



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Submission to Department of Justice's Review of
the Law on Child Sexual Exploitation**

April 2019

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Summary of recommendations

The Commission:

- Broadly supports the proposed reforms. However, the Commission advises that additional legislative change is needed to fully reflect the relevant human rights standards, including the ECHR, Articles 3, 8, and 13 and the Lanzarote Convention (1.14).
- Recommends that throughout this consultation exercise the Department of Justice ensures that children aged 16 and 17 years have access to protections (1.16).
- Recommends that the Department of Justice utilises the reform process as an opportunity to raise awareness of the Lanzarote Convention (1.17).
- Supports the Department of Justice's proposal to amend the legislation to replace the terms 'child prostitute', 'child prostitution' and 'child pornography' with the term 'sexual exploitation' of children (2.5).
- Recommends that the Department of Justice considers working towards aligning the definition of child sexual exploitation found in legislation and statutory guidance (2.7).
- Supports the Department of Justice's proposal to amend Article 41 of the Sexual Offences (Northern Ireland) Order 2008 to ensure that it encompasses live-streamed images of child sexual exploitation (2.13).
- Recognising that the age of consent in NI is 16, the Commission recommends that the Department of Justice looks again at legislative and policy provision to ensure that 16 and 17 year olds who are particularly vulnerable are best protected from grooming. The Commission acknowledges that the current grooming offence cannot easily be amended to include 16 and 17 years and so encourages the Department to consider developing a new approach (2.19).

- While the focus of this consultation is children, the Commission recommends that the Department of Justice also considers legislative / policy protections against grooming for vulnerable adults (2.20)
- Supports the Department of Justice's proposal to reverse the burden of proof, in line with the recommendations of the UN Committee on the Rights of the Child and UN Committee on the Elimination of Discrimination against Women (2.25).
- Recommends that the Department of Justice monitors the use of the new defence and that it collates and publishes the monitoring data (2.26).
- Advises that the current definition of position of trust found at Article 28, Sexual Offences (Northern Ireland) Order 2008 is not consistent with the requirements of the Lanzarote Convention (2.34).
- Recommends that the Department of Justice extends the definition outlined at Article 28 to include other relationships of trust i.e. that it does not just apply to children in state care. The Commission recommends that the 'circle of trust' notion informs the language of the provision (2.35).
- Considers that measures should be adopted to ensure that children are not unduly criminalised. The Commission recommends that the PPS adopts guidance similar to CPS to confirm that prosecution is not normally in the public interest in specified circumstances (2.41).
- Recommends that the Department of Justice closely monitors developments in relation to the White Paper on Online Harms. Further, the Commission encourages the Department of Justice to work with relevant NI departments as well as internet providers / social media hosts to develop a mechanism that enables persons to report sexual images of children (including self-generated sexual images) with the view to ensure the prompt removal and destruction of such images (2.45).

- Accepts that the Department of Justice has made the case that no legislative change is necessary to protect children from anonymous online harassment and from solicitation for sexual purposes (2.48).
- Supports the Department of Justice's proposal to amend the existing voyeurism offence under Article 71 of the Sexual Offences (Northern Ireland) Order 2008 to include up skirting (2.52).
- Advises that child sex dolls fall within the scope of activities that should be criminalised under the UNCRC Optional Protocol (2.55).
- Recommends that legislative change is required to criminalise the manufacture and possession of child sex dolls. The Commission encourages the Department of Justice to actively monitor developments in England and Wales prior to developing legislation. The Commission also recommends that the Department acknowledges the requirement to legislate on this matter (2.56).
- Recommends that the Department for Justice extends Articles 3 and 4 to apply to all children under 18 years (2.61).
- Recommends the introduction of recovery orders for children who are not in care (2.62).
- Considers that these police powers would be a useful tool to help the PSNI stop and disrupt child sexual exploitation and therefore supports the Department of Justice's proposal to create new police powers (2.70).
- Recommends that consideration is given to developing a Barnahus model in Northern Ireland (3.6).
- Recommends that the Criminal Injuries Compensation Scheme and associated guidance is updated without delay to reflect the NI Court of Appeal judgement and that the eligibility criteria is extended to include child victims of indecent images/pornography and all forms of child exploitation. Furthermore, the Department of Justice should consider how

best to ensure that child victims of crime (including historical abuse) can readily access the scheme (3.10).

- Recommends that the Department of Justice ensures that, when sentencing an individual for sexual offences, a sentencing judge must have regard to all aggravating factors listed at Article 28 of the Lanzarote Convention and therefore should add the factor of the offence being committed within the framework of a criminal organisation (3.13).
- Recommends that data on all forms of child sexual abuse and exploitation is gathered, disaggregated, published, monitored and evaluated. This should include data on the new 'reasonable belief' defence as outlined above. Data should be disaggregated to include gender, BME, care status and disability (3.16).
- Recommends that all existing measures and support for victims of sexual exploitation are fully accessible to children with disabilities. The Department should consider how best to ensure the effective participation of children with disabilities in consultation with NICCY and organisations such as Disability Action and Children in Northern Ireland (3.20).
- Recommends that legislation is introduced to repeal all legal provisions permitting the marriage of children in NI and increasing the minimum age for marriage to 18 years, for both girls and boys (3.24).

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the Commission), pursuant to Section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with these functions, the following statutory advice is submitted to the Department of Justice in response to its review on the law of child sexual exploitation in Northern Ireland (NI).
- 1.2 The Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE), European Union (EU) and United Nations (UN) systems. The relevant international treaties in this context include:
- European Convention on Human Rights 1950 (ECHR);¹
 - European Convention on Compensation for Victims of Violent Crimes 1983;²
 - European Convention on Cybercrime 2001;³
 - European Convention on Action against Trafficking in Human Beings 2005;⁴
 - European Convention on the Protection of Children and Young People against Sexual Exploitation and Sexual Abuse 2007 (Lanzarote Convention);⁵
 - European Convention on Preventing and Combating Violence against Women and Domestic Violence 2011 (Istanbul Convention);⁶

1 Ratified by the UK in 1951.

2 Ratified by the UK in 1990.

3 Ratified by the UK in 2011.

4 Ratified by the UK in 2007.

5 Ratified by the UK in 2018.

6 Signed by the UK in 2012. The UK has not yet ratified this Convention but has committed to do so with the enactment of the Preventing and Combating Violence against Women and Domestic Violence (Ratification of Convention) Act 2017. The UK Mission at Geneva has also stated, "the UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow-up with ratification in a short time thereafter". See UK Mission at Geneva, 'Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations Agreed in June 2008' (UKMIS), at recommendation 22 (France).

- Charter of Fundamental Rights of the European Union 2000;⁷
- EU Directive on combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography 2011;⁸
- EU Directive on establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime 2012 (EU Victims Directive).⁹
- UN Convention on the Elimination of All Forms of Discrimination against Women 1979 (UN CEDAW);¹⁰
- UN Convention against Torture 1987 (UN CAT);¹¹
- UN Convention on the Rights of the Child 1989 (UN CRC);¹²
- Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC Optional Protocol);¹³
- UN Convention on the Rights of Persons with Disabilities 2006 (UN CRPD);¹⁴

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

- UN Resolution on the Rights of the Child 1977;¹⁵
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985;¹⁶

7 Ratified by the UK in 2000.

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

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

10 Ratified by the UK in 1981.

11 Ratified by the UK in 1988.

12 Ratified by the UK in 1991.

13 Ratified by the UK in 2009.

14 Ratified by the UK in 2009.

15 A/RES/51/77, 'UN General Assembly Resolution on the Rights of the Child', 20 February 1977.

16 A/RES/40/34, 'UN General Assembly Principles of Justice for Victims of Crime and Abuse of Power,' 29 November 1985.

- CoE Committee of Ministers Recommendation concerning sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults 1991;¹⁷
- CoE Parliamentary Assembly resolution on the sexual exploitation of children 2002;¹⁸
- CoE Committee of Ministers Recommendation concerning the protection of children against sexual exploitation 2011;¹⁹
- EU Agenda for the Rights of the Child 2011;²⁰
- Resolution of the European Parliament on the 25th anniversary of the UN Convention on the Rights of the Child 2014;²¹
- Resolution of the European Parliament on Child Sexual Abuse Online 11 March 2015.²²

1.4 The Commission welcomes the opportunity to respond to the Department of Justice’s consultation on child sexual exploitation. The legislative reforms proposed within the consultation document address some of the legislative gaps previously identified by the Commission and by Kathleen Marshall’s Independent Inquiry. The proposed legislative reforms will assist with satisfying the UN Committee on the Rights of the Child’s 2016 recommendation that the UK “implement the recommendations of the Marshall Inquiry into child sexual exploitation in Northern Ireland”.²³ However, the Commission has highlighted areas where further reform is necessary to ensure full compliance with human rights standards.

1.5 This response is divided into three parts. The first part provides some introductory commentary on the relevant human rights standards applicable to child sexual exploitation. Part 2 addresses the questions outlined in the consultation document. Part 3 makes some additional recommendations on

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

18 Doc/9535, ‘Council of Europe Parliamentary Assembly, Resolution on the Sexual Exploitation of Children: Zero Tolerance’, 5 September 2002.

19 Recommendation Rec (2001)16 of the Committee of Ministers to Member States concerning the protection of children against sexual exploitation, 31 October 2001.

20 COM(2011)60, ‘EU Agenda for the Rights of the Child’, 15 February 2011 .

21 RES 289/57, ‘Resolution of the European Parliament on the 25th anniversary of the UN Convention on the Rights of the Child’, 27 November 2014.

22 2015/2564(RSP), ‘Resolution of the European Parliament on Child Sexual Abuse Online’, 11 March 2014.

23 CRC/C/GBR/CO5, ‘UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 44 (c).

issues that are not directly covered by the review, but that are nonetheless relevant to keeping children safe from exploitation.

Human rights engaged

- 1.6 International law places positive obligations on States to take steps to combat all forms of child exploitation. The UN CRC requires States to protect children from harm and to consider their best interests at all times.²⁴ The UN CRC, Article 34, includes a specific provision on child sexual exploitation, which requires States to take appropriate measures to prevent:
- a) The inducement or coercion of a child to engage in any unlawful sexual activity;
 - b) The exploitative use of children in prostitution or other unlawful sexual practices;
 - c) The exploitative use of children in pornographic performances and measures.²⁵
- 1.7 The UK is also party to the UN CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. The Optional Protocol places specific obligations on States to criminalise all forms of child exploitation. The UN Committee on the Rights of the Child has issued a number of 'general comments', which provide guidelines for State parties on the interpretation of specific aspects of the provisions contained within the treaty. The Commission highlights relevant UN CRC general comments below. The Commission also highlights relevant recommendations known as Concluding Observations issued by the Committee on the Rights of the Child and by the Committee on the Elimination of Discrimination against Women (including the UN CEDAW Concluding Observations issued in 2019, following the most recent examination of the UK).
- 1.8 The European Court on Human Rights (ECtHR) has ruled in a number of cases involving child sexual exploitation in cases that have engaged ECHR Articles 3, 8, and 13.

²⁴ See Articles 1, 3, 11, 21, 32, 33, 35 and 36, UNCRC.

²⁵ Article 34, UNCRC.

- 1.9 ECHR, Article 3, prohibits torture, inhuman or degrading treatment or punishment.²⁶ This is an absolute right, which must not be interfered with under any circumstances.²⁷ The ECtHR confirms “Article 3 requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals”.²⁸ Such measures include providing “adequate protection” in law.²⁹ The ECtHR has found a number of violations of Article 3 in cases involving sexual assault of children, recognising that suffering can reach the minimum threshold of severity.³⁰ The ECtHR acknowledges that positive obligations on States are “even stronger where vulnerable persons [such as children] are concerned”³¹ and that “children and other vulnerable individuals, in particular, are entitled to effective criminal-law protection.”³²
- 1.10 ECHR, Article 8, protects the right to respect for private and family life. Article 8 is qualified and can be limited in certain circumstances. An interference with this right may be justified if the State’s acts or inaction are lawful, serve a legitimate aim and are proportionate.³³ Article 8(2) provides guidance on what may constitute a legitimate aim:

there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

26 The requirement to prohibit torture, inhuman or degrading treatment or punishment by law is also provided for within ICCPR, Article 7; UN CRC, Article 37(a); UN CAT; UN CRPD, Article 15; and Charter of Fundamental Rights of the European Union, Article 4.

27 Article 15(2), ECHR.

28 *A v United Kingdom* (1998) ECHR 85, at para 22.

29 *A v United Kingdom* (1998) ECHR 85, at paras 23-24.

30 *P and S v Poland* (2012) ECHR 1853; *V.C. v Italy* (2018) ECHR 042; *MC v Bulgaria* (2003) ECHR 651.

31 *P and S v Poland* (2012) ECHR 1853, at para 69.

32 *MC v Bulgaria* (2003) ECHR 651, at para 150.

33 *Dudgeon v United Kingdom* (1981) ECHR 5, at para 53.

- 1.11 The ECtHR has confirmed that ECHR, Article 8, encompasses a person's physical and moral integrity on the basis that "a person's body concerns the most intimate aspect of private life".³⁴ This protection is also found in other human rights instruments.³⁵ States are under a duty "to protect physical and moral integrity of an individual from other persons. To that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals".³⁶ The ECtHR has found that failure to provide practical and effective protection through criminal law provisions to victims of sexual abuse can amount to an Article 8 violation.³⁷ The ECtHR has also found a violation of a child's right to respect for private life in a case involving online paedophilia.³⁸
- 1.12 While not directly incorporated into the Human Rights Act, ECHR Article 13 provides for an effective remedy. An effective remedy exists where a competent authority provides a domestic remedy to deal with the "substance of an arguable complaint under the Convention and to grant appropriate relief".³⁹ In cases involving child sexual abuse, the ECtHR has found a violation of Article 13 where victims have been unable to obtain adequate protection or compensation⁴⁰ or recognition of the nature of the crime.⁴¹
- 1.13 In 2018, the UK ratified the European Convention on the Protection of Children and Young People against Sexual Exploitation and Sexual Abuse 2007 (Lanzarote Convention).⁴² The Lanzarote Convention requires States to criminalise all kinds of sexual offences against children. Legislative changes have been introduced across the UK, including Northern Ireland, to

34 *YF v Turkey* (2003) ECHR 391, at para 33.

35 The requirement to respect physical and moral integrity, as part of the right to respect for private and family life, is also provided for within ICCPR, Article 17; UN CRC, Article 16; UN CRPD, Article 22; and Charter of Fundamental Freedoms of the European Union, Article 24.

36 *Sandra Janković v. Croatia* (2008) ECHR 140, at para 45.

37 *X and U v Netherlands* (1985) ECHR 26. See also *GU v Turkey* (2016) ECHR 334.

38 In *K.U v Finland* (2008), the Court found Finland in breach by requiring the service provider of a website to disclose the identity of a suspected paedophile who had targeted a child online. The Court found that the legislature should have provide a framework for reconciling the confidentiality of internet services with the prevention of crime and protection of children.

39 *M.S.S. v. Belgium and Greece* (2011) ECHR 21, at para. 288. See also *Halford v. United Kingdom* (1997) EHRR 523, at para 64.

40 *D.P. and J.C. v. the United Kingdom* (2003) EHRR 14. See also *E. and Others v. United Kingdom* (2002) ECHR 26.

41 *O'Keeffe v. Ireland* (2014) ECHR 28.

42 Ratified by the UK in 2018.

bring about compliance with this Convention; some of these changes are discussed below.

1.14 The Commission broadly supports the proposed reforms. However, the Commission advises that additional legislative change is needed to fully reflect the relevant human rights standards, including the ECHR, Articles 3, 8, and 13 and the Lanzarote Convention.

1.15 In its 2016 Concluding Observations, the UN Committee on the Rights of the Child expressed concern that the UK defines a child as a “person under the age of 16 for the purpose of the criminal law on child abuse and neglect”.⁴³ The Committee specifically recommended a revision of the legislation in order to protect all children under 18 years from child abuse and neglect.⁴⁴

1.16 Throughout this consultation, the Commission recommends that the Department of Justice ensures that children aged 16 and 17 years have access to protections.

1.17 The Commission further recommends that the Department of Justice utilises the reform process as an opportunity to raise awareness of the Lanzarote Convention.

2.0 Response to consultation questions

Legislative references to ‘child prostitution’ and ‘child pornography’

2.1 The terms ‘child prostitution and child pornography’ are still used within international legal treaties. However, the Commission notes an increasing tendency to reject these terms – especially in non-legal contexts - and to replace them with the term ‘child sexual exploitation’. This is the term now

⁴³ CRC/C/GBR/CO/5, ‘UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 41(b).

⁴⁴ Ibid, at para 42(a).

found in UN General Assembly Resolutions and is increasingly used by the UN Human Rights Committee and the Council of Europe.⁴⁵

- 2.2 In 2014, an international working group was established to draft guidelines on the use of terminology relating to child sexual exploitation.⁴⁶ The Interagency Working Group included the Council of Europe secretariat, the UN Committee on the Rights of the Child, UNICEF and the UN Special Rapporteur on the sale of children, child prostitution and child pornography. Adopted in Luxembourg in 2016, these guidelines provide clarity as to the preferred terminology. According to UN Special Rapporteur on Sale of Children, Child Prostitution and Child Pornography, Maud de Boer-Buquicchio, “in the fight against sexual exploitation and sexual abuse of children, terminology is not just a matter of semantics: it determines the efficacy of responses. The Luxembourg Guidelines will contribute not only to protecting children, but also in ending the impunity for these heinous crimes.”⁴⁷
- 2.3 The Department accepts the Marshall Inquiry’s recommendation of removing legislative references to ‘child prostitute’, ‘child prostitution’ and ‘child pornography’ and replacing them with the term ‘sexual exploitation’ of children. The Department acknowledges that children who have been sexually exploited or involved in prostitution or pornography should be considered as victims of abuse and that the use of terms such as ‘child prostitute’ is now considered outdated and minimises the abuse suffered by children.
- 2.4 The Commission recognises the point made by the UN Special Rapporteur that terminology is important and not just a matter of semantics.

45 See UN General Assembly Resolution 51/77 of 20 February 1997; Council of Europe Parliamentary Assembly resolution on the sexual exploitation of children: Zero Tolerance, 5 September 2002; Council of Europe, Committee of Ministers Recommendation No. R(91)11 concerning sexual exploitation, pornography, and prostitution of, and trafficking in, children and young adults; Council of Europe, Committee of Ministers Recommendation Rec(2001)16 concerning the protection of children against sexual exploitation. In light of the above, the European Parliament, in its Resolution on Child Sexual Abuse Online of 11 March 2015, explicitly states that it “is essential to use the correct terminology for crimes against children, including the description of images of sexual abuse of children, and to use the appropriate term ‘child sexual abuse material’ rather than ‘child pornography’”.

46 Interagency working group, ‘Terminology guidelines for the protection of children from sexual exploitation and sexual abuse adopted on 28 January 2016’ (June 2016).

47 ILO Luxembourg Guidelines on terminology, ‘Press release: A step forward in the fight against sexual exploitation and sexual abuse of children’ (14 June 2016).

- 2.5 **The Commission supports the Department of Justice’s proposal to amend the legislation to replace the terms ‘child prostitute’, ‘child prostitution’ and ‘child pornography’ with the term ‘sexual exploitation’ of children.**
- 2.6 The Commission notes that the proposed legislative definition is different to the definition found in statutory guidance.⁴⁸
- 2.7 **The Commission recommends that the Department of Justice considers working towards aligning the definition of child sexual exploitation found in legislation and statutory guidance.**

Inclusion of live-streamed images in CSE offences

- 2.8 As outlined above, UN CRC, Article 34, requires States to take appropriate measures to prevent:
- b) The exploitative use of children in prostitution or other unlawful sexual practices;
 - c) The exploitative use of children in pornographic performances and materials.
- 2.9 The UN CRC Optional Protocol offers an expansive definition of child pornography as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes”.⁴⁹ In its preamble, the Optional Protocol notes the challenge posed by “the internet and other evolving technologies” and calls for full criminalisation of child pornography in all its forms.⁵⁰
- 2.10 The European Directive specifies that ‘pornographic performances’ involving children are to be criminalised.⁵¹ The Directive defines pornographic

48 Department of Health, ‘Co-operating to Safeguard Children and Young People in Northern Ireland’ (August 2017), p.15.

49 Article 2(c), UN CRC Optional Protocol.

50 A/RES/54/263, ‘UN General Assembly Resolution on Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography’ 25 May 2000.

51 Article 5, Directive 2011/93/EU.

performance as a 'live exhibition aimed at an audience, including by means of information and community technology", where a child is "engaged in real or simulated sexually explicit conduct".⁵² The Commission considers that this definition includes live-streamed images.

2.11 The Department proposes amending Article 41 of the Sexual Offences (Northern Ireland) Order 2008 to clarify that live-streamed images are included for the purpose of offences of child sexual exploitation.

2.12 An equivalent legislative provision was recently adopted in England and Wales. This was in direct response to a case where child sexual abuse involving the live streaming of images was not successfully prosecuted due to it being unclear that such behaviour was criminalised by the relevant legislation.

2.13 The Commission supports the Department of Justice's proposal to amend Article 41 of the Sexual Offences (Northern Ireland) Order 2008 to ensure that it encompasses live-streamed images of child sexual exploitation.

Adequacy of the existing grooming offences

2.14 In 2016, the Committee on the Rights of the Child issued a general comment on the rights of the child during adolescence. The Committee highlights the "importance of adopting a human rights-based approach that includes recognition and respect for the dignity and agency of adolescents".⁵³ The Committee also highlights that reaching adolescence can expose children to a "range of risks [that are] reinforced or exacerbated by the digital environment, including... violence and abuse, sexual or economic exploitation..."⁵⁴ Thus States must seek to find an appropriate balance between respecting the evolving capacities of adolescents while ensuring appropriate levels of protection.⁵⁵

⁵² Article 2(c), Directive 2011/93/EU.

⁵³ CRC/C/GC/20, 'UN Committee on the Rights of the Child General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence', 6 December 2016, at para 4.

⁵⁴ Ibid, at para 11.

⁵⁵ Ibid, at para 20.

- 2.15 In finding this balance, the Committee emphasizes that respecting adolescents' increasing levels of autonomy and responsibility "does not obviate States' obligations to guarantee protection".⁵⁶
- 2.16 The Marshall Inquiry recommended that the grooming offence under Article 22 of the Sexual Offences (Northern Ireland) Order should be extended to include situations where an individual 'entices' a child under the age of 16. In response, the Department amended the provision to lower the threshold.⁵⁷ A perpetrator now commits an offence if, for the purposes of sexual gratification, a person (aged 18 years or over) has met or communicated with a child (under 16) on at least one occasion (previously two occasions); and intentionally met, travelled to meet, arranged to meet or travelled with the intention to meet the child; and did so with the intention of committing a sexual offence as defined in the 2008 Order. There is a new offence of communicating sexually with a child under Article 22A of the 2008 Order where no meeting takes place. Article 22 of the Sexual Offences (NI) Order 2008 now mirrors section 15 of the Sexual Offences Act 2003 in England and Wales.
- 2.17 In light of this recent amendment, the Department considers that the 'legislative gap' identified by the Marshall report has been closed and does not propose any further legislative changes.
- 2.18 The Commission welcomes the recent legislative changes, however, considers that further efforts are required to ensure adequate protection for children aged 16 and 17 years, who currently fall outside of the scope of the existing and proposed grooming offences. The Commission notes that the Committee on the Rights of the Child does not provide any guidelines on the age of sexual consent. The Commission also notes that some 16 and 17 year olds may have vulnerabilities, which put them at particular risk of grooming. This could include 16 and 17 year olds who are living in care or supported accommodation, who are homeless, who have intellectual or sensory impairments, poor mental health, separated children, etc.

⁵⁶ Ibid, at para 19.

⁵⁷ Section 89 of the Justice Act (Northern Ireland) Act 2015 amends Article 22(1) (a) of the Sexual Offences (Northern Ireland) Order 2008.

2.19 Recognising that the age of consent in NI is 16, the Commission recommends that the Department of Justice looks again at legislative and policy provision to ensure that 16 and 17 year olds who are particularly vulnerable are best protected from grooming. The Commission acknowledges that the current grooming offence cannot easily be amended to include 16 and 17 years and so encourages the Department to consider developing a new approach.

2.20 While the focus of this consultation is children, the Commission recommends that the Department of Justice also considers legislative and policy protections against grooming for vulnerable adults.

Defence of 'reasonable belief' in relation to sexual offences against children

2.21 In March 2019, in its Concluding Observations on the UK, the UN Committee on the Elimination of Discrimination against Women recommended that the UK "revise its legislation to shift the burden from the prosecution to the [defendant] in cases involving sexual exploitation of minors".⁵⁸ This reiterated the Committee's 2012 recommendation.⁵⁹ In 2014, the UN Committee on the Rights of the Child raised concerns about the legislation in Northern Ireland with regards to the rebuttable presumption:

the Sexual Offences (Northern Ireland) Order 2008, for certain grave offences of sexual exploitation of children between 13 and 16 years of age, such as meeting a child following sexual grooming, engaging in sexual activity with a child, arranging or facilitating a child sex

58 CEDAW/C/GBR/CO/8. 'UN Committee on the Elimination of Discrimination against Women Concluding Observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland' 8 March 2019, para 35(g).

59 The UN Committee on the Elimination of Discrimination Against Women noted that in Northern Ireland it is an offence to pay for the sexual services of a child under 18 years of age but expressed concern that "in the case of a child over the age of 13 years and under the age of 18 years, the prosecution is required to prove that the purchaser did not reasonably believe the child to be 18 years old or more." See CEDAW/C/GBR/7, 'UN Committee on the Elimination of Discrimination Against Women Concluding Observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' 8 – 26 July 2013.

offence, the defendant may claim that he/she believed the victim to be above 16 years.⁶⁰

2.22 Accordingly, the Committee on the Rights of the Child recommended reform to the 2008 Order to include “a provision that for child victims, the burden of proof would be reversed”.⁶¹

2.23 The Department is considering the ‘reasonable belief’ defence in relation to sexual offences against children. At present, the Sexual Offences (NI) Order 2008, Article 17 states that:

a person aged 18 or over (A) commits an offence if he intentionally causes or incites another person (B) to engage in a proscribed activity and B is under 16 and A does not reasonably believe that B is 16 or over.⁶²

2.24 The Department proposes changing the burden of proof so that, if a defendant wishes to rely on a defence of reasonable belief, the onus will be on the defendant to prove that he or she reasonably believed that the child was over the age specified in the offence. This was a recommendation of the Marshall Report,⁶³ which stemmed from the Commission’s advice.⁶⁴

2.25 The Commission supports the Department of Justice’s proposal to reverse the burden of proof in line with the recommendations of the UN Committee on the Rights of the Child and UN Committee on the Elimination of Discrimination against Women.

2.26 The Commission recommends that the Department of Justice monitors the use of the new defence and that it collates and publishes the monitoring data.

60 CRC/C/OPSC/GBR/CO/1, ‘UN Committee on the Rights of the Child Concluding observations on the report submitted by the United Kingdom of Great Britain and NI under article 12, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 8 July 2014 at VI.

61 Ibid, at VI(a).

62 E.g. Article 17, Sexual Offences (Northern Ireland) Order 2008.

63 Kathleen Marshall, ‘Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry’ (November 2014). Key Recommendation 14.

64 NIHRC, ‘Submission to Independent Inquiry into Child Sexual Exploitation in Northern Ireland’ (March 2014).

Abuse of trust offences

- 2.27 The Lanzarote Convention, Article 18, requires States to criminalise the act(s) of engaging in sexual activities with a child where “abuse is made of a recognised position of trust, authority or influence over the child.”⁶⁵ The Explanatory Report to the Convention is clear that “children in certain relationships must be protected, even when they have already reached the legal age for sexual activities and the person involved does not use coercion, force or threat”.⁶⁶
- 2.28 The Explanatory Report to the Lanzarote Convention states that abuse of trust can occur in relation to persons who “have parental or caretaking functions; or educate the child; provide emotional, pastoral, therapeutic or medical care; or employ or have financial control over the child; or otherwise exercise control over the child”.⁶⁷ The report specifies that “volunteers who look after children in their leisure-time or during voluntary activities, for example at holiday-camps or in youth organisations, can also be viewed as holding positions of trust”.⁶⁸ The Commission notes that the list of situations involving relationships of trust is not exhaustive.
- 2.29 In its first implementation report of the Convention, the Lanzarote Committee specifies that the concept of relationships of trust should be afforded a “broad interpretation”.⁶⁹ The Committee notes that domestic legislation is only in conformity with the Convention if it provides an “open-ended enumeration” of situations involving abuse of trust. This ensures that there is “enough flexibility to determine on a case by case basis whether the alleged perpetrator abused his or her position of authority, influence or trust.”⁷⁰ The Lanzarote Committee recommends that “legislation be worded in a manner to allow enough margin of appreciation to the judicial authorities to decide on a case by case basis”.⁷¹

65 Article 18(1b), Lanzarote Convention.

66 CETS 201 Explanatory Report to the Lanzarote Convention, at para 124.

67 Ibid.

68 Ibid.

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

70 Ibid, at para 23.

71 Ibid, at para 24.

- 2.30 Accordingly, the Lanzarote Committee requires State parties to “introduce in their legislation a clear reference to the possible ‘abuse of a recognised position of trust, authority or influence.’”⁷² The Committee cautions States to avoid any “rigid listing of very specific situations” as to do so would risks “leaving children in other situations without protection”.⁷³ The Committee also invites States to “review their legislation to include a reference to the notion of “circle of trust” which would comprise members of the extended family (including new partners), persons having care-taking functions (including trainers of any kind) or exercising control over the child professionally or on a voluntary basis (including persons who look after children in their leisure-time) and any other person trusted by the child (including other children)”.⁷⁴ The Committee specifically acknowledges that sexual abuse of children may be perpetrated in the context of sports activities and commends the Greek Criminal Code for making specific reference to protecting children in taking part in sports.⁷⁵
- 2.31 The Committee is clear that protections against abuse of trust should apply regardless of the age of the child. Indeed, as a means to “eliminate ambiguity”, the Committee advises that “domestic law should specify that the child’s age is not relevant in the context of the criminal offence of sexual abuse in the circle of trust.”⁷⁶
- 2.32 The Department is reviewing the existing offences relating to the abuse of trust. Articles 23-26 of the Sexual Offences (Northern Ireland) Order 2008 provide for offences where sexual activity occurs with a child through abuse of positions of trust. These offences currently apply to all children under the age of 18 but only where the abuse of a position of trust occurs in the context of a statutory responsibility – i.e. education, state care and criminal justice – as defined in Article 28.⁷⁷ The Department is aware of calls to amend the law to include sports coaches and other groups of people working with children and young people such as church groups and youth groups. The Department notes that the policy basis for establishing position

72 Ibid, at para 36.

73 Ibid, at para 36.

74 Ibid, at para 36.

75 Ibid, at para 29.

76 Ibid, at para 141.

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

of trust offences was to provide additional protection for 16 and 17 year olds, who could otherwise legally consent to sexual activity, in circumstances of state care. The Department concludes that it will not change the law to further expand the scope of abuse of trust offences.

2.33 The 2016 report of the Independent Inquiry into Child Sexual Abuse highlighted the need for a wide approach to protecting children, “as recent allegations relating to professional football clubs show, no institution or aspect of institutional life should be beyond our reach.”⁷⁸ The Commission agrees with this view and notes that abuse linked to positions of power can occur in a range of settings i.e. it is not just limited to the context of statutory responsibility.

2.34 The Commission advises that the current definition of position of trust found at Article 28, Sexual Offences (Northern Ireland) Order 2008 is not consistent with the requirements of the Lanzarote Convention.

2.35 The Commission recommends that the Department of Justice extends the definition outlined at Article 28 to include other relationships of trust i.e. that it does not just apply to children in state care. The Commission recommends that the ‘circle of trust’ notion informs the language of the provision.

Indecent ‘self’ images of children under 18

2.36 The definition of child pornography used in the UN CRC Optional Protocol and the Lanzarote Convention is wide and could be interpreted as being applicable to indecent ‘self’ images or sexting between children. The Lanzarote Committee has confirmed that the intention of the Convention is “not to criminalise consensual sexual activities between children of similar ages and maturity”.⁷⁹ This ethos is legislated for in Article 20(3) of the

⁷⁸ Professor Alexis Jay, OBE, Chair of the Independent Inquiry into Child Sexual Abuse. Report of the internal review, (December 2016), p 4.

⁷⁹ T-ES (2015) ‘Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, ‘First implementation report: protection of children against sexual abuse in the circle of trust’, 8 January 2016, at para 17.

Convention, which provides that Member States can decide to exclude sexting between minors from child pornography offences where the “images are produced and possessed by [the children] with their consent and solely for their own private use”.

- 2.37 The EU Directive on combating sexual abuse and sexual exploitation of children and child pornography adopts a similar position by explicitly confirming that “it shall be within the discretion of Member States” to decide whether to apply child pornography offences to self-generated images.⁸⁰ The Recital to the Directive emphasizes that the Directive does not seek to regulate “consensual sexual activities in which children may be involved and which can be regarded as the normal discovery of sexuality in the course of human development”.⁸¹
- 2.38 The Commission advises that human rights law provides Member States with discretion with regards to criminalising or decriminalising self-generated images by minors. This notwithstanding, the Commission is concerned that the knowledge that they may have committed a criminal offence may make it more difficult for children and young people to speak out and seek help. The Commission is aware that a number of children’s experts/organisations have highlighted that children and young people who have shared self-generated sexual images may experience intense shame and this can lead to long-term stigma, self harm and even suicide.⁸²
- 2.39 The Department is considering how to respond to sexting, which involves the making and sending of sexual explicit texts, images and videos. Article 3 of the Protection of Children (Northern Ireland) Order 1978 provides that any person who takes, distributes or shares an indecent photograph of a child is guilty of an offence. This offence is not qualified or limited in any

80 Article 8, EU Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

81 Recital 20, EU Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

82 Barnardo’s, ‘Now I know it was wrong: report of the Parliamentary Inquiry into support and sanctions for children who display harmful sexual behaviour’ (2016); Jim Gamble (former Chief Executive of Child Exploitation and Online Protection Centre) to Committee for Justice evidence on Justice (No.2) Bill (5 November 2015); Digital Journal, ‘Online bullying, sexting causes teen depression, anxiety, suicide’ (12 March 2015); Wirral Safeguarding Children Board, ‘Sexting: what is it?’ (undated); UK Council for Child Internet Safety, ‘Sexting guidance for schools and colleges’ (undated).

way and so can criminalise children who engage in such behaviour including those who take 'selfies'. However, the Department explains that in practice criminal justice agencies do not seek to prosecute such children but instead will adopt a safeguarding approach. This is reflected in the PSNI guidance on 'Sexting and the Law',⁸³ which states that "while offences technically have been committed by the child/children involved", the PSNI will deal with such cases sensitively. The Department concludes that no change in legislation is necessary.

2.40 The Commission notes that CPS has issued guidance that states "it would not usually be in the public interest to prosecute the consensual sharing of an image between two children of a similar age in a relation [but] a prosecution may be appropriate in other scenarios".⁸⁴ This guidance reflects the approach taken by PSNI, which is to treat cases sensitively.

2.41 The Commission considers that measures should be adopted to ensure that children are not unduly criminalised. The Commission recommends that the PPS adopts guidance similar to CPS to confirm that prosecution is not normally in the public interest in specified circumstances.

2.42 In 2014, the Committee on the Rights of the Child held a day of general discussion on the topic "digital media and children's rights". The Committee acknowledged the risks posed by digital media and information technology to the safety of children, including self-generated sexual content. The Committee encourages States to address such risks through "holistic strategies." Measures that States should consider adopt include:

a) – e) ...

f) ensuring accessible, safe, confidential, age-appropriate, child-friendly and effective reporting channels, such as child hotlines, for reporting violations of children's rights in relation to digital media and ICTs;

⁸³ PSNI, 'Sexting and the Law: a basic guide to help professionals and the public deal with incidents of 'sexting' (undated).

⁸⁴ CPS, 'Child Sexual Abuse: Guidelines on prosecuting cases of child sexual abuse' (issued 17 Oct 2013 and revised 26 July 2017) para 76 – 79.

- g) providing safe, child-friendly and confidential points of contact for children to report self-generated sexual content to a relevant authority;
- h) providing fast and effective procedures for the removal of prejudicial or harmful material involving children; etc.⁸⁵

2.43 The Commission notes that the Safeguarding Board for Northern Ireland is currently consulting on e-safety core messages to help protect children and young people from the risks of online activity.⁸⁶ The Commission also notes that the Department of Education has issued 'e-safety guidance'⁸⁷ and understands that the Department is also considering consulting on a strategy.

2.44 The Commission further notes developments at Westminster, namely the publication of the White Paper on Online Harms⁸⁸ and the House of Lord's Select Committee on Communications' report, 'Regulating in a digital world'.⁸⁹ The government has proposed creating a new statutory duty of care whereby online companies have a responsibility for the safety of their service users. It is important that Northern Ireland does not fall behind in terms of any legislative protections that might be developed in England and Wales.

2.45 The Commission recommends that the Department of Justice closely monitors developments in relation to the White Paper on Online Harms. Further, the Commission encourages the Department of Justice to work with relevant NI departments as well as internet providers / social media hosts to develop a mechanism that enables persons to report sexual images of children (including self-generated sexual images) with the view to ensure the prompt removal and destruction of such images.

85 OHCHR, Committee on the Rights of the Child, 'Report of the 2014 day of general discussion: digital media and children's rights' (12 September 2014), at para 105.

86 Northern Ireland Executive, 'Safeguarding Board for Northern Ireland e-safety strategy and action plan' (March 2019).

87 Department of Education, 'E-safety Guidance' (12 June 2015).

88 HM Government, 'Online Harms White Paper CP57' (April 2019).

89 House of Lords Select Committee on Communications, 'Regulating in a digital world HL Paper 299' (9 March 2019).

Using online anonymity to harass

- 2.46 The European Directive on combatting sexual abuse and sexual exploitation of children and child pornography acknowledges that the internet poses a threat with regards to the solicitation of children for sexual purposes given that it provides “unprecedented anonymity to users because they are able to conceal their real identity and... age”.⁹⁰ It is therefore necessary for Member States to ensure adequate protections against such risks.
- 2.47 The Department is considering introducing a new law to deal with situations where an individual uses anonymity provided by the internet and/or the ability to create multiple online accounts to harass another person. This was a recommendation of the NI Assembly Committee for Justice in its Justice in the 21st Century inquiry.⁹¹ However, the Department does not consider there to be a legislative gap as individuals cannot, under existing law, harass other people online without committing offence(s). The Department therefore concludes that there is no need to create a new law on harassment. The Commission notes that the PSNI and PPS have indicated that the existing sentencing guidelines for offences under the Communications Act 2003 work well.

2.48 The Commission accepts that the Department of Justice has made the case that no legislative change is necessary to protect children from anonymous online harassment and from solicitation for sexual purposes.

Up skirting

- 2.49 ECHR, Article 8, requires States to ensure respect for private life and personal integrity. In *Söderman v. Sweden*,⁹² an applicant, who had been subject to attempted covert filming, argued that Sweden had failed to protect her privacy. Specifically, the applicant argued that Sweden’s legal

⁹⁰ Recital 10, EU Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

⁹¹ Committee for Justice, 'Report on Justice in the 21st century: innovative approaches for the criminal justice system in NI NIA 313/11-16 (8 March 2016).

⁹² *Söderman v. Sweden* (2013) ECHR 12.

system breached her Article 8 rights because it contained no provision prohibiting filming without a person's consent. The Court upheld her complaint and found a violation of Article 8.

2.50 The Department recognises that a 'legislative gap' exists in relation to up skirting – namely that such activity is captured under non-sexual offences such as a breach of the peace, disorderly behaviour or outraging public decency, which may present prosecutorial difficulties. Such difficulties were highlighted in a recent case of up skirting in Northern Ireland (which did result in a conviction).⁹³ The Department proposes creating an up-skirting offence. Up skirting is now an offence in England, Wales and Scotland.⁹⁴

2.51 The Commission recalls that ECHR, Article 7, requires that the law is sufficiently accessible and precise to enable an individual to know in advance whether his or her conduct is criminal.⁹⁵

2.52 The Commission supports the Department of Justice's proposal to amend the existing voyeurism offence under Article 71 of the Sexual Offences (Northern Ireland) Order 2008 to include up skirting.

Child sex dolls

2.53 The UN CRC Optional Protocol describes child pornography as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes".⁹⁶ In respect to child pornography, the Optional Protocol requires States to criminalise the "producing, distributing, disseminating, importing, exporting, offering, selling or possessing".⁹⁷ In its preamble, the Optional Protocol notes the challenge posed by "evolving

93 BBC News NI, 'Enniskillen schoolboy guilty in upskirting' 27 February 2019.

94 Earlier this year the Voyeurism (Offences) Act 2019 amended the voyeurism offence under section 67 of the Sexual Offences Act 2003 to criminalise up skirting in England and Wales. The 2019 Act will come into force on 12 April 2019. Up-skirting falls within the scope of the voyeurism offence in Scotland under Section 9 (4A) and (4B) of the Sexual Offences (Scotland) Act 2009.

95 *Handyside v United Kingdom* (1976) 1 EHRR 737.

96 Article 2(c), Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

97 Article 3(1)(c), Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

technologies” and therefore recognises the need for States to be receptive to new forms of child pornography.⁹⁸

2.54 The Department is considering the issue of child sex dolls. The Department notes a possible gap in the law in relation to the possession and manufacture of these dolls. The Department notes that this is a UK wide matter and that the Home Office, National Crime Agency and police in England and Wales are currently undertaking work to consider whether any future legislative or non-legislative changes might be necessary. The Department proposes to stay abreast of developments and to keep this issue under review rather than develop a new offence at this stage.

2.55 The Commission advises that sex dolls fall within the scope of activities that should be criminalised under the UNCRC Optional Protocol.

2.56 The Commission recommends that legislative change is required to criminalise the manufacture and possession of child sex dolls. The Commission encourages the Department of Justice to actively monitor developments in England and Wales prior to developing legislation. The Commission also recommends that the Department acknowledges the requirement to legislate on this matter.

Inclusion of all children under 18 in scope of abduction offences

2.57 UN CRC, Article 11, requires States to “take measures to combat the illicit transfer and non-return of children abroad”.⁹⁹ As outlined above, the UN Committee of the Rights of the Child has recommended a revision of legislation to protect all children under 18 years from child abuse and neglect.¹⁰⁰ The Committee has endorsed the Marshall Inquiry’s

⁹⁸ Preamble, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

⁹⁹ Article 11 (1), UNCRC.

¹⁰⁰ CRC/C/GBR/CO/5, ‘UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 42(a).

recommendation of extending the Child Abduction (Northern Ireland) Order 1985 to children up to the age of 18.¹⁰¹

2.58 The Department is considering amending legislation to ensure that all children under 18 are included within the scope of abduction offences. Article 3 of the Child Abduction (Northern Ireland) Order 1985 provides for offences of abduction of a child by a parent whereas Article 4 applies to abduction of a child by a non-parent. Both Articles 3 and 4 apply where the child is under 16 years. The Department concludes that there is no need to extend either offence to include children aged 16 and 17.

2.59 The Commission notes that Child Abduction Warning Notices (previously referred to as Harbourer's Warning Notices) are generally considered as a useful early intervention tool that permit the police to disrupt grooming relationships before they escalate.¹⁰²

2.60 The Commission acknowledges the importance of seeking a balance between respecting the autonomy of children aged 16 and 17 years while also providing effective protections in law. The Commission considers that priority should be given to protecting children from sexual exploitation.

2.61 The Commission recommends that the Department for Justice extends Articles 3 and 4 to apply to all children under 18 years.

2.62 The Commission recommends the extension of Child Abduction Warning Notices to all children.

Recovery orders for children not in care

2.63 As outlined above, UN CRC, Article 11, requires States to "take measures to combat the illicit transfer and non-return of children abroad".¹⁰³ The UK is

101 Kathleen Marshall, 'Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry' (November 2014), Recommendation 14; The Marshall Inquiry recommended extending the Child Abduction (Northern Ireland) Order 1985 to children up to the age of 18 – see recommendation 14.

102 See Children's Society, 'Serious Crime Bill report stage: allowing the police to use Child Abduction Warning Notices to protect the most vulnerable 16 and 17 years' (undated); Kathleen Marshall, 'Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry' (November 2014) at p.28, 121, 122; Parents against child sexual abuse (PACE), 'Disruption tools available to the police' (undated); PSNI, 'S134117 Child Protection' (23/11/2017).

103 Article 11 (1), UNCRC.

therefore obliged to take measures to combat the non-return of children abroad.¹⁰⁴ Further, the UN Committee on the Rights of the Child has advised the UK ensure that all children under 18 years are adequately protected by criminal law.¹⁰⁵

2.64 The Department is considering introducing recovery orders under the Child Abduction (Northern Ireland) Order 1985 for children who are living at home or who are living independently who have been abducted, along the lines of the current recovery order available for children in care. The Department identifies a risk of abuse of or the vexatious use of such recovery orders that could result in unnecessary increased costs and inappropriate use of police, social services and court time. The Department concludes that a recovery order would not be an appropriate tool for children who are not in care. The Marshall Inquiry recommended that the Department considers introducing such recovery orders.¹⁰⁶

2.65 As outlined above, the Commission acknowledges that the Department needs to strike a balance between respecting autonomy and providing effective protection. The Commission is in favour of prioritising a protective approach.

2.66 The Commission recommends the introduction of recovery orders for children who are not in care.

Police powers

2.67 Article 8 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography requires States to adopt “appropriate measures to protect the rights of victims”.¹⁰⁷ Taking measures to identify victims of CSE is therefore clearly consistent with the Article 8 of the Optional Protocol. The Marshall Inquiry recommended the introduction of such powers. Similar

104 Article 11 (1), UNCRC.

105 CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 42(a).

106 Kathleen Marshall, 'Child Sexual Exploitation in Northern Ireland: Report of the Independent Inquiry' (November 2014) Recommendation 14.

107 Article 8, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

changes have recently been made available in England and Wales under sections 116-118 of the Anti-Social Behaviour, Crime and Policing Act 2014.

- 2.68 The Department proposes the introduction of new powers that would allow the PSNI to request information on guests staying at hotels, bed and breakfasts, etc. where it is suspected that the accommodation is or will be used for the purposes of child sexual exploitation.
- 2.69 The Commission notes that such powers may give rise to privacy concerns thus engaging ECHR, Article 8, which protect the right to respect for private and family life. As outlined in the introduction, ECHR Article 8 is a qualified right and interference with this right may be justified. The Commission advises that any interference is likely to be proportionate as a means to combat child sexual exploitation.

2.70 The Commission considers that these police powers would be a useful tool to help the PSNI stop and disrupt child sexual exploitation and therefore supports the Department of Justice's proposal to create new police powers.

3.0 Additional issues

- 3.1 The Commission takes this opportunity to raise a number of additional issues relevant to protecting children.

Supporting victims through the Barnahus model

- 3.2 International law requires that child victims of sexual abuse and exploitation receive protection and support during investigations or prosecutions of offenders. Article 8 of the Optional Protocol requires that the “interests of child victims [are protected] at all stages of the criminal justice process”. The Article identifies a number of measures: “adapting procedures to recognise children’s special needs as witnesses; keeping child victims informed; ensuring the views of the child are presented and considered; providing appropriate support services to child victims throughout the legal process; protecting, as appropriate, the privacy and identity of child victims; protecting child victims and their families from intimidation and retaliation; and, avoiding unnecessary delay”.
- 3.3 The Lanzarote Convention also requires that States adopt a protective approach towards child victims, “ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate.”¹⁰⁸ In its Concluding Observations 2016, the Committee on the Rights of the Child recommended that the UK “develops comprehensive services to support children who are victims or at risk of sexual exploitation and abuse.”¹⁰⁹ The Committee also recommended that the UK “strengthens the capacity of law enforcement authorities and the judiciary to detect and prosecute child sexual exploitation and abuse, and grant effective remedies to the child victims”.¹¹⁰ The Committee’s General Comment No. 13 provides detailed commentary on appropriate measures to support children during judicial processes.¹¹¹

¹⁰⁸ Article 30(2), Lanzarote Convention.

¹⁰⁹ CRC/C/GBR/CO/5, ‘UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 43(d).

¹¹⁰ Ibid, at para 43(e).

¹¹¹ CRC/C/GB/13, UN Committee on the Rights of the Child, ‘General Comment No.13: the right of the child to freedom from all forms of violence’ (18 April 2011).

- 3.4 The Barnahus or 'child house' model was developed in Iceland 20 years ago and is designed to prevent re-traumatisation while also producing valid evidence for judicial proceedings by eliciting the child's disclosure. The Barnahus model is promoted by the Council of Europe¹¹² and highlighted as good practice by the Lanzarote Convention Committee.¹¹³ The model aims to establish a child-friendly environment bringing under one roof all relevant services (the judge, the prosecutor, the police, psychologists, medical doctors, social workers) to obtain from the child the necessary information for investigation and court proceedings. The Barnahus model is now operating in more than ten countries and is being piloted in some Home Office-funded projects in England.¹¹⁴ The Scottish Courts and Tribunals Service has recommended that the model be developed in Scotland.¹¹⁵
- 3.5 In its response to the Gillen Review, Northern Ireland's Commissioner for Children and Young People drew particular attention to the development and adaptation of the Barnahus in Northern Ireland. In his preliminary report, Sir Justice Gillen agreed that the "Barnahus project... is arguably well worthy of consideration".¹¹⁶ He noted that the "concept requires our close attention if we are to take seriously the need to protect children from being possibly traumatised a second time by a harrowing procedural process, whilst still protecting the rights of the accused to raise questions, but in a non-traditional setting."¹¹⁷
- 3.6 **The Commission recommends that consideration is given to developing a Barnahus model in Northern Ireland.**

112 Council of Europe, 'Children's House: 20 years of protecting children against sexual violence' (September 2018) accessible here: <https://rm.coe.int/children-s-house-20-years-of-protecting-children-against-sexual-violence/16808d2907> [Accessed 6 March 2019].

113 T-ES (2015) 'Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, 'First implementation report: protection of children against sexual abuse in the circle of trust', 8 January 2016, p. 23, 30, 42, 45.

114 See Sir Justice John Gillen, 'Preliminary report into the law and procedures in serious sexual offence in Northern Ireland: Part 2' (November 2018); Children's Commissioner, 'Barnahus: improving the response to child sexual abuse in England' (2016).

115 Scottish Courts and Tribunals Service, 'Evidence and procedure review: child and vulnerable witness project' (June 2017).

116 Sir Justice John Gillen, 'Preliminary report into the law and procedures in serious sexual offence in Northern Ireland: Part 2' (November 2018), p.354.

117 Ibid, at p.354.

Compensation for victims of child sexual exploitation

- 3.7 International human rights law requires States to take measures to promote physical and psychological recovery and social integration of victims.¹¹⁸ Access to compensation forms an important component of recovery. The UN Convention against Torture requires that victims have an “enforceable right to fair and adequate compensation”.¹¹⁹ The UN Committee on the Elimination of Discrimination against Women clarifies that compensation should be available in situations involving ‘private’ actors (which is often the case in child sexual exploitation).¹²⁰ The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that States should provide financial compensation to victims who have sustained injuries as a result of serious crime where compensation is not fully available from the offender. The EU Victims Directive provides that victims should be informed about national compensation for criminal injuries and requires States to promote measures to encourage offenders to provide adequate compensation to victims.¹²¹ Child victims of human trafficking are also entitled to access compensation.¹²²
- 3.8 The European Court of Human Rights has ruled on cases involving survivors of child sexual abuse seeking access to compensation. The Court has found a violation of Article 13 (right to an effective remedy) in child sexual abuse cases where victims have been unable to obtain adequate protection or compensation.¹²³
- 3.9 The Commission notes that in September 2018 the Justice Secretary announced a review of the Criminal Injuries Compensation Scheme to ensure the scheme “reflects the changing nature of crime” in England and Wales.¹²⁴ The review will consider broadening the definition of what

118 Article 39, UNCRC; Article 14, Lanzarote Convention.

119 Article 14 UNCAT; A/RES/40/34, ‘United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’, 29 November 1985.

120 CEDAW/C/GC/19, ‘UN Committee for the Elimination of Discrimination against Women, General Recommendation No. 19’, 1992, at para 9.

121 Articles 8,9,16, EU Victims Directive.

122 CETS 197 Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, Article 15.

123 *D.P. and J.C. v. the United Kingdom* (2003) EHRR 14. See also *E. and Others v. the United Kingdom* (no. 33218/96) (2002) ECHR 26; *O’Keeffe v. Ireland* (2014) ECHR 28.

124 Ministry of Justice, ‘Press release: Justice Secretary announces victim compensation scheme review, scraps unfair rule (9 September 2018).

constitutes a crime of violence for the purposes of accessing compensation; specifically, the review will consider including sexual exploitative behaviour such as grooming. The Commission further notes calls from a coalition of children's organisations to establish a new legal right for a child to obtain compensation from any person found to be in unlawful possession of an image of them.¹²⁵ Finally, the Commission notes the recent NI Court of Appeal judgment that found that the 'same roof' requirement for historical abuse compensation claims contravened the applicant's rights pursuant to ECHR, Article 14 and Article 1 First Protocol.¹²⁶

- 3.10 The Commission recommends that the Criminal Injuries Compensation Scheme and associated guidance¹²⁷ is updated without delay to reflect the NI Court of Appeal 'same roof' judgement and that the eligibility criteria is extended to include child victims of indecent images/pornography and all forms of child exploitation. Furthermore, the Department of Justice should consider how best to ensure that child victims of crime (including historical abuse) can readily access the scheme.**

Aggravating circumstances

3.11 The Lanzarote Convention requires States to consider specified aggravating circumstances when sentencing offenders for offences covered by the Convention (i.e. offences related to child sexual exploitation). The aggravating circumstances outlined at Article 28 are as follows:

- a) The offence seriously damaged the physical or mental health of the victim;
- b) The offence was preceded or accompanied by acts of torture /serious harm;
- c) The offence was committed against a particularly vulnerable victim;

¹²⁵ Children's Charities' Coalition, 'Internet safety: digital manifesto, 4th edition', (2014).

¹²⁶ [2018] NICA 42. The ECHR First Protocol Article 1 provides protection for property.

¹²⁷ Department of Justice, 'Guide to the Northern Ireland Criminal Injuries Compensation Scheme (2009)' Issue Number Two (February 2012).

- d) The offence was committed by a member of the family, a person cohabiting with the child or a person having abused his or her authority;
- e) The offence was committed by several people acting together;
- f) The offence was committed within the framework of a criminal organisation;
- g) The perpetrator has previously been convicted of offences of the same nature.

3.12 The Lanzarote Convention requires States to consider specified aggravating circumstances. The Commission notes that all but one of these circumstances are specifically referred to as aggravating factors in the relevant offences in the Sexual Offences Act 2003.¹²⁸ The outstanding circumstance that is not specifically listed is where the offence was 'committed within the framework of a criminal organisation'.

3.13 The Commission recommends that the Department of Justice ensures that when sentencing an individual for sexual offences a sentencing judge must have regard to all aggravating factors listed at Article 28 of the Lanzarote Convention and therefore should add the factor of the offence being committed within the framework of a criminal organisation.

Access to data

3.14 The Committee on the Rights of the Child recommends that the UK "systematically collect and publish comprehensive and disaggregated data on child exploitation and abuse, including through mandatory reporting, in all settings".¹²⁹ The UN Special Rapporteur on Violence against Women has also noted, "coherence and sustainability in data collection is essential for the effective development and implementation of laws, policies and programmes. It is also essential to include both quantitative data, to

¹²⁸ Sentencing Council, 'Sexual Offences Definitive Guidelines' (December 2013).

¹²⁹ CRC/C/GBR/CO/5, 'UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI', 12 July 2016, at para 44(b).

measure prevalence and forms, and qualitative data, to assess the efficacy of measures.”¹³⁰

3.15 In its submission to the Gillen Review,¹³¹ the Commission cited a report by the Economist Intelligence Unit, which conducted a benchmarking exercise with 40 countries across Europe. This report highlighted the lack of data on the extent of child sexual exploitation in the UK.¹³²

3.16 The Commission recommends that data on all forms of child sexual abuse and exploitation is gathered, disaggregated, published, monitored and evaluated. This should include data on the new ‘reasonable belief’ defence as outlined above. Data should be disaggregated to include gender, BME, care status and disability.

Children with disabilities

3.17 The UN Committee on the Rights of the Child has noted that:

children with disabilities are more vulnerable to all forms of abuse be it mental, physical or sexual in all settings, including the family, schools, private and public institutions, inter alia alternative care, work environment and community at large. It is often quoted that children with disabilities are five times more likely to be victims of abuse.¹³³

3.18 Similarly, States Parties to the UNCRC should recognise “that women and girls with disabilities are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.

130 A/HRC/23/49, ‘Report of the Special Rapporteur on violence against women, its causes and consequences’, 14 May 2013, at para 61.

131 NIHRC, ‘Response to the Gillen Review preliminary report into the law and procedures in serious sexual offences in Northern Ireland’ (January 2019).

132 The Economist Intelligence Unit, ‘Out of the shadows: Shining light on the response to child sexual abuse and exploitation: UK country profile’ (EIU, 2018) p.1.

133 CRC/C/GC/9, ‘UN Committee on the Rights of the Child, General Comment No. 9 on the rights of children with disabilities’, (27 February 2007) at para 42.

- 3.19 The UN CRPD requires State Parties to “take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers ... States Parties shall ensure that protection services are age-, gender- and disability-sensitive”.¹³⁴ The UN CRPD also requires State Parties to ensure that persons with disabilities have effective access to justice, including “through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages”.¹³⁵
- 3.20 **The Commission recommends that all existing measures and support for victims of sexual exploitation are fully accessible to children with disabilities. The Department should consider how best to ensure the effective participation of children with disabilities in consultation with NICCY and organisations such as Disability Action and Children in Northern Ireland.**

Child, Early and Forced Marriage

- 3.21 The UN Committee on the Rights of the Child has repeatedly recommended that all States raise the minimum age for marriage to 18 years.¹³⁶ This recommendation has been reiterated by the UN Committee on the Elimination of Discrimination against Women.¹³⁷ In addition to these general comments, the Committee has issued a targeted recommendation to the UK to take “effective measures to ensure that marriage of children of 16-17 years of age takes place only in exceptional circumstances and is based on the full, free and informed consent of the concerned children”.¹³⁸

134 Article 16(2), UNCRPD.

135 Article 13, UNCRPD. See also CRC/C/GC/12, ‘UN Committee on the Rights of the Child, General Comment No. 12 on the right of the child to be heard, (20 July 2009), at para 34. See also, E/CN.15/2005/L.2/Rev 1, ‘Economic Social Council: Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime’ May 2005, at para. 16.

136 CRC/GC/2003/4 Committee on the Rights of the Child General Comment No. 4 on adolescent health and development Adopted at 33rd session, (19 May – 6 June 2003), at para 13; CRC/C/GC/20 Committee on the Rights of the Child General Comment No. 20 on the implementation of the rights of the child during adolescence, (6 December 2016).

137 UN Committee for the Elimination and Discrimination against Women, ‘General Recommendation No. 21 on equality in marriage and family relations’ 1994.

138 CRC/C/GBR/CO/5, ‘UN Committee on the Rights of the Child Concluding Observations on the Fifth Periodic Report of the UK of Great Britain and NI’, 12 July 2016, at para 46(a).

3.22 The Commission notes that the Forced Marriage (Civil Protection) Act 2007 protects any individual from being forced to enter into marriage, extends to Northern Ireland. This is welcome. However, the Commission has ongoing concerns that the Marriage (Northern Ireland) Order 2003 provides for the marriage of a 16 or 17 years old child with the consent of their parents or legal guardians. The Commission notes the prevalence of child marriage in Northern Ireland: in 2017, 52 children in NI (40 girls and 12 boys) were married.¹³⁹

3.23 **The Commission recommends that legislation is introduced to repeal all legal provisions permitting the marriage of children in NI and increasing the minimum age for marriage to 18 years, for both girls and boys.**

¹³⁹ These figures were provided by NISRA upon request from the Commission : NIHRC Annual Statement 2018. See NIHRC, 'submission to the UN Committee on the Rights of the Child 72nd Session on the Fifth Periodic Report of the United Kingdom of Great Britain and Northern Ireland on compliance with the UN Convention on the Rights of the Child' (April 2016).

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