

*These notes refer to the Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022 (c.19) which received Royal Assent on 27 April 2022*

# Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes relate to the Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022, which received Royal Assent on 27 April 2022. They have been prepared by the Department of Justice in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by the Assembly.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section or Schedule does not seem to require any explanation or comment, none is given.

### **BACKGROUND AND POLICY OBJECTIVES**

3. The Act gives effect to the Justice Minister's desire to improve the operation and effectiveness of the justice system. At its core are two key aims, which are:
  - a) to enhance public safety by implementing certain elements of the Report of the Gillen review of serious sexual offence cases and from a review of the law on child sexual exploitation and sexual offences against children; and
  - b) to improve services for victims of trafficking and exploitation.

### **OVERVIEW**

#### **Part 1: Sexual offences**

##### *Chapter 1: Criminal Conduct*

#### **Voyeurism**

4. The Act creates new offences that capture the highly intrusive behaviours known as "up-skirting" and "down-blousing". The up-skirting offence will occur where a person operates observational 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.

5. The down-blousing offence will occur where a person operates observational 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. Up-skirting is an offence within the rest of the United Kingdom, but the offence within this Act for down-blousing is unique to this jurisdiction.

### **Sending an unwanted sexual image (Cyber-flashing)**

6. A new offence is created that captures the increasingly prevalent behaviour of sending an unwanted sexual image, more commonly referred to 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**

7. Provisions are also brought forward to strengthen the law on sexual offending to better protect children from child sexual exploitation by implementing specific proposals made during consultation on the 'Review of the Law on Child Sexual Exploitation'
8. Under these provisions, four new offences are 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 four offences, collectively, seek to cover all possible angles of approach – communicating with an individual, communicating with a group, communicating with a view to grooming a particular child and communicating with a view to grooming any child under 16.
9. This builds upon existing child grooming and sexual communication with a child offences contained within the 2008 Order (Articles 21, 22 and 22A). The proposals in this area aim to address behaviour at an earlier stage, where offenders pretend to be children 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.
10. The offending behaviour is not limited to online activity. The act of pretending to be a child does not fall within any of the existing offences contained within the 2008 Order and therefore this provision seeks to bridge that gap. The proposed offence will be unique to this jurisdiction.

### **Abuse of Position of Trust**

11. New provision amends the current abuse of position of trust legislation, contained in Part 3 of the Sexual Offences (Northern Ireland) Order 2008. Specifically, it extends the scope of the relevant offences (provided for at Articles 23 to 26) to include the non-statutory sector settings of sport and religion.

12. This means that those who hold a position of trust where they knowingly coach, teach, train, supervise, or instruct a child on a regular basis within the area of sport or religion (as defined in the provisions) and who abuse that position, would be liable for any of the relevant offences contained in Articles 23 to 26.
13. These are: sexual activity with a child; causing or inciting a child to engage in sexual activity; sexual activity in the presence of a child; causing a child to watch a sexual act.
14. A delegated power is also included so that categories additional to sport and religion can be added by secondary legislation where the need for further legal intervention is evidenced and required. Provision also requires the Department to annually review the areas of sport and religion to determine whether the delegated power contained should be exercised.

### **Private Sexual Images**

14. Provisions amend existing provision in section 51 of the Justice Act (Northern Ireland) 2016 which provides for the offence of disclosing private sexual photographs and films with intent to cause distress.
16. Section 51 is amended to make it an offence to threaten to disclose private sexual photographs and films with intent to cause distress.
17. All elements of the existing offence are attached to the new offence. An additional element which relates solely to the threats to disclose offence is that, where a person was charged with the offence, it would not be necessary for the prosecution to prove that the photograph or film referred to in the threat existed, or if it did exist, that it was in fact a private sexual photograph or film.

### **Miscellaneous amendments as to sexual offences**

18. Provisions also amend the 2008 Order to remove and replace existing references to 'child prostitution' and 'child pornography'.
19. The Department considers that this terminology is outdated and that its use tends to minimise the abuse suffered by children through such forms of exploitation. The terms may be taken as implying that children are somehow responsible or willing participants in their own abuse, which has the effect of stigmatising and 'blaming' victims for what has happened to them.
20. It is hoped that amending the legislative references will go some way to helping raise awareness of the status of children as victims of exploitation rather than as willing participants or being complicit in the abuse perpetrated by others. This change reflects particular recommendation made in the Marshall Report, as well as changes made in England and Wales.
21. The 2008 Order is also amended to widen the scope of the definition of 'images' relevant to specific offences within the Order to include 'live streaming'. As it currently stands, the legislation around indecent images of a child only relates to 'recorded' images. Specifying the use of live streaming in statute is designed

to ensure that the law in this regard is in keeping with updates in modern technology.

22. Provision is also made to bring the Article 22A offence of sexual communication with a child, contained within the 2008 Order, within scope of extra-territorial jurisdiction arrangements. Minor amendment is also being made to the offence of paying for sexual services as contained in Article 64A of the 2008 Order, but only in so far as to provide clarity on what constitutes an offence under this provision.

## **Chapter 2: Anonymity and Privacy**

23. These provisions implement four of the Gillen recommendations. These are:
  - (1) To extend the current lifelong anonymity of the victim of a sexual offence to provide for their anonymity for 25 years after death. The provisions allow for applications to be made to the court to discharge or modify reporting restrictions, including to reduce or increase the period of 25 years;
  - (2) To provide 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 protected during their lifetime and for 25 years after their death. The provision allows for applications to be made to the court to dis-apply or modify reporting restrictions, including to reduce or increase the period of 25 years;
  - (3) To increase the penalty for breach of anonymity. Currently a penalty of up to a level 5 fine on summary conviction is available for breach of anonymity. The provisions increase the penalty to a maximum of six months imprisonment, or a fine, or both; and
  - (4) To exclude the public from hearings of serious sexual offence cases (Crown Court and those proceeded by way of appeal to the Appeal Court). Only the complainant, the accused, persons directly involved in the proceedings, 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 the court where it considers it is in the interests of justice to do so.

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

24. The Act amends the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 to:
  - (1) Change from annual to three-yearly reporting in relation to the Modern Slavery Strategy;

- (2) Extend statutory assistance and support to adult potential victims of slavery, servitude or forced or compulsory labour where there is no element of trafficking;
- (3) Provide for the support to adult potential victims of slavery, servitude or forced or compulsory labour beyond the 45 days specified in the 2015 Act for as long as may be needed;
- (4) Extend the support provided to a person who has received a conclusive determination of being a victim of trafficking for a period of up to 12 months, or more than 12 months for such period as the Department may determine;
- (5) Include Class A drugs in Section 22 (9) of the 2015 Act for a statutory defence for offences under the Misuse of Drugs Act 1971; and
- (6) Insert a new provision in the 2015 Act to enable the Department to introduce steps or measures to protect a person from slavery or trafficking. These steps or measures are to be introduced within 24 months of Royal Assent and are to be introduced by means of regulations laid before and approved by the Assembly.

### **Part 3: Chapter 1: Prevention Orders**

25. The legislative provision seeks to strengthen the effectiveness of the Sexual Offences Prevention Order (SOPO) and the Violent Offences Prevention Order (VOPO) in certain areas identified by key operational partners.
26. The provisions applicable to both are relatively minor in nature and comprise adjustments to existing legislation. This is Schedule 5 to the Sexual Offences Act 2003 (“the 2003 Act”) for SOPO and section 57 of the Justice Act (Northern Ireland) 2015 (“the 2015 Act”) for VOPO.
27. The amendment to the 2003 Act brings the offence under Article 68 of the Children (Northern Ireland) Order 1995 (abduction of children in care, etc.) into the scope of existing SOPO provision, by including the offence in the list of specified offences. This would mean that a SOPO could be applied for in respect of persons who present a risk of serious sexual harm where they have committed the offence now being specified.
28. The amendment to the 2015 Act removes, in connection with a VOPO application, the statutory six month time limit (under Article 78(1) of the Magistrates’ Courts (Northern Ireland) Order 1981) within which a civil complaint must normally be made to the court. The amendment will ensure that behaviour of an offender evidenced more than six months previous to the time when an application is being made for a VOPO could be considered by the court.

## **Chapter 2: Causing or Risking Serious Harm**

29. This Chapter clarifies the law on the defence of consent to harm for the purpose of sexual gratification and creates a new offence of non-fatal strangulation or asphyxiation, reflecting similar changes made to the law of England and Wales via the Domestic Abuse Act 2021.
30. Section 27 makes the existing common law position clear that a person cannot rely on the injured party's consent as a defence where acts carried out for the purpose of obtaining sexual gratification, regardless of whose sexual gratification, result in serious harm.
31. The threshold of 'serious harm' aims to balance individuals' private law rights with the public interest of protecting the health and safety of members of society, and reflects the general proposition established in the case of *R. v. Brown* [1993] 2 W.L.R.556, that a person may not consent to the infliction of serious harm on themselves and, by extension, is unable to consent to their own death.
32. The section also acknowledges the exception in relation to cases involving the transmission of sexually transmitted infections, in so far as the law has been established by the cases of *R v Dica* [2004] 3 All ER 539 and *R v Konzani* [2005] EWCA Crim 706.
33. Section 28 makes provision for a new offence of strangulation or asphyxiation. It provides for trial in either the magistrates' courts or in the Crown Court and sets the maximum penalties for each mode of trial.
34. Aligning with section 27, section 28 also makes provision for consent to be available as a defence provided serious harm does not occur.

## **COMMENTARY ON SECTIONS**

### **Part 1: Sexual offences**

#### **Chapter 1: Criminal Conduct**

##### **Section 1: Voyeurism: additional offences**

This section amends the Sexual Offences (Northern Ireland) Order 2008 to add new Articles 71A and 71B – Voyeurism: additional offences (genitals and buttocks) and Voyeurism additional offences (breasts). 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. phone camera) beneath another person's (B's) clothing with the intention of enabling them or another (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 (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

Under 71A (2) 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); 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.

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.

The penalties proposed 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.

New Article 71B deals with "down-blousing" and includes two offences of 'operating equipment' and 'recording images'.

Under Article 71B (1) a person (A) commits an offence if they: operate equipment (e.g. phone camera) beneath or above another person's (B's) clothing with the intention of enabling them or another (C) to observe B's breasts whether exposed or covered with underwear, or the underwear covering the breasts, where they wouldn't ordinarily be visible; they do so 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 B had not consented.

Under 71B (2) 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 breasts, 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); 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.

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.

The penalties proposed 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.

### ***Section 2: Sending etc. an unwanted sexual image (Cyber-flashing)***

This section amends the Sexual Offences (Northern Ireland) Order 2008 to add a new Article 72A (Sending etc. an unwanted sexual image).

Under Article 72A 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.

A sexual image means a photograph or film of any person engaging in sexual activity or of any person's genitals. 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 the image. Data stored by any means which is capable of conversion into a photograph or film is also included.

References to sending or giving include sending by any means whether electronically or otherwise; sending it to another person and; placing it for another person to find.

The penalties proposed 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.

### ***Section 3: Consequential amendments***

This section amends the Sexual Offences (Northern Ireland) Order 2008 by inserting new Article 72(1B) which introduces new Schedule 1 which lists the consequential amendments required by the introduction of the offences of up-skirting, down-blousing and, sending an unwanted sexual image.

### ***Section 4: Sexual grooming: pretending to be a child***

This section amends the Sexual Offences (Northern Ireland) Order 2008 to include new Articles 22B to 22G. This provision is not limited to online communication.

Under new **Article 22B** (communicating with a person with a view to grooming a particular child) 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.



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. An example may be that A knows C and is acutely aware that they are under 16. Equally, A may not be personally acquainted with C, or know they are under 16. Regardless of the scenario, A must reasonably believe that the person is 16 or over to have committed an offence.

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.

'Relevant offence' is defined at Article 22F.

Under new **Article 22C** (communicating with a group with a view to grooming a particular child) a person (A) commits an offence if they are aged 18 or over and A communicates with a group of persons with a view to establishing, or participating in, an exchange of communication with a particular person whom A has in mind (B), with a view to subsequently committing a relevant offence against B.

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.

The key difference with this provision and that provided for 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.

However, with Article 22C, the perpetrator is communicating with a group specifically to find a child they have in mind. It is considered that 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.

Under new **Article 22D** (communicating with a person with a view to grooming any child), 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).

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.

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.

This particular provision differs from Articles 22B and 22C in that the perpetrator does not have a particular child in mind, rather, they are communicating with someone for the purposes of conducting a fishing exercise in the hope of finding any child with whom they can communicate.

Under new **Article 22E** (communicating with a group with a view to grooming any child), 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.

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. In this case, A does not have to have a particular child in mind at the time of the communication.

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.

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 a group and not an individual person.

New **Article 22F** (communication with a view to grooming: interpretation) provides a 'reasonable person' test in respect of whether 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.

Relevant offence is defined at Article 22F as 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.

New **Article 22G** (communication with a view to grooming: sentencing) sets out the penalties for an offence committed under Articles 22B to 22E whereby those convicted summarily would be liable to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both; and on indictment, they would be liable to imprisonment of a term not exceeding two years.

**Section 5: Abuse of position of trust: relevant positions**

This section amends existing provision made for abuse of position of trust of a child in Part 3, Articles 23 to 31, of the Sexual Offences (Northern Ireland) Order 2008.

Section 5(2) makes minor amendment to existing Article 2 of the 2008 Order (interpretation) by inserting new paragraph (4A) to clarify that reference to the Department means the Department of Justice.

Section 5(3) amends existing Article 28 (1)b (positions of trust) by substituting “an order made by the Secretary of State” with “regulations made by the Department (of Justice)”.

Section 5(4) inserts new Article 29A into the 2008 Order.

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

Paragraph (2) defines sport and religion for the purpose of paragraph (1).

Sport includes “any game in which physical skill is the predominant factor or any form of physical recreation which is also engaged in for purposes of competition or display”.

Religion includes “a religion which involves belief in more than one god or a religion which does not involve belief in a god”.

Paragraph (3) provides that paragraph (1) does not apply where A holds a position of trust as already provided for in existing Article 28 provision (within the statutory sector).

Paragraph (4) allows the Department of Justice to amend paragraphs (1) and (2) by regulations, but only in so far as this relates to the settings involved (not the activities).

Paragraph (5) amends Article 80 of the 2008 Order. It changes the Article 80 heading to read “Orders and regulations” and inserts new paragraphs Article 80(4) and (5).

New Article 80(4) provides that regulations made under Article 28(1)(b) or 29A(4) may not be made unless a draft of them has been laid before and approved by a resolution of the Assembly.

New Article 80(5) provides that such regulations may include any incidental, supplementary, consequential, transitory, transitional or saving provision which the Department of Justice considers necessary or expedient.

Paragraph (6) provides that the Department (of Justice) must annually review Article 29A(1) and (2) of the Sexual Offences (Northern Ireland) Order 2008

so as to inform the Department on whether the power in Article 29A (4) of that Order should be exercised.

### ***Section 6: Private sexual images: threatening to disclose***

Section 6 amends provision in section 51 of the Justice Act (Northern Ireland) 2016 (disclosing private sexual photographs and films with intent to cause distress) to extend the scope of the existing disclosure offence to provide for a new offence of threatening to disclose a private sexual photograph and film with intent to cause distress.

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..

Subsection 51(2) is amended to provide that it will not be an offence to threaten to disclose the image to the individual involved.

Subsections 51(4) and (5) are amended to apply the defences available for the disclosure offence to the offence of threats to disclose. These include that the threat to disclose in the course of publication of journalistic material was in the public interest, or that there was a previous disclosure for reward.

A new subsection 51(7A) is inserted after subsection (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.

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

Section 6(3) involves a consequential amendment to section 53 to take account of substituted new section 51(1).

Section 6(4) amends Schedule 4 to the 2016 Act to bring within scope of the new 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.

The Schedule is also amended to remove reference to the E-Commerce Directive [2000/31/EC](#) which has ceased to have effect in the UK.

Similar consequential amendment has been made to remove references to the E-Commerce Directive in section 11 and Schedule 3 (Special rules for providers of information society services) to the Act which relate to the offences of breach

of anonymity of the victim or complainant in a sexual offence and breach of anonymity of the suspect in a sexual offence case.

### ***Section 7: Miscellaneous amendments as to sexual offences***

Section 7 introduces Schedule 2 to the Act which:

- (1) makes certain amendments to references in the Sexual Offences (Northern Ireland) Order 2008 to certain forms of child abuse;
- (2) extends offences that relate to the recording of indecent images so that they apply also to streaming or other transmission of such images;
- (3) makes minor amendments regarding the offences of engaging in sexual communication with a child; and
- (4) makes a clarifying minor amendment relating to the offence of paying of sexual services of a person.

## ***Chapter 2: Anonymity and privacy***

### **Anonymity of victims**

#### ***Section 8: Extended anonymity of victims***

This section amends section 1 of 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, for a period of 25 years after the death of the alleged victim or complainant.

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. This section extends the reporting restrictions for a period of 25 years after their death. The sexual offences to which the provisions apply are those listed in section 2 of the 1992 Act.

#### ***Section 9: Disapplication of anonymity of victim after death***

This section amends the 1992 Act by inserting new sections 3A (Disapplication of section 1 after victim's death) and 3B (Rules of Court). Section 3A(2) provides for interested parties to make application to the court for an order disapplying or modifying the reporting restrictions under amended section 1 of the 1992 Act as they apply to the prohibition of reporting anything that would lead to the identification of a victim for 25 years after their death.

Section 3A(4) clarifies that any order of the court to modify the reporting restrictions can reduce or increase the 25 year period.

Under section 3A(4) an 'interested party' means a family member or a personal representative of the deceased victim, or a person interested in publishing matters relating to the deceased victim. Sections 3A(8) and 3A(9) further define 'family member'.

Section 3A(5) places a duty on the court to make an order where an application has been made and where it is in the interests of justice or the public interest to do so. Under section 3A(6), any order made can be subsequently varied or revoked by the court on an application by an interested party, where the court is satisfied that the same tests are met.

New section 3B makes express provision for the making of Court Rules relating to the process of making applications to the court to dis-apply or modify reporting restrictions and the consideration of these applications by the court.

### ***Section 10: Increase in penalty for breach of anonymity***

This section amends section 5 of the 1992 Act to provide that a person guilty of breach of anonymity will be liable, on summary conviction, to a term of imprisonment of up to six months, or a fine not exceeding level 5 on the standard scale, or both.

### ***Section 11: Special rules for providers of information society services***

This section inserts a Schedule into the 1992 Act which 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.

## **Anonymity of suspects**

### ***Section 12: Restriction on reports as to suspects of sexual offences***

Subsections (1) and (2) of this section provide anonymity to a person against whom an allegation of having committed a sexual offence has been made to the police or a person who is being investigated by the police in connection with a sexual offence – ‘the suspect’. Nothing can be published that would lead to the identification of the suspect.

Subsection (5) details a list of non-exhaustive matters to which the reporting restrictions particularly apply. Subsection (3) provides that the reporting restrictions apply only up to the point of charge and sets out what constitutes a charge. Subsection (4) provides that where no charge is made, the reporting restrictions apply for the life of the suspect and for 25 years after the suspect’s death. Subsection (6) provides that the reporting restrictions will apply to a suspect regardless of whether the allegation is made, or there is a police investigation, before or after this section comes into operation.

### ***Section 13: Meaning of sexual offence in section 12***

Subsection (1) lists the offences which fall within the meaning of ‘sexual offence’ for the purposes of section 12. Subsections (2) and (3) provide that the Department can amend the meaning of ‘sexual offence’ by regulations which must be laid in draft before, and approved by a resolution of, the Assembly.

### ***Section 14: Power to dis-apply reporting restriction***

This section provides that a ‘relevant person’ can apply to a magistrates’ court to dis-apply or modify the reporting restrictions provided by section 12. During the suspect’s lifetime, ‘relevant person’ means the suspect or the Chief Constable.

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.

Subsection (3) clarifies that any order of the court to modify the reporting restrictions can reduce or increase the 25 year period of anonymity provided in section 12(4) but cannot override the loss of anonymity upon charge.

Subsections (8) and (9) define what is meant by ‘a family member’. Where an application has been made, subsection (5) places a duty on the court to make an order where it is in the interests of justice or the public interest to do so. An initial order can dis-apply or modify the reporting restrictions. A further order can vary or revoke the reporting restrictions.

### ***Section 15: Magistrates’ courts rules***

This section makes express provision for the making of magistrates’ courts rules relating to the making of applications to the Court to dis-apply or modify reporting restrictions and the consideration of these applications by the Court.

### ***Section 16: Offence relating to reporting***

Subsection (1) of this section 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. Subsections (2), (3) and (4) relate to the defences available to a person charged with the offence.

Subsection (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 to both. Proceedings for an offence can only be brought with the consent of the Director of Public Prosecutions.

### ***Section 17: Interpretation of sections 12 to 16***

This section provides interpretation of the terms ‘picture’, ‘publication’, relevant programme, ‘statutory provision’ and ‘suspect’ for the purposes of sections 12 to 16

### ***Section 18: Consequential amendment***

This 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). Section 44(4)(a) prohibits the publication of matters that could identify a person as involved in an offence while that person is under the age of 18.



The amendment excludes from section 44(4)(a), a suspect to whom new section 12(2) applies to ensure that the two legislative regimes do not overlap.

## **Exclusion from proceedings**

### ***Section 19: Serious sexual offences: exclusion of public from court***

This section amends the Criminal Evidence (Northern Ireland) Order 1999 by inserting new Articles 27A to 27D to provide for the exclusion of the public from hearings of serious sexual offences tried on indictment.

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

Article 27A does not apply where the complainant has died. Under an exclusion direction, all persons are excluded from the court with the exception of those listed in Article 27A(2).

These are: members and officers of the court; persons directly involved in the proceedings; a relative or friend of the complainant as nominated by the complainant; a relative or friend of the accused as nominated by the accused; bona fide representatives of news gathering or reporting organisations; and any other person excepted from the exclusion direction at the discretion of the court.

Under Article 27A(5) an exclusion direction has effect from the beginning of the trial until the proceedings have been determined or abandoned and does not apply during any time when a verdict is being delivered. Article 27A(7) provides definitions for terms used in Articles 27A to 27D. These include: ‘complainant’ which means any person who is the complainant in respect of a serious sexual offence to which the trial relates; and ‘serious sexual offence’ which is defined as any offence listed in section 2(3) of the Sexual Offences (Amendment) Act 1992.

New **Article 27B** (Nomination etc. of persons to be excepted from exclusion) supplements Article 27A(2)(c) and (d) which enable nominations to be made by the complainant and the accused for a relative or friend to remain in the court. 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.

The court can exercise this power either on application by a party to the proceedings or the complainant, or of its own motion, where it is in the interests of justice to do so. Article 27B(5) and (6) also supplement the power of the court under Article 27A(2)(f) to except other persons from the exclusion direction. This power can be exercised either on an application or of the court’s own motion, and only where excepting the person is in the interests of justice.



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; by specifying a person not already specified in the exclusion direction as allowed to remain in the court; or by revoking a specification of any person previously specified by the court as being allowed to remain in the court.

Variations may be made by the court only where it is in 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.

New **Article 27D** (Exclusion directions under Article 27A: general)

Article 27D(1) requires the court to state in open court its reasons for specifying or refusing to specify persons to be excepted from an exclusion direction and varying or refusing to vary exclusion directions. The reference to ‘open court’ means the court from which the public are excluded under Article 27A.

Article 27D(4) details the provisions and the powers of the court which take precedence over an exclusion direction.

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.

New **Article 27E** (Exclusion of public from appeal hearing)

Article 27E 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.

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); a reference under section 36 and; an application for leave to appeal or an appeal under section 12 or 13A of the Criminal Appeal (Northern Ireland) Act 1980 (appeals against findings of not guilty on ground of insanity and unfitness to be tried).

The duty to give an exclusion direction also applies where the appeal or leave to appeal hearing includes offences additional to the serious sexual offence. Article 27E does not apply where the complainant has died.

Under an exclusion direction, all persons are excluded from the court with the exception of those listed in Article 27A(2).

Under Article 27E(5) an exclusion direction has effect from the beginning of the appeal hearing until the proceedings have been determined or abandoned and does not apply during any time when a decision is being pronounced by the court. Article 27A(7) provides definitions for ‘decisions’ of the court.

Article 27E(8) provides definitions for terms used in Articles 27E and 27F.

*These notes refer to the Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022 (c.19) which received Royal Assent on 27 April 2022*

Article 27E(9) clarifies that a reference to an appeal in Article 27A 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) are not held in open court.

New **Article 27F** (Exclusion from appeal hearings: further provision)

Article 27F(1) provides that an exclusion direction has the meaning given by Article 27A(2).

Article 27F(2) sets out the provisions in Articles 27B, 27C and 27D which apply to an exclusion direction in the Court of Appeal.

Article 27F(3) adds a further provision to the list of provisions and powers of the court detailed in Article 27D(4) which take precedence over an exclusion direction.

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.

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.

### ***Section 20: Guidance about Part 1***

This section provides that the Department of Justice in Northern Ireland must issue guidance about the effect of Part 1 of the Act; and such other matters as the Department considers appropriate as to the criminal law or procedure relating to Part 1 in Northern Ireland.

The section specifies that the guidance must include information for the training of personnel in any public body that has functions within the Criminal Justice System in Northern Ireland that the Department considers appropriate on the effect of Part 1; and the sort of information to be obtained from them for the purpose of the assessment of the operation of the Act.

A person exercising public functions to whom the guidance relates must have regard to it in the exercise of those functions and the Department must keep any issued guidance about Part 1 under this section, under review and revise that guidance as necessary in light of review. Finally, the guidance (including any revised guidance) must be published.

## **Part 2: Trafficking and exploitation**

### ***Section 21: Support for victims of trafficking etc.***

This section has the effect of extending the statutory assistance and support provided under section 18 of the 2015 Act 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.

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***

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: Reports on slavery and trafficking offences***

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 3 years.

### ***Section 24: Protective measures for victims of slavery or trafficking***

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: Chapter 1: Prevention Orders**

### ***Section 25: Qualifying offences for Sexual Offences Prevention Orders (SOPO)***

Section 25 amends provisions contained within the Sexual Offences Act 2003 by including ‘abduction of children in care’ (as provided for in Article 68 of the Children (Northern Ireland) Order 1995) within the list of specified offences of Schedule 5 to that Act.

This is intended to improve the effectiveness of the SOPO by slightly widening the scope of offences to which the SOPO provision apply.

Schedule 5 offences allow for a SOPO to be made in respect of offences specified therein (as well as those specific to sexual offences and contained

within Schedule 3) if they are 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 (VOPO)***

Section 26 amends provision contained within section 57 of the Justice Act (Northern Ireland) 2015 (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 Court (Northern Ireland) Order 1981 (time within which civil complaint must be made to give jurisdiction).

Section 26(2) ensures that provision made under 28(1) will apply to a complaint made after its coming into operation even where the cause of complaint arose more than six months before the making of the complaint.

### ***Chapter 2: Causing or risking serious harm***

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

This section provides that, for the purposes of determining whether a person ('D'), who inflicts "serious harm" on another person ('V') is guilty of a "relevant offence", it is not a defence that V consented to the infliction of the serious harm for the purposes of obtaining sexual gratification.

Subsection (2) makes clear that it does not matter whether the harm was inflicted for the purposes of obtaining sexual gratification for D, V or some other person.

Subsection (3) defines what is meant by "*relevant offence*" and "*serious harm*" by reference to sections 18 (causing grievous bodily harm with intent), 20 (inflicting grievous bodily harm) and 47 (actual bodily harm) of the Offences Against the Person Act 1861 ("the 1861 Act").

Subsection (4) provides for an exception in the case of an offence under section 20 or 47 of the 1861 Act where the serious harm consists of, or is a result of, the infection of V with a sexual transmitted infection in the course of sexual activity, and V consented to the sexual activity in the knowledge or belief that D had the sexually transmitted infection.

This subsection prevents D's criminalisation in such cases, but preserves the position (as set out paragraph 58 of the judgment in *R v Dica*) that consent would provide no defence to a charge under section 18 of the 1861 Act.

Subsection (5) provides that nothing in this section affects any enactment or rule of law relating 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**

This section creates a new offence of non-fatal strangulation or asphyxiation of another person.

Subsection (1) states that a person (“A”) commits an offence if the conditions set out in subsections (2) and (3) are met.

The conditions are that A:

- intentionally applies pressure on or to the throat or neck of another person (“B”), or does some other act amounting to battery of B; and
- intends to affect B’s ability to breathe or the flow of blood to their brain, or is reckless in this regard.

Subsection (4) provides that the offence is committed irrespective of whether B’s ability to breathe or flow of blood to the brain is in fact affected. This means that a victim does not need to prove injury for the offence to be committed: the necessary components of the offence are the application of pressure or battery in combination with the perpetrator’s intention or recklessness as set out in subsections (2) and (3).

Subsection (5) makes clear that it does not matter how the act is done, so, for example, the person may use their hands, another part of their body or an object to apply the pressure or inflict the battery.

Subsections (6) to (8) make provision for a limited defence of consent to the offence. The defence is not available where:

- B suffers "serious harm" as a result of the act; and
- serious harm is intended by A, or A is reckless in this regard.

This reflects the law as set out in the case of *R v Brown* [1993] 2 W.L.R. 556 and subsequent cases, that where a person consents to an act that results in anything less than serious injury, their consent is a valid defence for the person who did the act.

Subsection (9) makes it an offence triable in Northern Ireland, as if it occurred in Northern Ireland, for a person who is a United Kingdom national or is habitually resident in Northern Ireland to do an act in a country outside the United Kingdom that amounts to an offence under the section.

Under subsection (10) the offence is triable in either a magistrates’ court or in the Crown Court. The maximum penalty on summary conviction in a magistrates’ court is 2 years’ imprisonment and/or a fine not exceeding the statutory maximum. On conviction on indictment in the Crown Court the maximum penalty is 14 years’ imprisonment and/or an unlimited fine.

Subsection (11) is an interpretive provision, defining “the 1861 Act”, "serious harm" and “United Kingdom national”.

## **Part 4: Final provisions**

### ***Section 29: Ancillary regulations***

This section enables the Department to bring forward regulations to make any supplementary, incidental, consequential, transitional, transitory or saving provision considered necessary for the purposes of giving the full intended effect of the provisions of the Act; and specifies the Assembly control of any such regulations (i.e. whether the instrument is subject to negative resolution or if a draft of the instrument must be laid before and approved by a resolution of the Assembly).

### ***Section 30: Commencement***

This section sets out the commencement arrangements for the provisions of the Act, specifying those provisions that are to come into operation the day after Royal Assent and those that are to come into operation on days to be appointed by order made by the Department of Justice.

### ***Section 31: Short title***

This section sets out the short title for the Act, which is the Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022.

## **SCHEDULES**

### ***Schedule 1: Consequential amendments: voyeurism (additional offences) and sending etc an unwanted sexual image.***

**Schedule 1** contains amendments consequential to provisions in sections 1 and 2 to bring the new offences of up-skirting, down-blousing and sending an unwanted sexual image within the scope of the:

- Police and Criminal Evidence (Northern Ireland) Order 1989 – questioning and treatment of persons by police: meaning of ‘qualifying offence’;
- Sexual Offences (Amendment) Act 1992 – offences under the law of Northern Ireland to which the Act applies;
- Industrial Tribunals (Northern Ireland) Order 1996 – power to provide for restrictions of publicity in certain cases;
- Sexual Offences Act 2003 – notification requirements, but only in so far as where the offence is committed for the purpose of sexual gratification; and
- Criminal Justice (Northern Ireland) Order 2008 – specified sexual offences

## ***Schedule 2: Miscellaneous amendments as to sexual offences***

### **Part 1: Amendment of references to certain forms of child sexual abuse**

Part 1 of Schedule 2 makes amendments to the 2008 Order to remove the terms ‘prostitution’ and ‘pornography’ relating to child victims 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.

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.

### **Part 2: Amendments relating to the offence of engaging in sexual communication with a child**

Part 2 amends Article 76(10)(a) of the Sexual Offences (Northern Ireland) Order 2008 which relates to offences committed outside the United Kingdom, to bring Article 22A (sexual communication with a child) within scope of extra territorial jurisdiction arrangements available for certain offences within the 2008 Order.

The reference to Article 22A is omitted from Article 76(10)(a) of the 2008 Order; consequential amendment is required to section 90(3) of the Justice Act (Northern Ireland) 2015. Adjustment is also required to the ordering of the list of sexual offences for notification requirement provision contained for this offence within Schedule 3 to the Sexual Offences Act 2003; in consequence of that section 90(4) of the 2015 Act is also omitted.

### **Part 3: Amendment relating to the offence of paying for the sexual services of a person**

Part 3 comprises a simple amendment to Article 64A of the 2008 Order 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***

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.

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

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 violence, which are prescribed for other purposes, including:

- calculating the timescales for retention of forensic data;

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- the application of notification orders, SOPOs, 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.

## **HANSARD REPORTS**

35. The following table sets out the dates of the Hansard reports for each stage of the Act's passage through the Assembly.

<i>STAGE</i>	<i>DATE</i>
Introduction to the Assembly	5 July 2021
Second Stage debate	13 September 2021
Committee Stage Report	27 January 2022
Consideration Stage	15 February 2022
Further Consideration Stage	7 March 2022
Final Stage	15 March 2022
Royal Assent	27 April 2022