is unaware of Clare's age. (For this offence 'B' may be under 16 or over 16). The communication is made directly to her via Facebook private messenger. His intention in communicating with Clare is to get to any child under 16 so that he can establish or participate in a communication exchange with a view to committing a relevant offence. He presents himself to Clare as being under 18. He is hoping that he may be able to find a person of this description from his communication with Clare.

All elements of the offence must be satisfied for the offence to be made out. Taking this scenario through the elements of the offence:

- Is 22D(a) satisfied?

Yes. This element requires a person 18 or over to communicate with another person. The offending adult in this case has communicated with Clare.

- Is 22D(b) satisfied?

Yes. This element requires that the adult intentionally presents himself or herself to another person 'B', to a group of persons that includes 'B', or to the public at large as being under 18. In this case, the offending adult pretends to be under 18 to Clare as an individual.

- Is 22D(c) satisfied?

Yes. This element requires that the offending adult's intention in communicating with another person 'B' is to establish or participate in an exchange of communications with any person under 16 with a view to subsequently committing a relevant offence against such a person. In this case the offending adult's intention is to communicate with Clare to establish an exchange of communications with anyone under 16.

Scenario 2

An adult offender 'A' communicates with a group via a group chat on Facebook. He filters his profile to only present himself as under 18 to a certain person or persons within the group. In this case he has filtered his profile so as to present as under 18 to Tom (B) who is 18. By intentionally presenting as under 18 to Tom, the offender's intention is to get to any child under 16 so that he can establish or participate in a communication exchange with a view to committing a relevant offence.

All elements of the offence must be satisfied for the offence to be made out, Taking this scenario through the elements of the offence:

- Is 22D(a) satisfied?

Yes. This element requires a person 18 or over to communicate with another person. It is important to note here that where the offending adult 'A' communicates with a group of persons and filters his profile to only present himself as under 18 to a certain person or persons in the group, then 22D(a) is satisfied. The key point, by virtue of Article 22D(2), is that by

filtering their profile to only a certain person or persons they are taken to have communicated with that person or persons (as opposed to merely communicating with the group), in which case Article 22D(a) is satisfied and Article 22D(c) can be satisfied.

- Is 22D(b) satisfied?

Yes. This element requires that the adult intentionally presents himself or herself to another person 'B', to a group of person that includes B, or to the public at large as being under 18. In this case, the offending adult has filtered his profile so as to intentionally present as under 18 to Tom, but in a group context.

- Is 22D(c) satisfied?

Yes. This element requires that the offending adult's intention is to establish or participate in an exchange of communication with any person or persons under 16 with a view to subsequently committing a relevant offence against such a person or persons. By filtering his/her profile to present as under 18 to a certain person or persons in the group (in this case Tom), and by virtue of Article 22D(2) the offender will be regarded as communicating with Tom to establish an exchange of communication with anyone under 16.

Article 22E: Communicating with a group with a view to grooming any child

134. This offence is designed to cover the scenario where an adult offender does not have a particular child in mind and seeks to reach them through fishing via a group of persons in the hope that he/she will find a child under 16. This is the most general of the four offences and captures general fishing behaviour by a perpetrator.

135. Under new [Article 22E](#) a person (A) commits an offence if they are 18 or over and A communicates with a group of persons. At the time of the communication, A must intentionally present to the group, or to the public at large, as being under 18.

136. A's intention in communicating with the group must be to establish, or participate in, an exchange of communication with any child with a view to subsequently committing a relevant offence against them.
137. As with Article 22D, this provision differs from Articles 22B and 22C in that the perpetrator does not have to have a particular child in mind at the time of the communication.
138. This provision differs from Article 22D in that the perpetrator is communicating with a group rather than an individual, but again with the hope of finding any child with whom they can communicate. They are communicating with the whole group and not an individual person. Nor are they are filtering their profile so as to present as under 18 to a certain person or persons within a group.
139. The offence would capture the following behaviours:

Scenario 1

An adult offender 'A' communicates with a group as part of a Facebook chat. The intention in communicating with the group is to get to any child under 16 so that he can establish or participate in a communication exchange with a view to committing a relevant offence. He presents himself to the group as being under 18. He does this by presenting a false profile description. He is hoping that he may be able to find any child under 16 from his communication with the group.

All elements of the offence must be satisfied for the offence to be made out. Taking this scenario through the elements of the offence:

- Is 22E(a) satisfied?

Yes. This element requires a person 18 or over to communicate with a group of persons. The offending adult in this case has communicated with a group so this element is met.

- Is 22E(b) satisfied?

Yes. This element requires that the adult intentionally presents himself/herself to a group of persons or to the public at large as being under 18. In this case, the offending adult pretends to be under 18 to the group.

- Is 22E(c) satisfied?

Yes. This element requires that the offending adult's intention in communicating with the group is to establish or participate in an exchange of communications with a person or persons under 16 with a view to subsequently committing a relevant offence against that person or persons. In this case the offending adult's intention is to communicate with the group to establish an exchange of communications with anyone under 16.

'Public at large'

140. The public at large element in the offences is to counter any defence put forward that, because of the nature of the presentation, it does not meet the requirement of presentation to a person or a group.

141. For example, a person in a shopping centre presents himself as under 18 and speaks directly to a person in a crowd of coming and going shoppers. A defence might be put forward that:

- this is not a presentation to the person because it was not just to that person, and/or
- the collection of people was too loose and constantly changing to constitute a group that could be presented to.

142. In such a case, the presentation is to the 'public at large' and the offence is made out.

143. A further example is where a person portrays themselves on an online network or forum as under 18, potentially presenting themselves as under 18 to the whole world, or at least potentially to everyone with an internet connection. Where the perpetrator contacts a person, their defence might be that they have not intentionally presented themselves to B as under 18, on the grounds that the presentation was not directed specifically at B. In such a case, the offence would be made out under a presentation to the 'public at large'.
144. 'Public at large' is included in the offences to cover all possible angles of approach.

Article 22F: Communication with a view to grooming: interpretation

145. New [Article 22F\(a\)](#) provides a 'reasonable person' test in respect of whether the offending adult 'A' has presented themselves as being under 18. It provides that for the purposes of Articles 22B to 22E, a person (A) presents to a person (or persons) as being under 18 if a reasonable person would consider that, in all the circumstances, A presents to that person as being under 18.
146. Relevant offence is defined at [Article 22F\(b\)](#) as an offence under the Sexual Offences (Northern Ireland) Order 2008, a human trafficking offence under the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 in so far as it relates to sexual exploitation or anything done outside Northern Ireland which is not such an offence, but would be if done in Northern Ireland.
147. General Points to note:
- The 'masquerading' communication does not have to be sexual.
- The 'masquerading' communication does not have to be reciprocated.

The presentation as under 18 has to be intentional with a view to committing a relevant offence against a child.

It is recognised that there are some adults who might pretend to be a child for innocent reasons, either because of vulnerability or immaturity. There may also be occasions where an adult (accidentally or not) logs on (for example in an online game) under their child's log on details. The offences are structured so as not to criminalise those who have no malign intent and do not pose a risk to children.

A table demonstrating the relevant stages required for the offences to be made out is provided at page 49.

Penalties

148. The penalties for offences committed under Articles 22B to 22E are: for summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; and on indictment, imprisonment for a term not exceeding two years.

Notification Requirements

149. A perpetrator convicted for an offence under Articles 22B to 22E will be subject to notification requirements.
150. [Section 4\(2\)](#) of the 2022 Act amends [Schedule 3 to the Sexual Offences Act 2003](#) (*sexual offences for purposes of notification requirements*). It inserts new paragraphs 921B, 921C, 921D and 921E into Schedule 3 to bring the Articles 22B to 22E offences within scope of notification requirements. This is applied automatically to the offender and the period of notification is dependent on the conviction term.
151. Failure to comply with the notification requirements, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of

imprisonment up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

Public protection sentences

152. [Section 4\(3\)](#) of the 2022 Act amends [Part 2 of Schedule 2](#) to the Criminal Justice (Northern Ireland) Order 2008 (specified sexual offences) by inserting new Articles 22B to 22E into the Schedule to bring them within scope of an extended custodial sentence. Where the perpetrator is convicted under Articles 22B to 22E and where the court considers that he/she poses a risk of serious sexual harm from the commission of further specified offences, the court must impose an extended custodial sentence, as provided for in [Article 14](#) of the 2008 Order.
153. Under an extended custodial sentence, the court sets a custodial period and an extended licence period. The prisoner will be considered for release, by the Parole Commissioners, at the halfway point of the custodial term imposed by the court. If not considered suitable for release at that point, the prisoner can, where considered necessary for the protection of the public, be kept in custody for the remainder of the custodial period. On release, the offender will be on licence for an extended period of up to eight years.

Application of civil prevention orders

154. Offences under Articles 22B to 22E can attract a civil prevention order used to manage risk from sexual offending.
155. There are three orders available in Northern Ireland, the provision for which is contained in the UK-wide Sexual Offences Act 2003: a Sexual Offences Prevention Order (SOPO); a Foreign Travel Order (FTO); and a Risk from Sexual Harm Order (RoSHO). Only two of the three orders can be sought in relation to Articles 22B to 22E: the SOPO and the FTO.

SOPO

156. Provision for the SOPO is included at [section 104](#) of the Sexual Offences Act 2003. It is designed to protect the public from the risk of serious sexual harm. Relevant offences which qualify for a SOPO application are contained within Schedule 3 (and 5) to the 2003 Act.
157. As Articles 22B to 22E have been added to the offences listed at Schedule 3, a person who is convicted of these offences would qualify for a SOPO. A court can make a SOPO, either on application by the Chief Constable, or on conviction. Breach of a SOPO, or an interim SOPO, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

FTO

158. Provision for the FTO is included at [section 114](#) of the 2003 Act. It is designed to protect children generally or any child from serious sexual harm from a qualifying offender outside the UK. Certain offences of Schedule 3 to the 2003 Act have been prescribed at section 116, which does not extend to Articles 22B to 22E. However, [section 116 \(2\)\(d\)](#) provides that an offender qualifies for an FTO if they have been convicted of an offence contained within any paragraph of Schedule 3, where the victim of that offence was under 18 at the time of the offence. A court can only make a FTO upon application by the Chief Constable.
159. Breach of a FTO, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

Stage	22B Communicating with a person with a view to grooming a particular child	22C Communicating with a group with a view to grooming a particular child	22D Communicating with a person with a view to grooming any child	22E Communicating with a group with a view to grooming any child
Stage 1: the initial communication to:	(a) A communicates <u>with another person (B).</u>	(a) A communicates <u>with a group of persons.</u>	(a) A communicates <u>with another person (B).</u>	(a) A communicates <u>with a group of persons.</u>
Stage 2: the intentional presentation as under 18 to:	(b) at the time of the communication, A intentionally presents himself or herself <u>to B, to a group of persons that includes B or to the public at large as being under 18.</u>	(b) at the time of the communication, A intentionally presents himself or herself <u>to the group or to the public at large as being under 18.</u>	(b) at the time of the communication, A intentionally presents himself or herself <u>to B, to a group of persons that includes B or to the public at large as being under 18, and</u>	(b) at the time of the communication, A intentionally presents himself or herself <u>to the group or to the public at large as being under 18, and</u>
Stage 3: with the intent to establish or participate in an exchange of communications with:	(c) A's intention in communicating with B is to establish or participate in an exchange of communications <u>with a particular person whom A has in mind (C)</u>	(c) A's intention in communicating with the group is to establish or participate in an exchange of communications <u>with a particular person whom A has in mind (B)</u>	(c) A's intention in communicating with B is to establish or participate in an exchange of communications <u>with a person or persons aged under 16</u>	(c) A's intention in communicating with the group is to establish or participate in an exchange of communications <u>with a person or persons aged under 16</u>
Stage 4: with a view to subsequently committing a relevant offence against:	with a view to subsequently committing a relevant offence <u>against C</u> and	with a view to subsequently committing a relevant offence <u>against B</u> , and	with a view to subsequently committing a relevant offence <u>against such a person; but without having a particular person in mind at the time of the communication.</u>	with a view to subsequently committing a relevant offence <u>against such a person; but without having a particular person in mind at the time of the communication.</u>
Stage 5: the possible optional defence.	(d) C is under 16 and A does not reasonably believe that C is 16 or over.	(d) B is under 16 and A does not reasonably believe that B is 16 or over.		
Stage 6: the possible further definition of (B) and (C).	(2) B and C may be the same person.			
Stage 7: the possible further definition of communication with that person.	(3) If— (a) A communicates with a group of persons, and (b) the group contains a person to whom A intentionally presents himself or herself as being under 18, A is to be regarded as communicating with that person.		(2) If— (a) A communicates with a group of persons, and (b) the group contains a person to whom A intentionally presents himself or herself as being under 18, A is to be regarded as communicating with that person.	

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Section 5: Abuse of position of trust: extension of scope of offences to sport and religious settings

160. [Section 5](#) of the 2022 Act amends existing abuse of position of trust legislation, contained in [Part 3 \(Sexual Offences Against Children\)](#) of the 2008 Order, to extend the scope of the existing abuse of position of trust provisions, as provided for in [Articles 23 to 31 \(Offences against children under 18: abuse of position of trust\) of the 2008 Order](#), to include the non-statutory settings of sport and religion. Prior to this legislative change, the abuse of position of trust offences applied only to those adults in a position of trust of young people within the statutory sector, such as in education, health environments, youth detention and social service care and as defined in [Article 28 \(Positions of trust\) and Article 29 \(Positions of trust: interpretation\)](#) of the 2008 Order.
161. The additional provisions detailed in this guidance mean that those adults who are in a position of trust of under 18s and who carry out certain activities with them in sport and religion (as defined at section 29A) are captured by the offences.

The abuse of trust provision

162. The aim of the abuse of trust provision is to protect young people in particular situations where there is some element of dependency on an adult, which is often combined with an element of vulnerability on the part of the young person. They are intended to capture those relationships where there is an imbalance in power held by the child and adult, and where there is scope for that position of trust to be abused: to prevent the manipulation of children to consent to sexual activity by those who hold a position of trust with them.
163. The offences originally created at Articles 23 to 26 of the 2008 Order, and which still apply following the 2022 amendment, are identical to the behaviours prohibited by the child sex offences contained in Articles 16 to 19 of the 2008 Order, except that for the abuse of position of trust offences, the child may be 16 or 17. The offences are:

[Article 23](#) (*Abuse of position of trust: sexual activity with a child*)

[Article 24](#) (*Abuse of Position of Trust: causing or inciting a child to engage in sexual activity*)

[Article 25](#) (*Abuse of position of trust: sexual activity in the presence of a child*),
and

[Article 26](#) (*Abuse of position of trust: causing a child to watch a sexual act*)

164. The offence provisions set out certain requirements in terms of reasonable belief. Except where the child is under 13, one of the requirements is that the adult does not reasonably believe that the child is 18 or over, and the adult is subject to an evidential burden in relation to this aspect of the offence. An evidential burden means that, unless the adult shows from the evidence that there is an arguable case as to whether he reasonably believed the child to be 18 or over, it is presumed that he did not reasonably believe this.
165. Where the child is under 13, the offence is committed regardless of any belief that the adult might have in relation to the child's age.
166. [Article 27](#) (*Acts done in England and Wales or Scotland*) provides that any act that would, if done in Northern Ireland, constitute an offence under Articles 23 to 26, also constitutes an offence if carried out in England, Wales or Scotland. Extra-territorial provision for the offences is contained at [Article 76\(10\)\(a\)](#).
167. [Article 28](#) (*Positions of trust*) defines a person in a position of trust relating to those who look after a person under 18 who are being accommodated and/or cared for in a defined statutory sector setting.
168. [Article 29](#) (*Positions of trust: interpretation*) defines the term 'looks after' relevant to Article 28, which is where the adult is regularly involved in caring for, training, supervising or being in sole charge of a person under 18, within the associated statutory settings.
169. [Article 30](#) (*Exceptions for spouses and civil partners*) provides that it is not an offence if the young person is 16 and over and the young person and the adult

concerned are lawfully married or are civil partners with each other. In such a case, the defendant has to prove that they and the young person involved were lawfully married or civil partners at the time of the engagement in activity.

170. [Article 31](#) (*Sexual relationships which pre-date a position of trust*) provides that it is not an offence if immediately before the position of trust arose, a sexual relationship existed between the adult and young person. This does not apply where the sexual intercourse was unlawful.

Extended scope of abuse of position of trust offences

171. [Section 5](#) of the 2022 Act inserts new [Article 29A \(*Positions of trust: further categories*\)](#) into the 2008 Order. This new Article sets out the further categories of adults in a position of trust who are captured by the position of trust offences at Articles 23 to 26.

172. [New Article 29A\(1\)\(a\)](#) provides that, for the purposes of the offences contained in Articles 23 to 26, a person (A) is in a position of trust in relation to another person (B) if A coaches, teaches, trains, supervises or instructs B on a regular basis in a sport or a religion.

173. It is a specific requirement that the adult carries out the activity on a regular basis. This acts as a safeguard to deal with frequency of an activity and the person's knowledge of the young person. The legislation is not intended to capture a person who only helps out with an activity e.g. a coaching session, where it is carried out on one occasion or infrequently. Those who are involved in defined activities on a regular basis would have the best opportunity to connect with the young person and form a bond or close relationship. Those who dip in and out of activities, which are considered on a more casual basis, do not have the same opportunity to manipulate or influence.

174. [New Article 29A\(1\)\(b\)](#) provides for a requirement that A knows he/she coaches, teaches, trains, supervises or instructs a person under 18 on a regular basis in that sport or religion. This requirement is additional to the reasonable belief

requirements and the associated evidential burden as set out in the original abuse of trust offences.

175. The aim of the additional requirement is twofold: to prevent the positions of trust being drawn too broadly and; to strengthen the requirement for a prior connection or contact between the adult in the position of trust and the young person.
176. For example, it would cover the situation where an adult regularly preaches to a congregation of people where they have never personally met the young person and do not know that the young person is a member of their congregation. In such a situation, the adult will not be considered to be in a position of trust over the young person.
177. New Article 29A(2) defines sport and religion for the purposes of Article 29A(1). Sport is defined as including any game in which physical skill is the predominant factor and, any form of physical recreation which is also engaged in for purposes of competition or display.
178. This will capture coaches, teachers (outside of a statutory setting), trainers, supervisors etc. in physical sport such as tennis, rugby, hockey, hurling, camogie, football etc. It will also capture those sports where there is a more recreational dimension to them and for competition/display purposes. This could include dance or gymnastics for example.
179. Religion is defined as including a religion which involves belief in more than one god and a religion which does not involve belief in a god. Uniformed organisations, such as scouts, BB/GB/Girl Guides etc. would fall within scope if there is a faith dimension to the teaching or instruction etc. as prescribed in the religion definition. For example, the Scouts organisation now has its focus on skill forming and is no longer affiliated to the church. However, there is religious affiliation to the Boys Brigade (BB), Girls Brigade (GB) and the Girl Guides. Drama might also fall within scope if, for example, the nature of a play or the messaging portrayed, related to religious teaching.

180. New Article 29A(3) provides that anyone considered to already be in a position of trust under Article 28 of the 2008 Order is not brought within scope of the proposed new provisions.
181. New Article 29A(4) provides for an enabling power to allow further sectors to be brought within, or removed from, the scope of the provisions.

General points to note

182. The extended scope provisions refer to a range of activities carried out by an adult in relation to a child under 18: teaching, instructing, training, coaching and supervising a young person on a regular basis in a religion or sport. The aim of the legislation is to capture, as effectively as possible, all possible behaviours associated with relevant offending. Specifically, the definition has not been aligned to a particular formal role or job title. Formal roles and titles are particularly relevant to a religious setting (e.g. Minister, Priest, Rabbi, Imam, youth leader in a religious setting etc.) but may be less so in sports settings. The legislation recognises the diversity of roles and leadership structures within both settings.
183. This is further qualified by the fact that the person of trust must know that they are teaching, instructing, training, coaching or supervising that person on a regular basis. While, as referenced above, the definition has not been aligned to a particular formal role or job title, this would include persons in paid employment (e.g. Minister, sports coach) as well as those responsible for the young person on a voluntary basis (e.g. Sunday school teacher, voluntary sports assistant). The teaching, instruction, training, coaching and supervising must be relevant to religion/faith or in a sport.
184. Where a sport or religious establishment hire, rent or lease out owned premises, (for example, a church hall), to a third party, individuals concerned in that third party arrangement would be captured by the legislation if they fall within the required definition. That is, if they teach, instruct, train, coach or

supervise in a religion or in a sport on a regular basis and know that they carry out such activity on a regular basis. The emphasis is on the activity.

185. During the passage of the legislation through the Assembly, the issue of whether musical bands would fall within scope of the provisions was raised. While it could be argued that marching constitutes an element of physical recreation and for competition purposes, the Department considers that bands would not fall within scope. However, decisions on scope and charge and prosecution must be determined on the individual circumstances of each case.
186. While the provisions seek to protect all under 18s, by virtue of the Northern Ireland statutory age of sexual consent, the provisions mainly relate to persons aged 16 or 17. They have been structured to minimise the risk of over criminalising young people who could be considered to be breaking the law if, for example, a person aged 18 has a sexual relationship with a person aged 16 or 17, in practice effectively raising the age of consent. The legislation is constructed to provide that those with innocent intention, who are enjoying a healthy relationship, should not be criminalised unnecessarily.
187. It should be noted that the abuse of position of trust provision comprises one category within the wider robust legislative framework used by PSNI and PPS which already provides extensive and significant protections to young people from the harm caused by sexual offending. This wider framework makes it an offence for anyone to engage in sexual activity with someone under the age of 16, whether or not they consent to that activity. All non-consensual sexual activity is criminalised irrespective of age.
188. Where an offender in a case is in a position of trust, this is already, and will always be, treated as a significant aggravating factor by the courts when sentencing.
189. The PPS Code for Prosecutors specifically refers to the defendant being in a position of trust or authority as a consideration for prosecution when considering the Public Interest Test. While this is not specifically a reference

to an aggravating factor, it demonstrates the importance of this factor at the decision-making stage.

190. The four offences to which these provisions apply, and the available penalties, remain unchanged.

Penalties

191. The penalties for offences committed under Articles 23 to 26 are: for summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; and on indictment, imprisonment for a term not exceeding five years.

Public protection sentences

192. Articles 23 to 26 are specified in [Part 2 of Schedule 2](#) to the Criminal Justice (Northern Ireland) Order 2008 (specified sexual offences). Where the offender is convicted under any of these Articles and where the court considers that he/she poses a risk of serious sexual harm from the commission of further specified offences, the court must impose an extended custodial sentence, as provided for in [Article 14](#) of the 2008 Order. Under an extended custodial sentence, the court sets a custodial period and an extended licence period. The prisoner will be considered for release, by the Parole Commissioners, at the halfway point of the custodial term imposed by the court. If not considered suitable for release at that point, the prisoner can, where considered necessary for the protection of the public, be kept in custody for the remainder of the custodial period. On release, the offender will be on licence for an extended period of up to eight years.

Notification Requirements

193. Those convicted of an offence under Articles 23 to 26 will be made subject to notification requirements under section 80 of, and Schedule 3, paragraph 93J to, the Sexual Offences Act 2003.
194. This is applied automatically to the offender and the period of notification is dependent on the conviction term. Failure to comply with the notification requirements, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

Application of civil prevention orders

195. Offences under Articles 23 to 26 can attract a civil prevention order used to manage risk from sexual offending.
196. There are three orders available in Northern Ireland, the provision for which is contained in the Sexual Offences Act 2003: a Sexual Offences Prevention Order (SOPO); a Foreign Travel Order (FTO); and a Risk from Sexual Harm Order (RoSHO). Only two of the three orders can be sought in relation to Art 71A where sexual gratification is proven: the SOPO and the FTO.

SOPO

197. Provision for the SOPO is included at [section 104](#) of the UK-wide Sexual Offences Act 2003. It is designed to protect the public from the risk of serious sexual harm. Relevant offences which qualify for a SOPO application are contained within Schedule 3 (and [Schedule 5](#)) to the 2003 Act.
198. A court can make a SOPO, either on application by the Chief Constable, or on conviction. See NI Guidance on Part 2 Sexual Offences Act 2003. Breach of a SOPO, or an interim SOPO, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

FTO

199. Provision for the FTO is included at [section 114](#) of the 2003 Act. It is designed to protect children generally or any child from serious sexual harm from a qualifying offender outside the UK. Certain offences of Schedule 3 to the 2003 Act have been prescribed at [section 116](#) of the 2003 Act. Section 116 (2)(d) provides that an offender qualifies for an FTO if they have been convicted of an offence contained within any paragraph of Schedule 3, where the victim of that offence was under 18 at the time of the offence. A court can only make a FTO upon application by the Chief Constable.
200. Breach of a FTO, without reasonable excuse, is a criminal offence punishable on summary conviction by a period of imprisonment up to six months or a fine not exceeding the statutory maximum, or both. Conviction on indictment carries a term of imprisonment not exceeding five years.

Anonymity of victims of sexual offences

201. Articles 23 to 26 are already within scope of the [Sexual Offences \(Amendment\) Act 1992](#) (the 1992 Act), which provides lifelong anonymity to victims of the offence. This is specified at [section 2\(3\) \(hb\)\(i\)](#) of the 1992 Act (*offences under law of Northern Ireland to which the Act applies*).
- [Section 8](#) (*Extended anonymity of victims*) of the 2022 Act amends section 1 of the 1992 Act to extend this lifelong anonymity for 25 years after death.

Anonymity of Suspects in sexual offence cases

202. [Section 12](#) (*Restriction on reports as to suspects of sexual offences*) of the 2022 Act provides anonymity to suspects in Articles 23 to 26 cases. Where a suspect is not subsequently charged, this anonymity will be lifelong and will continue for 25 years after death.

Section 6: Private Sexual Images: threatening to disclose

203. [Section 6](#) of the Act amends the existing law concerning the disclosure of private sexual photographs and films with intent to cause distress - contained in [section 51](#) of the Justice Act (Northern Ireland) 2016 - to bring 'threats to disclose' within its scope. This means that those who threaten to disclose a relevant image, without the consent of the individual concerned, are guilty of a criminal offence.

Nature of offending

204. While there is no comparable research available in Northern Ireland, [research](#) conducted by Refuge in England and Wales (a specialist service provider in England and Wales for women survivors of domestic abuse) found that 1 in 14 adults had experienced threats to share intimate or sexual images. Threats to share were much more common amongst young people (aged 18-34), with 1 in 7 young women and 1 in 9 young men experiencing threats. And while 60% of those who had experienced threats to share intimate or sexual images were aged 39 and under, almost 1 in 8 were in their 60s, and 1 in 20 were in their 70s, demonstrating that individuals of any age can be vulnerable to this form of abuse.
205. The research also found that threats to share are most commonly experienced as part of a pattern of domestic abuse – 72% of women who have experienced threats to share were threatened by a current or former partner. Many had been threatened more than once: almost half (47%) of women and 30% of men who were threatened by a current partner; and 38% of women and 32% of men who were threatened by an ex, reported that this was the case.
206. Further, 83% of women who experienced threats to share from their partners or ex-partners also experienced other forms of abuse. 43% of women experienced coercive and controlling behaviour in addition to threats to share and 39% experienced emotional abuse.
207. One in five women experienced other forms of abuse in addition to the threats to share, such as monitoring their phones or other devices, using technology to track their location or spy on them, harassing them through constant messages

and phone calls, threatening to share information about them online, or stalking them through fake social media accounts. Additionally, more than 1 in 4 women were sexually abused and more than 1 in 6 women were physically abused.

208. The research also found that threats to share intimate or sexual images have a severe, lasting impact on survivors' mental and emotional wellbeing, with 83% of women saying that the threats directly impacted their mental health and more than 1 in 10 saying the threats made them feel suicidal. Threats are also having a direct impact on women's physical safety, with almost 1 in 10 saying they were forced to resume or continue the relationship and/or tell the perpetrator where they were.
209. Further information on frequency and impact of threats to disclose private sexual images can be found in the [Revenge Porn Helpline 2022 Annual Report](#). The report explores how the Revenge Porn Helpline team offer successful practical support to adults over the age of 18, in the UK, who are experiencing intimate image abuse.

The Offence

210. [Section 6](#) of the 2022 Act amends [section 51](#) (Disclosing private sexual photographs and films with intent to cause distress) of the Justice Act (Northern Ireland) 2016 ("the 2016 Act") to extend the scope of the existing disclosure offence. It provides for the new offence of threatening to disclose a private sexual photograph and film with intent to cause distress. (The existing disclosure offence is more commonly known as 'revenge pornography'. However, there is a recognised move away from using this term which is considered to misrepresent this type of offending and to not capture the full range of perpetrator behaviour.)
211. Under section 6(2), a **new section 51(1)** is substituted for existing section 51(1) of the 2016 Act to make it an offence where a person threatens to disclose a private sexual photograph or film in which 'the relevant individual' appears, without consent and with the intent to cause distress to that individual. 'The relevant individual' is the person who appears in the actual, or alleged,

photograph or film. Only threats to disclose private sexual photographs or films to third parties, with intent to cause distress, constitute an offence.

212. **Subsection 51(2)** of the 2016 Act is amended to provide that it will not be an offence to threaten to disclose the image to the individual who appears in the photograph or film.
213. For clarity, a possible scenario of how such a threat could occur is where a person has taken a photograph of a partner (the 'relevant individual') but has promised that he/she has destroyed the photograph, or the partner may not remember it being taken, or know that it was being taken. At some later stage, the partner or ex-partner tells or reminds the person ('the relevant individual' who may have moved on into another relationship) that they have, or still have, a photograph and they threaten to show it to them. If no longer in the relationship, the thought that someday the image might be sent e.g. to their phone, might disgust, humiliate or distress the relevant individual but even where there was distress caused, this would not fall within scope of offence. In a coercive relationship (past or present) this could be used as an inherent threat or as a means of control but would not fall within the scope of this new offence.
214. Subsections **(4) and (5)** of **section 51** are amended to apply the defences available for the disclosure offence to the new offence of threats to disclose. These defences are that (the disclosure) or threat to disclose:
- was for the purposes of investigating, preventing or detecting of crime;
 - was made in the course of publication of journalistic material and believed to be in the public interest (*this defence ensures that the freedom of the press to publish such stories is not fettered²*);
 - that the image was previously disclosed for reward either by the relevant individual or another person but with the relevant individual's consent. For example, this would cover commercial pornography. It would not be an offence, whatever the motive of the person in publishing the photograph or

² [Guidelines on prosecuting the offence of disclosing private sexual photographs and films | The Crown Prosecution Service](#)

film, unless the person has some reason to believe that the person in the image had not consented when the material was published for reward³.

215. As with the disclosure offence, the burden of proving that the threat to disclose was necessary for the purposes of preventing, detecting or investigating crime rests with the defendant. However, where the defendant provides sufficient evidence to raise an issue in respect of the matters set out in *subsections 51(4) and (5)* it will be for the prosecution to disprove those matters beyond all reasonable doubt in order to secure a conviction.
216. The scope of 'consent' and the meaning of 'publication' as set out in section 51(7) of the 2016 Act and which apply to the disclosure offence also apply to the threats to disclose offence.
217. 'Consent' to a disclosure includes general consent covering the disclosure of the photograph or film (for example, on a previous occasion for commercial reward), as well as consent to the particular disclosure. This only describes the scope of consent to a disclosure, it does not define what consent is.
218. 'Publication' is defined as publication to the public at large or to a section of the public.
219. A new **subsection 51(7A)** is inserted after *subsection 51(7)* which provides that where a person is charged with an offence of threats to disclose, it is not necessary for the prosecution to prove that the photograph or film referred to in the threat exists, or if it does exist, that it is in fact a private sexual photograph or film.
220. A new **subsection 51(8)** is substituted for the existing *subsection (8)* to provide that a person charged with threats to disclose is not to be taken to have intended to cause distress merely because this was a natural and probable

³ [Guidelines on prosecuting the offence of disclosing private sexual photographs and films | The Crown Prosecution Service](#)

consequence of having made the threat. (This provision already applies to the disclosure offence.)

221. This means that even though the threat to disclose is likely to cause distress or may have already caused distress, for it to be an offence it must be proved beyond reasonable doubt that there is an intention or 'mens rea' to cause distress. It is not an offence irrespective of the harm or distress caused to the victim, unless the motivation is to cause distress.
222. In explaining the motivation to distress concept further, by way of example – and while not directly relevant to the specifics of the threats to disclose offence itself: where the image was first shared as a joke or a prank without consent, and, where shared online, may have been re-tweeted or shared multiple times without consent, it is not an offence irrespective of the harm or distress caused to the victim, unless the motivation to cause distress is proven. Distress is not defined in the legislation.
223. Subsections **(4) to (8) of [section 52](#)** of the 2016 Act define “photograph or film”. As detailed above, under the threats to disclose offence there is no need for the prosecution to prove that the photograph or film referred to in the threat exists or, if it does exist, that it is a private photograph or film. However, for completeness an explanation of the definition is set out below.
224. The offence applies to photographs and films but will also apply to an image which appears photographic and originated from a photograph or film even if the original is altered in some way or where two or more photographed or filmed images are combined. A photographed or filmed image is a still or moving image (or part of an image) originally captured by photography or by the making of a film recording. For example, an image, even if derived from a photograph, which has been digitally altered to look entirely like a drawing would not satisfy the test. But if a drawing had a photographed image or part of a photographed image transposed onto it, it would do so. The offence does not apply if the disclosed material looks like a photograph but does not in fact contain any

photographic element, for example, where it had been generated entirely by computer.

225. The offence does not apply if it is only because of the alteration or combination that the film or photograph has become private and sexual or if the intended victim is only depicted in a sexual way because of the alteration or combination. For example, a person who has non-consensually disclosed a private and sexual photograph of an individual in order to cause that person distress will not be able to avoid liability for the offence by digitally altering the colour of the victim's hair. However, a person who simply transposes the head of a former partner onto a sexual photograph of another person will not commit the disclosure offence.
226. References to a photograph or film include a negative version of a still or moving image that is a photograph or film and stored data that can be converted into such a still or moving image – for instance data stored on a hard drive or disc.
227. The meanings of 'private' and 'sexual' are set out in [section 53](#) of the 2016 Act, and as they apply to the disclosure offence, they also apply to the new threats to disclose offence. A photograph or film is 'private' if it shows something of a kind not ordinarily seen in public. A photograph or film is 'sexual' if:-
- it shows all or part of exposed genitals or pubic area
 - it shows something that a reasonable person would consider to be sexual because of its nature, or
 - its content, taken as a whole, is such that a reasonable person would consider it to be sexual.
228. The provisions only make reference to one part of the body – exposed genitals or pubic area - because this part of the body is considered to be so intimate that an image showing it should automatically be regarded as sexual for the purposes of the offence⁴. Photographs or films depicting other types of

⁴ [Guidelines on prosecuting the offence of disclosing private sexual photographs and films | The Crown Prosecution Service](#)

nakedness would be caught by the offence if they meet the definition of private and sexual.

229. [Section 6\(4\)](#) of the 2022 Act amends [Schedule 4](#) to the 2016 Act to bring within scope of the threats to disclose offence, the protections already afforded to online service providers from prosecution for the disclosure offence where they are merely storing, hosting or caching information and are unaware of illegal content.

Penalties

230. The penalties for offences committed under section 51 (the disclosure offence and the new threats to disclose offence) are: for summary conviction, imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; and for conviction on indictment, imprisonment for a term not exceeding two years.

To note:

231. Disclosure of, and threats to disclose, private sexual images are not sexual offences in the criminal law. Therefore, convicted offenders are not subject to notification requirements. Nor does the offence attract related civil prevention orders.

Victims of, and suspects in, these cases do not have anonymity.

CHAPTER 2 – ANONYMITY AND PRIVACY

Summary of Provisions

These provisions were developed from recommendations contained in the Gillen Review into the law and procedures in serious sexual offences in Northern Ireland.

Anonymity of victims

- **Extended anonymity of victims** - extends the current lifelong anonymity of the victim of a sexual offence to provide for their anonymity for 25 years after death.
- **Increase in penalty for breach of anonymity** - increases the penalty for breach of anonymity, which is currently up to a level 5 fine on summary conviction to a maximum of six months imprisonment, or a fine, or both.

Anonymity of suspects

- **Restriction on reports as to suspects of sexual offences** – provides for the anonymity of the suspect in a sexual offence case up to the point of charge. Where a suspect is not subsequently charged, then the anonymity will be provided during their lifetime and for 25 years after their death.

Exclusion from proceedings

- **Serious sexual offences: exclusion of public from court** - restricts the public from hearings of serious sexual offences (Crown Court and Court of Appeal). Only the complainant, the accused, persons directly involved in the proceeding, a witness while giving evidence, any person required to assist a witness, jury members and bona fide members of the press will be allowed to remain in the court during the hearing of a serious sexual offence. The court also has discretion to permit any other person to remain in court where it considers it is in the interests of justice to do so.

Sections 8 – 11 Anonymity of Victims

232. [Sections 8 to 11](#) of the 2022 Act amend the [Sexual Offences \(Amendment\) Act 1992](#) ('the 1992 Act') to extend the existing lifelong anonymity of the alleged victim of a sexual offence, or the complainant in a sexual offence case. Lifelong anonymity is provided under the 1992 Act by prohibiting the publication, during the victim's or complainant's lifetime, of anything that would help to identify them. Sections 8 to 11 of the 2022 Act extend these reporting restrictions for a period of 25 years after their death.

The Provisions

233. [Section 8 of the 2022 Act](#) (*extended anonymity of victims*) amends [section 1 of the 1992 Act](#) (*anonymity of victims of certain offences*). Section 1(1) of the 1992 Act is amended to extend the existing lifelong anonymity of the alleged victim of a sexual offence for 25 years after death. Section 1(2) of the 1992 Act is amended to extend the existing lifelong anonymity of the complainant in a sexual offence case for 25 years after death.
234. This means that publication of anything that would help to identify a victim or a complainant is prohibited during their lifetime and for a period of 25 years after their death.
235. From the date of commencement, anonymity for 25 years after death will apply to all living victims or complainants of sexual offences regardless of when the sexual offence took place. Where a victim or complainant has died, the extended anonymity will apply if they have died 25 years or less ago.
236. By amending sections 1(1) and 1(2) as outlined above, the existing provisions of the 1992 Act as they apply to the lifelong anonymity of the victim or complainant, apply equally to the extended anonymity of the victim or complainant.

237. Of particular note is [section 3 of the 1992 Act](#) (*Power to displace section 1*) in its application to both lifelong and extended anonymity.
238. The effect of subsection (1) of section 3 is that a court must dis-apply reporting restrictions in relation to a complainant permanently if a person charged with an offence applies to the court before trial and the court is satisfied that the disapplication is necessary to induce witnesses to come forward and that the applicant's defence will be substantially prejudiced without such disapplication.
239. The effect of subsection (2) is that at a trial a court must dis-apply reporting restrictions in relation to a *specified matter* permanently if the restrictions impose a substantial and unreasonable restriction upon the reporting of proceedings and it is in the public interest to remove or relax the restriction. Under sub-section (3), a direction is not to be given under section 3(2) by reason only of the outcome of the trial.
240. The effect of subsection (4) is that where a person appealing a conviction applies to dis-apply restrictions and satisfies the court that the reporting restrictions should cease to apply in relation to an offence so that evidence may be obtained and substantial injustice be avoided, the court must direct that the reporting restrictions in section 1 do not apply in relation to a complainant.
241. [Section 9 of the 2022 Act](#) (*Disapplication of anonymity of victim after death*) further amends the 1992 Act by inserting new sections 3A and 3B which relate only to anonymity after death.
242. New [section 3A](#) (*Disapplication of section 1 after victim's death*) enables applications to be made to the magistrates' court by an interested party for an order dis-applying or modifying the extended period of anonymity of 25 years after death provided for in section 1. (Section 3A(2) refers.)

243. To clarify, applications can be made to totally dis-apply the extended period, or to decrease or increase the extended period of 25 years after death provided for in section 1. (Section 3A(3) refers.)
244. **To note:** this dis-application or modification procedure does not apply to the existing lifelong anonymity of the victim or complainant.
245. The prohibition on publication of anything that could identify a victim or complainant after death in sections 1(1) and (2) has effect subject to any order made under new section 3A. Therefore, where an order under section 3A increases the anonymity period beyond 25 years, sections 1(1) and (2) will have effect for that increased period. Further applications to dis-apply or modify the extended period of anonymity can be made.
246. In terms of time periods of reporting restrictions, an interested party may apply after the victim or complainant's death for:
- a. an order dis-applying publication restrictions at the time of the court order;
 - b. an order dis-applying the publication restrictions at a later time, but before the end of the automatic 25 year period (by modifying the application of section 1(1) or (2)); or
 - c. an order modifying the application of section 1(1) or (2) so that the 25 year period is increased to some longer period.
247. The combined effect of sections 1 and 3A means that an application can be made up until the end of the day on which the prohibition period expires. The prohibition period applicable to a particular victim or complainant will depend on a few factors:
- a. section 1(1) and (2) (lifetime plus 25 years);
 - b. any directions given under section 3; (as referenced above)
 - c. any orders made under new section 3A.

248. There is no specific reference to an appeal procedure in the provisions. Under [Article 143\(3\)\(c\) of the Magistrates' Courts \(Northern Ireland\) Order 1981](#), there is a right of appeal to the County Court against any order of the magistrates' court where proceedings are commenced by notice of application, as would be the case here. However, those affected by the order of the court can apply to vary or revoke that order.
249. Under section 3A(4) 'interested party' means:
- (a) a person who was a family member of the victim or complainant at the time of their death;
 - (b) a personal representative of the victim or complainant;
 - (c) a person interested in publishing matters relating to the victim or complainant which are prohibited from publication by virtue of sections 1(1) or (2).
250. Further definitions of the terms used in section 3A(4) are provided in sections 3A(8), (9) and (10).
251. Under section 3A(8) 'family member' is defined as
- (a) a person who, at the time of death, was:
 - (i) married to the victim or complainant
 - (ii) in a civil partnership with the victim or complainant
 - (iii) living with the victim or complainant.
 - (b) a relative of the victim or complainant.
252. Under section 3A(9)
- (a) 'relative' means parent, child, grandparent, great-grandparent, grandchild, great-grandchild, brother, sister, uncle, great-uncle, aunt, great-aunt, nephew, great-nephew, niece, or great-niece;

- (b) a relationship of the half-blood or by affinity is to be treated as a relationship of the whole blood;
 - (c) the stepchild of a person is to be treated as that person's child.
253. Under section 3A(10) 'a person interested in publishing matters' means a person who:
- (a) wishes the matters to be included in a publication;
 - (b) in relation to the publication, is a person mentioned in [section 5\(1\) of the 1992 Act](#). This section sets out the persons by whom an offence relating to publishing may be committed, where any matter is included in a publication in contravention of [section 1 of the 1992 Act](#)
254. The term 'personal representative of the victim or complainant' has not been defined in the legislation, but may be, for example, a lawyer who is representing the family's interests.
255. Turning back to section 3A(5), this provides that where an application to dis-apply or modify the extended period is made by any of the persons as defined above, the court must make an order of dis-application or modification where it is:
- (a) in the interests of justice, or
 - (b) otherwise in the public interest.
256. Where these tests are met, an order can dis-apply reporting restrictions completely, or in part, or modify the reporting restrictions to extend the period of anonymity beyond 25 years after death.
257. Under section 3A(6), any order of dis-application or modification made by the court can subsequently be varied or revoked by the court on an application by

an interested party (as defined above). The court may make a variation or revocation order where the same tests are met. i.e. that the court is satisfied that it would be:

- (a) in the interests of justice, or
- (b) otherwise in the public interest.

- 258. Section 3A(7) provides that an order doesn't affect the operation of sections 1(1) and (2) at any time before the order was made.
- 259. Sections 3A(8) to (10) are detailed above.
- 260. Section 3A(11) clarifies that references in new section 3A to matters being prohibited from publication include matters being partially prohibited from publication by any order under section 3 modifying the application of sections 1(1) and (2).
- 261. New [section 3B](#) makes express provision for the making of supporting Court Rules for the process of making applications to dis-apply or modify reporting restrictions and the consideration of these applications by the court.
- 262. These comprise Magistrates' Court Rules.
- 263. [Section 10 of the 2022 Act](#) amends [section 5\(1\) of the 1992 Act](#) to increase the penalty for breach of both lifelong anonymity, which is a summary offence, from a level 5 fine to a term of imprisonment not exceeding six months or a level 5 fine, or both. This penalty also applies to breach of extended anonymity.

264. Section 5(4) of the 1992 Act refers to the proceedings for the offence only being instituted with the consent of the Attorney General for Northern Ireland (AGNI). Any function of the AGNI of consenting to the conduct of criminal proceedings was non-textually transferred to the Director of Public Prosecutions in 2010 on devolution of justice by section 41 (2) of the Justice (NI) Act 2002. This means that there was no need to amend the 1992 Act.
265. The provisions prohibit the publication in the UK of material identifying the victim or complainant for their lifetime and for 25 years after their death but breach is part of the law in Northern Ireland only and the offence is triable only in Northern Ireland.
266. [Section 11](#) of the 2022 Act inserts a new Schedule after section 8 of the 1992 Act. The Schedule, titled 'offence of breach of anonymity providers of information society', sets out protections for certain online service providers from legal responsibility for illegal publication where the online service providers are a mere conduit for the relevant information, caching the information or hosting the information.

Sections 12 - 18: Anonymity of Suspects

267. [Sections 12 to 18](#) of, and [Schedule 3](#) to, the 2022 Act provide for the anonymity of the suspect in a sexual offence case up to the point of charge.
268. Where a suspect is not subsequently charged, then his or her anonymity will be protected during their lifetime and for 25 years after their death. Under the new provision, nothing can be published that would lead to the identification of the suspect.
269. A suspect is defined as a person against whom an allegation of having committed a sexual offence has been made to the police or whom the police are investigating in connection with a sexual offence but where no allegation has been made.
270. The provisions also allow for applications to be made to the court to dis-apply or modify the reporting restrictions. During the suspect's lifetime, such applications can be made only by the suspect or the Chief Constable. After the suspect's death, applications can be made by a personal representative or a relative of the deceased suspect or a person interested in publishing matters relating to the deceased suspect, to dis-apply or modify the period of 25 years after death.

The Provisions

[Section 12](#) (*Restriction on reports as to suspects of sexual offences*)

271. Sections 12(1) and (2) of the 2022 Act provide that, where an allegation has been made that a particular person has committed a sexual offence, or the police are investigating whether a particular person has committed a sexual offence but no allegation has been made, no matter relating to that particular person (i.e. 'the suspect') is to be included in any publication if it is likely to lead members of the public to identify him or her as a person who is alleged to have, or is suspected of, having committed the sexual offence.

272. Section 12(3) provides that the reporting restrictions apply up to the point of charge.
273. The section also sets out what is regarded as a charge as follows:
- (a) a summons or warrant is issued under [Article 20 of the Magistrates' Court \(Northern Ireland\) Order 1981](#) against the suspect in respect of the offence;
 - (b) the suspect is charged with the offence after being taken into custody without a warrant;
 - (c) an indictment charging the suspect with the offence is presented under [section 2\(2\)\(c\) or \(e\) of the Grand Jury \(Abolition\) Act \(Northern Ireland\) 1969](#);
 - (d) a magistrates' court commits the suspect to the Crown Court for trial on a new charge alleging the offence.
274. Once a suspect is charged with a sexual offence, the protection of anonymity ends. Information identifying the person charged can be published.
275. Section 12(4) provides that if the suspect is never charged under any of the provisions listed in section 12(3) above, then the reporting restrictions apply for the suspect's lifetime and for 25 years after their death.
276. Section 12(5) details the matters to which reporting restrictions apply in particular.
277. This **list is not exhaustive** but is illustrative of matters, some of which, particularly in a small jurisdiction like Northern Ireland, would identify the suspect. The list also mirrors matters in particular which must not be published relating to the identity of the victim or complainant in a sexual offence case and as listed in the Sexual Offences (Amendment) Act 1992. The matters include:

- (a) the suspect's name;
- (b) the suspect's address;
- (c) the identity of any school or other educational establishment attended by the suspect;
- (d) the identity of any place of work;
- (e) any still or moving image of the suspect.

278. Section 12(6) makes it clear that the anonymity provisions are retrospective. This means that the anonymity of the suspect applies both to those who were suspects before commencement of the provisions and to those who are suspects on or after commencement. It will also apply to suspects who have been dead 25 years or less on the date of commencement. For those who were suspects before commencement, the anonymity provisions, once commenced, will apply, whether or not their identity, or any information which could have helped identify them, was previously published.

Section 13 (*Meaning of sexual offence in section 12*)

279. Section 13(1) lists the offences which fall within the meaning of 'sexual offence' for the purposes of section 12. These are:
- (a) an offence under section 61 or 62 of the Offences against the Person Act 1861 (buggery, attempt to commit buggery, assault with intent to commit buggery or indecent assault on a male);
 - (b) an offence under section 2 of the Attempted Rape, etc., Act (Northern Ireland) 1960 (*assault with intent to commit rape*);
 - (c) an offence under [section 3 of the Sexual Offences \(Amendment\) Act 2000](#) (*abuse of position of trust*);
 - (d) an offence under Article 19 of the Criminal Justice (Northern Ireland) Order 2003 (*buggery*);

- (e) an offence under any provision of the Sexual Offences (Northern Ireland) Order 2008;
- (f) an offence under [section 63 of the Criminal Justice and Immigration Act 2008](#) (*possession of extreme pornographic images*);
- (g) an offence under [Serious Crime Act 2015](#);
- (h) any attempt to commit any of the offences mentioned in paragraphs (a) to (g);
- (i) any conspiracy to commit any of those offences;
- (j) any incitement of another to commit any of those offences;
- (k) aiding, abetting, counselling or procuring the commission of any of those offences;
- (l) [an offence under Part 2 of the Serious Crime Act 2007](#) (*encouraging or assisting crime*) in relation to any of those offences;
- (m) an offence (not falling within any other paragraph of this subsection) specified in [Part 2 of Schedule 2 to the Criminal Justice \(Northern Ireland\) Order 2008](#)

280. Under sections 13(2) and (3) the meaning of sexual offence can be amended by the Department by regulations. This enables any new sexual offences created after the 2022 Act to be brought within scope of the provisions. Any amendment will be made by affirmative resolution, ensuring that the Assembly can consider any proposed change.

[Section 14](#) (*Power to dis-apply reporting restrictions*)

281. Where publication of matters relating to a suspect are prohibited under section 12(2), section 14(2) provides that a 'relevant person' can apply to a magistrates' court to dis-apply or modify the reporting restrictions.

282. Under section 14(3) the modifications that may be made include increasing or decreasing the period of 25 years after death (where the suspect has not been charged). However, no application can be made to override the loss of anonymity on charge.
283. Under section 14(4), during the suspect's lifetime, 'relevant person' means the suspect or the Chief Constable. For example, a suspect might want to waive his or her right to anonymity to substantiate an alibi. Or the PSNI might apply to have anonymity dis-applied where, for example, the suspect is at large and poses a threat to the public.
284. After the suspect's death, 'relevant person' means a family member or a personal representative of the suspect, or a person interested in publishing matters relating to the suspect.
285. Under section 14(5), where an application to dis-apply or modify reporting restrictions is made, the court must make an order if it is satisfied that it would be:
- (a) in the interests of justice, or
 - (b) otherwise in the public interest.
286. There is no specific reference to an appeal procedure in the provisions. Under [Article 143\(3\)\(c\) of the Magistrates' Courts \(Northern Ireland\) Order 1981](#), there is a right of appeal to the County Court against any order of the magistrates' court where proceedings are commenced by notice of application, as would be the case here. However, those affected by the order of the court can apply to vary or revoke that order.
287. Under section 14(6), an order made to dis-apply or modify reporting restrictions may be varied or revoked by order of the magistrates' court on the

application of a 'relevant person' where the court is satisfied that the interests of justice or the public interest tests are met.

288. To clarify, an initial order can dis-apply or modify the reporting restrictions. A further order can vary or revoke the reporting restrictions.
289. Sections 14(8) and (9) define what is meant by 'family member'. A 'family member of the suspect' means
- (a) a person who at the time of the suspect's death was:
 - (i) married to the suspect;
 - (ii) in a civil partnership with the suspect;
 - (iii) living with the suspect as if a spouse;
 - (b) a relative of the suspect.
290. 'Relative' is further defined as meaning
- (a) parent, grandparent, great-grandparent, grandchild, great-grandchild, brother, sister, uncle, great-uncle, aunt, great-aunt, nephew, great-nephew, niece or great-niece;
 - (b) a relationship of the half-blood or by affinity is to be treated as a relationship of the whole blood;
 - (c) the step-child of a person is to be treated as that person's child.
291. Section 14(10) defines 'a person interested in publishing matters' as a person who:
- (a) wishes the matters to be included in a publication, and
 - (b) in relation to the publication, is a person mentioned in section_16(1) (persons by whom an offence relating to publishing may be committed).
- Further detail on section 16(1) is provided below.

292. The term ‘personal representative of the suspect’ has not been defined in the legislation, but may be, for example, a lawyer who is representing the family’s interests.

293. Section 14(11) clarifies that references to matters being prohibited from publication, include matters that are partially prohibited from publication by any order dis-applying or modifying reporting restrictions or any order varying or revoking such an order.

Section 15 (*Magistrates’ courts rules*)

294. This section makes express provision for the making of magistrates’ courts rules relating to the process for making applications to the court for an order to dis-apply or modify reporting restrictions or for an order varying or revoking such orders and for the consideration of the applications by the court.

Section 16 (*Offence relating to reporting*)

295. Section 16(1) details those who are held accountable where information identifying a suspect is included in a newspaper or periodical, in a relevant programme or in any other publication as follows:

(a) where the publication is a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical;

(b) where the publication is a relevant programme:

(i) any body corporate or Scottish partnership engaged in providing the programme service in which the programme is included, and

(ii) any person having functions in relation to the programme corresponding to those of an editor of a newspaper.

(c) In the case of any other publication, any person publishing it.

296. Sections 16(2), (3) and (4) relate to the defences available to a person charged with an offence of the inclusion of any matter identifying a suspect in a publication.
297. Under section 16(2), where charged with an offence, it is a defence to prove any of the following:
- (a) that the suspect included matter of that description in a publication;
 - (b) that the publication in which the matter appeared was one in respect of which the suspect had given written consent to its inclusion;
 - (c) that at the time of the alleged offence the person was not aware, and neither suspected nor had reason to suspect, that the publication included the matter in question;
 - (d) that at the time of the alleged offence the person was not aware, and neither suspected, nor had reason to suspect:
 - (i) that the allegation (that the suspect had committed a sexual offence) had been made to the police;
 - (ii) that any step had been taken by the police to investigate the suspect.
298. Section 16(3) clarifies that where a person charged is relying on the defence of written consent referred to in section 16(2)(b) above, it is not a defence if it is proved that:
- (a) any person interfered unreasonably with the peace or comfort of the suspect with intent to obtain it, or
 - (b) the suspect was under the age of 16 at the time when it was given.
299. It is considered that the defences set out in section 16(2)(a) and (b) relate to matters that could be quite easily proven (i.e. that the suspect had included matters in a publication or had given their written consent to their publication). Therefore, for these defences, proof on the balance of probabilities is justified.

However, for the defences referred to in section 16(2)(c) and (d) (i.e. that the person was not aware that matters had been included in the publication or that at the time of publication an allegation of having committed a sexual offence had been made or that there was an investigation ongoing), an evidential standard of proof is required. Under section 16(4), where section 16(2)(c) or (d) is used as a defence, the court must assume that the defence is satisfied unless the contrary is proved beyond reasonable doubt. This ensures compatibility with Article 6 ECHR (Right to a fair trial).

300. Section 16(5) provides that a person guilty of an offence is liable on summary conviction to a maximum of six months imprisonment, or to a fine not exceeding a level 5 fine on the standard scale, or both. Proceedings for an offence can only be brought with the consent of the Director of Public Prosecutions.

301. The provisions prohibit the publication in the UK of material identifying the suspect for their lifetime and for 25 years after their death but breach is part of the law in Northern Ireland only and the offence is triable only in Northern Ireland.

Section 17 (*Interpretation of sections 12 to 16*)

302. This section provides further definition of terms used in sections 12 to 16.

‘picture’ includes a likeness however produced;

‘publication’ has the same meaning as in section 6(1) of the Sexual Offences (Amendment) Act 1992 i.e. includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme shall be taken to be so addressed), but does not include an indictment or other document prepared for use in particular legal proceedings;

‘relevant programme’ means a programme included in a programme service within the meaning of the Broadcasting Act 1990;

'statutory provision' has the meaning given by [section 1\(f\) of the Interpretation Act \(Northern Ireland\) 1954](#);

'suspect' is to be read in accordance with section 12(1) which defines 'suspect' as a person against whom an allegation of having committed a sexual offence has been made to the police or whom the police are investigating in connection with a sexual offence but no allegation has been made.

[Section 18](#) (Consequential amendment)

303. The section makes a consequential amendment to [section 44\(4\)\(a\) of the Youth Justice and Criminal Evidence Act 1999](#) (*restrictions on reporting alleged offences involving persons under 18*) to take account of the anonymity of the suspect provision in section 12(2).

[Schedule 3 to the 2022 Act](#) (Offence of breach of anonymity: Providers of Information Society Services)

304. This Schedule sets out protections for certain online service providers from legal responsibility for illegal publication where the online service providers are a mere conduit for the relevant information, caching the information or hosting the information.
305. The anonymity and privacy provisions were commenced on 28 September 2023 by the [Justice \(Sexual Offences and Trafficking Victims\) \(2022 Act\) \(Commencement No.2\) Order \(Northern Ireland\) 2023](#). The Commencement Order No.2 did not make explicit reference to the commencement of Schedule 3 - reference to the Schedule is included in section 16 of the 2022 Act. However, for the avoidance of doubt, Commencement Order No. 3, which will commence the sexual offences in the 2022 Act, will make explicit reference to the commencement of Schedule 3 and will include a transitional provision stating that:

“Schedule 3 shall have effect in relation to any offence committed under section 16 of the Act on or after 28th September 2023.”

306. This retrospective provision will clarify that the defences in Schedule 3 can be relied on for any offence committed under section 16 on or after 28 September 2023.

Section 19: Serious Sexual Offences: exclusion of the public from court

307. [Section 19](#) of the [2022 Act](#) amends [The Criminal Evidence \(Northern Ireland\) Order 1999](#) (the 1999 Order) by inserting new Articles 27A to 27F to provide for the exclusion of the public from hearings of serious sexual offences tried on indictment and those proceeded by way of appeal to the Appeal Court. Only certain individuals permitted under the legislation from being exempt from exclusion will be able to remain in the court for the proceedings.
308. Section 19 was commenced on 28 September 2023. [The Justice \(Sexual Offences and Trafficking Victims\) \(2022 Act\) \(Commencement No.2\) Order \(Northern Ireland\) 2023](#) refers. Under transitional provisions in the Commencement Order, section 19 does not apply, in relation to the Crown Court, to any trial where the accused, (or, if more than one, any of the accused), was arraigned before 28 September 2023. In relation to the Court of Appeal, section 19 does not apply:
- (i) to any hearing of an application for leave to appeal, or of an application for leave to refer a sentence under section 36 of the Criminal Justice Act 1988, where the application was made before 28th September 2023;
 - (ii) to any hearing of an appeal where the appeal was made either with leave granted on an application made before 28th September 2023 or by virtue of a certificate granted by the judge of the court of trial before that date; and
 - (iii) to any hearing of a reference under section 36 of the Criminal Justice Act 1988 where the reference was made with leave granted on an application made before 28th September 2023.

The Provisions

309. New [Article 27A](#) (*Exclusion of public from trial*) imposes a duty on the court to give an exclusion direction, before the beginning of the trial, where a person is to be tried on indictment for a serious sexual offence. This duty also applies where the trial includes offences additional to the serious sexual offence.

Article 27A does not apply where the complainant has died before the start of the trial. (Using a direction for the purpose of exclusion mirrors the approach taken in [Article 13](#) of the 1999 Order (*Evidence given in private*).

310. No definition is included in the legislation for ‘the beginning of the trial’ but for the purpose of clarity, this is taken as ‘at the time when a jury is sworn’ as per [section 39\(3\) of the Criminal Procedure and Investigations Act 1996](#).
311. The exclusion direction will specify who is allowed to remain in the court during the trial and, in order to provide certainty and clarity for all those involved in the proceedings and for court staff, must be given before the start of the trial.
312. **Under an exclusion direction, all persons are excluded from the court with the exception of those listed in Article 27A(2). These are:**
- (a) members and officers of the court. This has not been defined further in the legislation. However, ‘Members and officers of the court’ is used in [Article 21 of the Criminal Justice \(Children\) \(Northern Ireland\) Order 1998](#) (*Power to clear court while child is giving evidence in certain cases*) and is already interpreted by the courts when a court is being cleared. Subject to the discretion of the court, this definition includes those escorting remand or convicted prisoners; the Investigating Officer in the case; the PPS Law Clerk and a representative of the Court Witness Service (where applicable).
- (b) persons directly involved in the proceedings and, where the complainant is not such a person, the complainant. Persons directly involved in proceedings is defined at Article 27A (7) and includes: the accused; legal representatives acting in the proceedings; any witness while giving evidence in the proceedings; any person acting in the capacity of an interpreter or other person appointed to assist a witness or an accused; and members of the jury). The specific reference to the complainant is to ensure

that, where a complainant in the case is not giving evidence, he or she is allowed to remain in the court. It is accepted that it will be rarely that a complainant will not give evidence but it is important that, were this to happen, such a complainant should not be excluded from the court.

- (c) any relative or friend of the complainant nominated by the complainant and specified in the direction – this comprises a relative or friend chosen and nominated by the complainant. Only one person may be nominated. In the case where there is more than one complainant, a nomination may be made by each complainant.

- (d) any relative or friend of the accused nominated by the accused and specified in the direction – this comprises a relative or friend chosen and nominated by the accused. Only one person may be nominated. In the case where there is more than one accused, a nomination may be made by each accused.

- (e) bona fide representatives of news gathering or reporting organisations; - This has not been defined in the legislation and there is no further definition of ‘bona fide’ provided in other statute. However, it follows Article 13(3) of the Criminal Evidence (Northern Ireland) Order 1999 (*Evidence given in private*) and is a term already interpreted by the courts.

- (f) any other person specified in the direction as a person excepted from the exclusion -This has been included to provide flexibility to the court should, in the interests of justice, any other person be required to remain in the court.

313. Article 27A(3) provides that the exclusion direction applies where the trial relates to offences additional to the serious sexual offence.

314. Where there is more than one complainant and the other complainants are being dealt with in respect of other lesser offences, then only the complainant(s) in respect of a serious sexual offence is automatically allowed to remain in the

court and has the right to nominate a friend or relative to remain in the court. If the complainants in respect of the lesser offences were, in the interests of justice, specified under Article 27A(2)(f) as excepted from the exclusion direction, (and therefore allowed to remain in the court), they cannot nominate a friend or relative to be excepted from the exclusion direction.

315. Article 27A(4) provides that the duty to give an exclusion direction does not apply where the complainant has died since the alleged offence occurred and before the start of the trial. For example, if a person was sexually assaulted and subsequently died prior to the start of the trial (whether as a result of the sexual assault or not), the trial would be held in public. In the unlikely event that a complainant dies after an exclusion direction has been made, but while the trial is in progress, the exclusion direction will continue in operation in the same way as it would have done if the complainant had not died.
316. Under Article 27A(5) an exclusion direction has effect from the beginning of the trial until the proceedings, in respect of each serious sexual offence to which the trial relates, have been determined (by acquittal, conviction or otherwise) or abandoned. If the trial continues in respect of other non-sexual offences, the exclusion direction no longer applies.
317. Under Article 27A(6) the exclusion direction does not apply during any time when a verdict is being delivered in relation to the accused, or where there is more than one accused, in relation to each of the accused.
318. This applies not only to a trial where one verdict is delivered at the end of a trial, but also to a trial where some verdicts are delivered at an earlier stage in the proceedings (for example, where there are multiple defendants or charges).

319. Article 27A(6) also covers those cases where there is no jury or where there is a determination other than by a conviction or acquittal (for example, where there is a finding of not guilty by reason of insanity).

320. Article 27A(7) provides definitions for terms used in Articles 27A to 27D.

These include:

- ‘complainant’ which means any person who is the complainant (within the meaning of [Article 2\(2\)](#) of the 1999 Order in respect of a serious sexual offence to which the trial relates;
- ‘effect’, in relation to a direction, means binding effect;
- ‘persons directly involved in the proceedings’ includes:
 - the accused;
 - legal representatives acting in the proceedings. To note this is the same terminology used in Article 13(2)(b) of the Criminal Evidence (Northern Ireland) Order 1999 (Evidence given in private) and covers the legal representatives of both parties to the case (the Crown and the accused)
 - any witness while giving evidence in the proceedings. Once a witness has completed giving evidence they must leave the court.
 - any person acting in the capacity of an interpreter or other person appointed to assist a witness or an accused, such as an intermediary; and
 - members of the jury.
- ‘serious sexual offence’ which is defined as any offence listed in [section 2\(3\) of the Sexual Offences \(Amendment\) Act 1992](#). This definition is ambulatory i.e., it will include any new offences which may be added to s.2(3) of the 1992 Act), by reason of sections [11\(1\)](#) and [12\(2\) of the Interpretation Act \(Northern Ireland\) 1954](#).

321. [Article 27B](#) (*Nomination etc. of persons to be excepted from exclusion*) supplements [Article 27A\(2\)\(c\)](#) and [Article 27A\(2\)\(d\)](#) which enables nominations to be made by the complainant and accused for a friend or relative to remain in the court. It also supplements the power of the court under [Article 27A\(2\)\(f\)](#) to except other persons from the exclusion direction.
322. Under Article 27B(1) only one person can be nominated by the complainant, or where there is more than one complainant, by each complainant, provided each complainant is in respect of a serious sexual offence to which the trial relates.
323. Only one person can be nominated by the accused, or where there is more than one accused, by each accused, provided each accused is in respect of a serious sexual offence to which the trial relates.
324. Under draft Crown Court Rules, the complainant and the accused give a notice of intended nomination to the court, nominating the person whom they wish to be excepted from the exclusion direction, stating their reasons for the nomination. Prior to an exclusion direction being made, the complainant or the accused can withdraw or substitute the intended nomination.
325. The notice of intended nomination or to withdraw or substitute the nomination must be served on all parties to the proceedings, and, where the complainant is not a party to the proceedings (i.e. not giving evidence in court), on the complainant. Those on whom the notice is served can oppose the intended nomination, stating their reasons. Where there is no opposition to the intended nomination, the court can determine the nomination with or without a hearing or can direct a hearing. Where a party to the proceedings opposes the nomination, the court must direct a hearing which every party to the proceedings can attend.
326. The court can specify the nominated person as excepted from the exclusion direction and therefore allowed to remain in the court. Under [Article 27B\(3\)](#) the court also has the power to refuse to specify the nominated person as excepted from the exclusion direction, but only where it is in the interests of justice to do so.

327. To clarify, the effect of Articles 27A(2)(c) and (d) and Article 27B(3), is that the court *must* specify a nominated person unless it appears to the court to be in the interests of justice to refuse to specify that person. Article 27A(2)(c) and (d) have the effect of empowering the complainant and the accused to nominate persons, and also of empowering the court to specify the nominated persons in the direction, while Article 27B(3) enables the court to refuse to specify a particular nominated person but *only* where that appears to the court to be in the interests of justice.
328. Article 27B(5) and (6) supplement the power of the court to except any other persons from the exclusion direction ([Article 27A\(2\)\(c\)\(f\)](#) refers). This power can be exercised either on application by a party to the proceedings or of the court's own motion, and only where excepting the person from the exclusion direction is in the interests of justice. As above, the court has the power to refuse to specify any other person from the exclusion direction, where it is in the interests of justice to do so.
329. As provided for in Article 27(B)(4), draft Crown Court Rules have been drawn up which make provision for the process of making nominations under Article 27A(2)(c) and (d).
330. New [Article 27C](#) (*Variation of exclusion directions given under Article 27A*) provides that the court may vary an exclusion direction either: by revoking the specification of a person nominated in accordance with Article 27B (if it does, another person may be nominated); by specifying, under Article 27A(2)(f), 'any other person' not already specified in the exclusion direction; or by revoking a specification of 'any other person' previously specified by the court under Article 27A(2)(f) as being allowed to remain in the court.
331. Variations may be made by the court only where it is the interests of justice to do so and either on application by a party to the proceedings or the complainant (where there has been a material change of circumstances), or of its own motion.

332. These provisions enable the complainant or the accused to replace the person they had originally nominated, but only where there has been a material change of circumstances, for example, where the person specified as excepted from the exclusion direction has been taken ill and is unable to attend the court. The provisions also enable another party to ask the court to vary an exclusion direction, for example where the presence of a person nominated by the accused and excepted from the exclusion direction, had become objectionable to the complainant. Where such an application is made, the provisions allow the court to vary the exclusion direction provided the 'interests of justice' condition (as set out in Art 27C(3)) is met.
333. There is no limit to the number of times applications to the court to vary an exclusion direction can be made, but there are safeguards in place against 'vexatious' applications. A variation on application is not granted unless it is in the interests of justice to do so and there has been a material change in circumstances since the initial exclusion direction or a subsequent variation. An application to vary can be refused if there is no material change in circumstances.
334. New [Article 27D](#) (*Exclusion directions under Article 27A: general*) requires the court to state in open court its reasons for:
- (a) specifying a person under Article 27A(2)(f) (*i.e. any other person*);
 - (b) refusing under Article 27B(3) to specify a person (*i.e. a person nominated by the complainant or the accused under Article 27A(2)(c) or Article 27A(2)(d)*);
 - (c) refusing an application under Article 27B(6);
 - (d) varying an exclusion direction under Article 27C(1) or (2);
 - (e) refusing an application under Article 27C(3) (*i.e. applications to vary an exclusion direction*).
335. To note, this provision has parallels in [Article 8\(5\)\(b\)](#) of the 1999 Order.

336. Under Article 27D(2), the reference to ‘open court’ means the court from which the public are excluded under Article 27A. In addition to the statements set out in Article 27D(1), this paragraph would apply to a statement made during the course of the trial in pursuance of any statutory requirement to make a statement ‘in open court’.
337. Article 27D(3) provides that any proceedings from which persons are excluded by an exclusion direction will be taken to be held in public for the purposes of any privilege or exemption from liability available in respect of fair, accurate and contemporaneous reports of the proceedings. This derives from [Article 13\(5\)](#) of the 1999 Order.
338. Article 27D(4) details the other powers of the court to exclude people from the court which take precedence over an exclusion direction under which persons listed in Article 27A(2) are allowed to remain in the court. These are:
- (a) [Article 21 of the Criminal Justice \(Children\) \(Northern Ireland\) Order 1998](#) (court to be cleared while child is giving evidence in certain cases)
 - (b) any power of the court to hear proceedings in private
 - (c) any power of the court to exclude a witness until that witness’s evidence is required;
 - (d) any other power of the court to exclude a person from the court.
339. Article 27D(4)(d) is a ‘catch all’ that is intended, in particular, to cover powers to exclude for contempt. It is aimed at clarifying that there are other powers available to the court to exclude people from the court that take precedence over an exclusion direction.
340. Article 27D(5) makes express provision for the making of Crown Court Rules relating to the process of making applications to the court under Articles 27B and 27C.

Exclusion of the public from appeal hearings

341. The Court of Appeal ordinarily determines leave applications to appeal against both conviction and sentence through a single judge mechanism where the

application is lodged in the Court of Appeal Office. This is supported by a written skeleton argument and authorities only, and considered purely on the papers by a Court of Judicature judge who will then produce a written determination which is then notified to the applicant for leave by the office. However, the Court of Appeal can sit publicly as a three or two member court to hear and determine the initial leave application based on the parties' written and oral submissions – although, in practice, this is rare.

342. When leave is refused by the single judge following the usual procedure, the applicant has the right pursuant to [Article 45\(4\) of the Criminal Appeal \(Northern Ireland\) Act 1980](#) (*Powers of court which are exercisable by single judge*) - almost invariably exercised - to renew the leave application before the full court and when that happens the hearing takes the form of a 'rolled-up' hearing in which both leave and the substantive appeal (if the court is minded to grant leave) will be dealt with in one sitting. Referrals to the Court of Appeal by the Director of Public Prosecutions are also dealt with in the form of a 'rolled-up' hearing.
343. Articles 27E and 27F provide for the exclusion of the public from hearings in open court which consider leave applications or appeals and from hearings which consider both leave and the substantive appeal.
344. An appeal or an application for leave to appeal can relate to both the conviction and/or the sentence.
345. Article 27E (Exclusion of public from appeal hearing) imposes a duty on the court to give an exclusion direction, where a hearing relating to a serious sexual offence is to be held, by the Court of Appeal. Under [Article 27F](#) an exclusion direction has the same meaning as the meaning given by [Article 27A\(2\)](#) (Exclusion of public from trial) as detailed above.
346. Under Article 27E(1) this duty applies to:
- an appeal or an application for leave to appeal against a conviction or sentence (or both) for a serious sexual offence;

- an application for leave to refer a sentence for a serious sexual offence to the Court of Appeal under section [36 of the Criminal Justice Act 1988](#) (*reviews of sentencing*). This provision enables the Director of Public Prosecutions, with the leave of the Court of Appeal, to refer a sentence to the Court of Appeal for re-consideration on the grounds of undue leniency.
- a reference under section 36 and;
- an application for leave to appeal or an appeal under [section 12](#) (*appeal against finding of not guilty on ground of insanity*) or [section 13A of the Criminal Appeal \(Northern Ireland\) Act 1980](#) (*appeal against finding of unfitness to be tried*)

347. The exclusion direction must be given before the beginning of the leave or appeal hearing. Where the complainant has died before the start of the hearing, an exclusion direction does not apply. Where the complainant has died after the hearing has commenced, the exclusion direction continues to apply. (Articles 27E(2) and (4) refer.)

348. Under Article 27E(3) the exclusion direction applies whether or not the hearing relates to other offences as well as a serious sexual offence.

349. The exclusion direction has effect from the beginning of the hearing until a decision has been made on the application or appeal relating to a serious sexual offence; or the application or appeal relating to a serious sexual offence has been abandoned. (Article 27E(5) refers). If the hearing continues on convictions and/or sentences on other non-sexual offences, the exclusion direction ceases to apply.

350. Under Article 27E(7) the exclusion direction does not apply during any time when the following decisions of the court are being pronounced:

- a decision to grant or refuse leave to appeal;
- a decision on an appeal;

- a decision to grant or refuse leave to make a reference under [section 36 of the Criminal Justice Act 1988](#) (*reviews of sentencing*)
- a decision on a reference under section 36.

351. Article 27E(8) clarifies the meanings of certain terms used in Article 27A (*Exclusion of public from trial*) as they apply to appeal hearings:

- ‘complainant’ has the meaning given by Article 27A(7) reading the reference to the trial in that Article as a reference to the hearing. (i.e. *any person who is the complainant (within the meaning of [Article 2\(2\) of the Criminal Evidence \(Northern Ireland\) Order 1999](#) in respect of a serious sexual offence to which the trial [to be read as ‘hearing’] relates*);
- ‘effect’ has the same meaning as in Article 27A(7) (*i.e. in relation to an exclusion direction, means binding effect*);
- ‘exclusion direction’ is to be read in conjunction with Article 27F(1). (*i.e. subject to Article 27E(5) detailed above, it has the same meaning as given by Article 27A(2)*);
- ‘sentence’ has the same meaning as in in [Part 1 of the Criminal Appeal \(Northern Ireland\) Act 1980](#);
- ‘serious sexual offence’ has the same meaning as in Article 27A(7) (*i.e. any offence listed in [section 2\(3\) of the Sexual Offences \(Amendment\) Act 1992](#)*).

352. Article 27E(9) clarifies that a reference to an appeal in Article 27E does not include any proceedings on an application for leave to appeal, or on an application for leave to refer a sentence, that (ignoring Article 27E i.e. which provides for the exclusion of the public from appeal hearings) are not held in open court. This makes it clear that the exclusion provisions do not apply to proceedings which are considered by a single judge mechanism on papers submitted.

[Article 27F](#) (*Exclusion from appeal hearings: further provision*)

353. As detailed previously, Article 27F(1) provides that an exclusion direction given for a hearing in the Court of Appeal has the meaning given by Article 27A(2).

354. Article 27F(2) sets out the provisions in Articles 27B, 27C and 27D which apply to an exclusion direction in the Court of Appeal. These are:
- Articles 27B(1) to (3), (5) and (6) – these provisions supplement Article 27A(2)(c) and (d) which enable nominations to be made by the complainant and accused for a friend or relative to remain in the court. They also supplement the power of the court under Article 27A(2)(f) to except other persons from the exclusion direction. The relevant provisions are detailed above.
 - Article 27(D)(4) details the other powers of the court to exclude people from the court which take precedence over an exclusion direction under which persons listed in Article 27A(2) are allowed to remain in the court. (Please see detail provided above). Article 27F(3) adds the following, additional, provision to this list which takes precedence over an exclusion direction: [Section 24 of the Criminal Appeal \(Northern Ireland\) Act 1980](#) (*Right of appellant to be present*)
355. Article 27F(4) makes express provision for the making of Court of Appeal Rules relating to the process of making applications to the court under Articles 27B and 27C.
356. Article 27F(5) sets out how the definitions of ‘complainant’ and ‘persons directly involved in the proceedings’, as referenced in Article 27A(7), are to be read in their application to Court of Appeal hearings.
357. As previously detailed, in the definition of ‘the complainant’, the reference to the trial is to be read as if it were a reference to the hearing.
358. The definition of ‘persons directly involved in the proceedings’ is to be read as if sub-paragraph (e) ‘members of the jury’ were omitted.
359. **In summary**, with the exceptions and amendments noted above which are specific to appeal hearings, and the references to Crown Court rules in Articles 27B(4) and 27D(5), the guidance on new Articles 27A to 27D as it applies to

the exclusion of the public from trial, also applies to the exclusion of the public from appeal hearing.

PART 2 TRAFFICKING AND EXPLOITATION

Section 21: Support for victims of trafficking etc.

360. [Section 21](#) This section has the effect of extending the statutory assistance and support provided under [section 18](#) of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2012 to adult potential victims of slavery, servitude or forced or compulsory labour where there is no element of trafficking. The section will have the effect of extending this support for an adult who has been given a reasonable grounds decision beyond the 45 days cited in the 2015 Act based on the needs of the individual.
361. Section 21 will also provide for support to a victim of slavery or trafficking after a positive conclusive grounds decision to be continued for a period of up to 12 months, or more than 12 months for such period as the Department may determine.

Section 22: Defence for slavery and trafficking victims

362. [Section 22](#) amends Section 22(9) of the 2015 Act to include Class A drugs in the statutory defence provisions for a person over the age of 21 who has been compelled to commit the offence by reason of compulsion or exploitation.

Section 23: Strategies on slavery and trafficking offences

363. [Section 23](#) This section removes the requirement to publish an annual strategy on offences under section 1 and 2 of the Act and replaces it with a requirement to publish such strategy at least once every three years.

Section 24: Protective measures for victims of slavery or trafficking

364. [Section 24](#) enables the Department to introduce steps or measures to protect a person from slavery or trafficking within 24 months of the date of Royal Assent. This will enable the Department to introduce measures such as Slavery and Trafficking Risk Orders (STROs), or activate the Duty to Notify provisions set out in the 2015 Act, if these are considered necessary, following an appropriate consultation process. Any steps or measures will be introduced by regulations laid before and approved by the Assembly.

PART 3 PROTECTION FROM HARM

Chapter 1 - Prevention Orders

Section 25: Qualifying offences for sexual offences prevention orders

365. [Section 25](#) of the 2022 Act adds the offence of abduction of children in care, under [Article 68](#) of the Children (Northern Ireland) Order 1995, to [Schedule 5](#) to the Sexual Offences Act 2003 (the 2003 Act). This means that those convicted of this offence can be made subject to a Sexual Offences Protection Order (SOPO).

366. A SOPO is a civil preventative orders designed to protect the public from serious sexual harm. It prohibits certain behaviours by, and places certain requirements on, an offender convicted of a relevant sexual offence and where there is evidence of a risk of serious sexual harm. The requirements can include positive actions as well as prohibitive conditions. A SOPO can be made on application by the Chief Constable in respect of a convicted sex offender, or by a court on conviction. A SOPO lasts for a minimum of five years and breach of a SOPO is a criminal offence with a maximum penalty of five years imprisonment.

367. Sections [104](#), [106-110 and 113](#) of, and [Schedule 3](#) and [Schedule 5](#) to, the 2003 Act, provide the statutory provisions relating to Sexual Offences Prevention Orders (SOPOs) in Northern Ireland. A SOPO can be made in respect of an offender convicted, cautioned etc., of sexual offences listed in Schedule 3 to the 2003 Act and certain other offences which are listed in Schedule 5 to the 2003 Act. Schedule 3 offences all have statutory sex offender notification attached (see para xx), while Schedule 5 offences allow for a SOPO to be made in respect of other offences committed in the overall context of sexual crime and where there is evidence of a risk of serious sexual harm.

Section 26: Time limit for making Violent Offences Prevention Orders

368. [Section 26](#) of the 2022 Act amends provision contained within [section 57 Justice Act \(Northern Ireland\) 2015](#) (“the 2015 Act”) (*VOPOs made on application by the Chief Constable*) by inserting a new subsection (6) to dis-

apply statutory time limits provided for under [Article 78 of the Magistrates' Courts \(Northern Ireland\) Order 1981](#) (*time limit within which civil complaint must be made to give jurisdiction*).

369. A Violent Offences Prevention Order (VOPO) is a civil preventative order aimed at helping to mitigate the risk of violent re-offending from certain offenders living in Northern Ireland. It allows the court to place relevant prohibitions or requirements on the activities and behaviour of a violent offender, and those subject to the order would also be automatically subject to notification requirements.
370. VOPO provisions are contained in [Part 8, sections 55 to 76](#) of the 2015 Act. A VOPO can be made by the court on conviction or on application by complaint by the Chief Constable under section 57 where an offender has been convicted of an offence specified [Part 1 of Schedule 2 to the Criminal Justice \(Northern Ireland\) Order 2008](#) (*violent offences*)
371. In those cases where a VOPO is made on conviction, this will be made at the point the court is dealing with an offender in respect of a specified offence. No application is necessary for the court to make a VOPO at the point of sentence.
372. Section 57 of the 2015 Act provides for a VOPO to be made on application by the Chief Constable by complaint to the magistrates' court. The police must evidence to the court that the qualifying offender has, since the appropriate date, acted in such a way as to give reasonable cause to believe that a VOPO should be made. 'Appropriate date' is defined as the date (or the first date where appropriate) the person was convicted of a specified offence.
373. Under Article 78 of the 1981 Order, prior to its amendment, evidence provided in support of an application for a VOPO had to be made within the six months prior to the application being made. that some evidence provided in support of an application for an order under Part 2 must relate to conduct that has occurred within the six months prior to the application being made, no longer applies.

374. The original policy intention was that there should be no time limits on evidence provided in support of applications by complaint for VOPOs. It is designed as a targeted risk management tool based on an assessment of the risk of serious violent harm. The key is to demonstrate in court that the offender has acted or behaved in a way that indicates they pose a risk of serious harm and that a VOPO is necessary.
375. Section 26 of the 2022 Act provides that the time limits under Article 78 of the Magistrates' Court (Northern Ireland) Order 1981 do not apply to applications for VOPOS made by the Chief Constable by complaint.

Chapter 2 - Causing or risking serious harm

Section 27: Consent to harm for sexual gratification is no defence

376. [Section 27](#) of the 2022 Act places in legislation the previous common law position that consent to serious harm for the purpose of sexual gratification is not a defence. The section makes clear that it does not matter who derives the sexual gratification – it might be the perpetrator, the victim or some other person. If serious harm occurs, as defined in the section, the victim's consent is not a defence to any of the offences listed.
377. A limited exception is provided where the serious harm consists of, or is a result of, a sexually transmitted infection where the victim had consented to the sexual activity and knew that the person had the sexually transmitted infection. This exception does not apply where the offence of causing grievous bodily harm with intent is charged.
378. Finally, the section is clear that it only applies to cases of sexual gratification. No change is made in relation to other circumstances in which a person's consent to the infliction of serious harm may, or may not, be a defence to a relevant offence. Well recognised examples include instances of medical treatment; injuries sustained in certain sports; and tattooing.

Section 28: Offence of non-fatal strangulation or asphyxiation

379. [Section 28](#) of the 2022 Act provides for the new offence of non-fatal strangulation or asphyxiation (NFS).
380. The offence occurs when a person intentionally does anything to affect the victim's ability to breathe, or the flow of blood to their brain, or is reckless in this regard. Actual interference with the victim's breathing or the flow of blood to their brain is not necessary. This allows the offence to be committed, for example, in those cases where a perpetrator is using NFS as a controlling tool to instil fear. It can be committed using any part of the body or any object.

381. Consent is available as a defence except where intentional or reckless serious harm occurs. Serious harm is defined in the section by reference to existing legislation.
382. If the offence is committed by a UK national or resident overseas it can be prosecuted in Northern Ireland.
383. The offence carries maximum sentences of two years imprisonment in the magistrates' courts and 14 years when tried in the Crown Court. These are considered to be significant maximums, but commensurate with the harm which may potentially be caused.

Nature of offending

384. NFS is often seen as a highly gendered offence, practised primarily against women, in the domestic abuse context, where it can be used as a controlling tool. This is not always the case. Anyone can be a victim of NFS regardless of their age or gender.
385. It can be committed as a purely violent act, and it can occur in consensual intimate relationships, where 'rough sex' is practised.
386. Social media and the popularity of fictions such as the 'Fifty Shades of Grey' novels have massively promoted rough sex as acceptable/desirable/the norm. This is particularly an issue for younger people who rely so heavily on internet-based information. Without an understanding of the risks involved, there is strong potential for incidences of rough sex going wrong continuing to rise.
387. In addition, those who practise strangulation violently or abusively have been shown to be up to eight times more likely to go on to commit homicide. It is therefore important for victims, perpetrators, criminal justice partners and the general public to understand the potential seriousness of this type of behaviour.

Potential impact of NFS

388. Regardless of the context, NFS can cause significant injury. It is important to understand the nature and extent of potential injuries as strangulation may not always leave visible marks.
389. Research shows that loss of consciousness can occur within four seconds, and that pathological problems can include:
- dissection of the main neck arteries;
 - blocking of blood flow to and from the brain;
 - brain swelling;
 - cardiac arrest;
 - miscarriage; and
 - stroke.
390. There can also be neurological consequences such as:
- loss of consciousness (which indicates at least mild brain injury);
 - paralysis;
 - movement disorders;
 - speech disorders;
 - incontinence; and
 - seizures.
391. In addition, a number of cognitive and psychological outcomes have been linked to strangulation, including:
- amnesia;
 - PTSD;
 - dissociation;
 - suicidality;

- depression;
- anxiety; and
- personality change.

Background to the new offence

392. The older offence of strangulation is of limited use as it can only be charged in the Crown Court and includes other limitations. As a result, alternative charges were normally used. This could result in inadequate sentencing and made recording of NFS cases impossible.

393. The proposal to legislate for NFS was consulted on by the Department of Justice following the creation of a new offence in England and Wales, and a recommendation made by Criminal Justice Inspection Northern Ireland (CJINI) that the Department should review how potential inadequacies in legislation regarding the act of choking or strangulation could be addressed.

SCHEDULES

Schedule 1: Consequential Amendments: voyeurism (additional offences) and sending etc an unwanted sexual image

394. [Schedule 1](#) contains amendments consequential to provision in sections 1 and 2 of the 2022 Act to bring the offences of up-skirting, down-blousing and sending an unwanted sexual image within the scope of:

- [Article 53A \(questioning and treatment of persons by police: meaning of “qualifying offence”\)](#) [Police and Criminal Evidence \(Northern Ireland\) Order 1989](#)
- [section 2\(3\) \(offences under law of Northern Ireland to which the Act applies\)](#) [Sexual Offences \(Amendment\) Act 1992](#) – victims of the above offences will have lifelong anonymity and for 25 years after their death;
- [Article 13\(4\) \(power to provide for restriction of publicity in certain cases\)](#) [Industrial Tribunals \(Northern Ireland\) Order 1996](#)
- [Schedule 3 \(sexual offences for purposes of notification requirements\)](#) [Sexual Offences Act 2003](#) but only in so far as where the offence is committed for the purpose of sexual gratification;
- [Part 2 of Schedule 2 \(Specified Sexual Offences\) to the Criminal Justice \(Northern Ireland\) Order 2008](#) bringing the above offences within scope of an extended custodial sentence.

Schedule 2: Miscellaneous amendments as to sexual offences

395. **Part 1 (Amendment of references to certain forms of child sexual abuse)** of [Schedule 2](#) to the 2022 Act makes amendments to the 2008 Order to remove the terms 'prostitution' and 'pornography' relating to child victims in [Articles 37 to 41](#) and to widen the scope of the three offences beyond recording of images so as to capture live streaming and other transmission of the images.
396. It removes the terms from the various headings and text of Articles 37 to 41, substituting them with 'to offer or provide sexual services to a third person in return for payment' and 'the recording or streaming or transmission of an indecent image of a child' respectively.
397. **Part 2 (Amendments relating to the offence of engaging in sexual communication with a child)** of Schedule 2 amends [Article 76\(10\(a\)\)](#) of the 2008 Order which relates to offences committed outside the United Kingdom, to bring [Article 22A](#) (*Sexual Communication with a child*) of the 2008 Order within scope of the extra territorial arrangements available for certain offences within the 2008 Order. Consequential amendment was also required to [section 90 Justice Act \(Northern Ireland\) 2015](#) which amended the 2008 Order to provide for the Article 22A offence.
398. **Part 3 (Amendment relating to the offence of paying for sexual services)** comprises a simple amendment to [Article 64A](#) (*paying for sexual services of a person*) to clarify an ambiguity in the elements which constitute the offence under that provision.

Schedule 3: Offence of breach of anonymity: providers of information society services

399. [Schedule 3](#) sets out protections for certain online service providers from legal responsibility for illegal publication where the online service providers are a mere conduit for the relevant information, caching the information or hosting the information.

Schedule 4: Offence of non-fatal strangulation or asphyxiation: Consequential Amendments

400. [Schedule 4](#) makes amendments to other enactments consequential on the new offence of non-fatal strangulation or asphyxiation, adding it to lists of offences of violences, which are prescribed for other purposes, including:

- calculating the timescales for retention of forensic data;
- the application of notification orders, sexual offences prevention orders, foreign travel orders, risk of sexual harm orders etc.;
- the imposition of extended custodial sentences;
- allowing the court or jury to draw inferences from the defendant's failure to give evidence or refusal to answer a question when charged with strangulation causing or allowing a child or vulnerable adult to die or suffer serious harm; and
- ensuring that battery of a child cannot be justified on the ground that it constituted reasonable punishment.