

SEXUAL OFFENCES (NORTHERN IRELAND) ORDER 2008

S.I. 2008 No. 1769 (N.I. 2)

EXPLANATORY MEMORANDUM

7.

POLICY BACKGROUND

The Provisions

Part 3 – Sexual offences against children

Rape and other offences against children under 13

Article 12: Rape of a child under 13

7.39. [Article 12](#) makes it an offence for a person intentionally to penetrate with his penis the vagina, anus or mouth of a child under the age of 13. Whether or not the child consented to this act is irrelevant.

Assault

Article 13: Assault of a child under 13 by penetration

7.40. [Article 13](#) makes it an offence for a person intentionally to penetrate sexually the vagina or anus of a child under the age of 13 with a part of his body, such as a finger, or with anything else, such as bottle or other object. The penetration must be sexual, as defined in Article 4. Whether or not the child consented to the act is irrelevant.

Article 14: Sexual assault of a child under 13

7.41. [Article 14](#) makes it an offence for a person to touch sexually a child under the age of 13. The meanings of "touching" and "sexual" are the same as for Article 7. Whether or not the child consented to the act is irrelevant.

Article 15: Causing or inciting a child under 13 to engage in sexual activity

7.42. [Article 15](#) makes it an offence for a person intentionally to cause or incite a child under the age of 13 to engage in sexual activity. In relation to caused sexual activity, the offence covers the same situations as does the offence under Article 8 except that, for this offence, whether or not the child consented to engaging in the sexual activity is irrelevant. This article also covers the situation where incitement takes place but the sexual activity itself does not. For example, a person may incite a child to engage in sexual activity with him (for example, where a person incites the child to masturbate him), or on the child himself (for example, where a person incites the child to strip) or with a third person (for example, where someone incites the child to have sexual intercourse with his friend).

Sexual offences against children under 16

Article 16: Sexual activity with a child

- 7.43. **Article 16** makes it an offence for a person (A) aged 18 or over to intentionally engage in sexual touching of a child under 16. Where the child is aged 13 or over but under 16, the prosecution must prove that A did not reasonably believe that he was 16 or over. "Touching" is explained at Article 2(11) and covers all forms of physical contact including penetration; "sexual" is defined at Article 4. Whether or not the child consented to the activity is irrelevant.

Article 17: Causing or inciting a child to engage in sexual activity

- 7.44. **Article 17** makes it an offence for a person (A) aged 18 or over, intentionally to cause or incite a child aged under 16 to engage in sexual activity (as defined at Article 4). Where the child is aged 13 or over, but under 16, the prosecution must prove that A did not reasonably believe that he was 16 or over. The sexual activity which is caused or incited may be activity with A (for example, where A causes or incites the child to have sexual intercourse with him), on the child himself (for example, where A causes or incites the child to strip for A's sexual gratification) or with a third person (for example, where A causes or incites the child to have sexual intercourse with A's friend). The incitement constitutes an offence whether or not the activity incited actually takes place. Whether or not the child consented to the activity caused or incited, or to the incitement, is irrelevant.

Article 18: Engaging in sexual activity in the presence of a child

- 7.45. **Article 18** makes it an offence for a person (A) aged 18 or over intentionally to engage in sexual activity (as defined in Article 4), in order to gain sexual gratification, when a child aged under 16 is present or in a place from which A can be observed. Where the child is aged 13 or over but under 16, the prosecution must prove that A did not reasonably believe that he was 16 or over. The offence is committed if A knows or believes that the child is aware that he is engaging in the activity or intends that the child should be aware of this. This offence would cover, for example, A masturbating himself in front of a child, or A masturbating himself in the presence of the child to whom he is describing what he is doing, perhaps because the child is covering his face. It would also cover the situation where A performs a sexual act in a place where he knows that he can be seen by a child, for example via a webcam.

Article 19: Causing a child to watch a sexual act

- 7.46. **Article 19** makes it an offence for a person (A) intentionally to cause a child aged under 16, for the purpose of the sexual gratification of A, to watch a third person engaging in sexual activity or to look at an image of a person engaging in sexual activity. Where the child is aged 13 or over but under 16, the prosecution must prove that A did not reasonably believe that he was 16 or over. The definition of sexual activity is at Article 4. A person who, for his own sexual gratification, forces a child to watch two people have sex, or who forces a child to watch a pornographic film, would commit this offence.

Article 20: Sexual offences against children committed by children or young persons

- 7.47. **Article 20** makes it an offence for a person aged under 18 to do anything that would be an offence under any of Articles 16 to 19 if he were aged 18 or over. The purpose of this Article is to provide a lower penalty where the offender is aged under 18. In practice (although there is no provision about this in the Order) decisions on whether persons under 18 should be charged with child sex offences will be made by the Public Prosecution Service in accordance with the principles set out in the Code for Prosecutors. In deciding whether it is in the public interest to prosecute these offences,

*This Explanatory Memorandum refers to the Sexual
Offences (Northern Ireland) Order 2008 No. 1769 (N.I. 2)*

where there is enough evidence to provide a realistic prospect of conviction, prosecutors may take into consideration factors such as the ages of the parties; the emotional maturity of the parties; whether they entered into a sexual relationship willingly; any coercion or corruption by a person; and the relationship between the parties and whether there was any existence of a duty of care or breach of trust.

Article 21: Arranging or facilitating commission of a child sex offence

- 7.48. **Article 21** makes it an offence for a person (A) intentionally to arrange or facilitate any action which he intends to do, intends another person to do or believes that another person will do, in any part of the world, which will involve an offence being committed against a child under any of Articles 16 to 20.
- 7.49. An example of the first two limbs of the offence is where A approaches an agency requesting the agency to procure a child for the purpose of sexual activity either with himself or with a friend. The offence is committed whether or not the sex takes place. An example of the third limb of the offence is where A intentionally drives another person (X) to meet a child with whom he knows X is going to have sexual activity. A may not intend X to have child sexual activity, but he believes that X will do so if he meets that child.
- 7.50. *Paragraph (2)* provides an exception for anyone whose actions are intended to protect the child. *Paragraph (3)* defines the concept of acting for the protection of a child as acting to protect a child from pregnancy or sexually transmitted infection, to protect the physical safety of a child or to promote the emotional wellbeing of a child by the giving of advice. The exception only applies if the person is not causing or encouraging an activity that would constitute an offence under Articles 16 to 20 and if he is not acting for the purpose of obtaining sexual gratification. An example would be where a health worker believes that a person is having sex with a child under 16. He advises that it is unlawful to have sex with children under 16 but supplies him with condoms because he believes that the person will otherwise have sex with the child without using any protection.

Offences against children under 18: abuse of position of trust

Article 22: Meeting a child following sexual grooming

- 7.51. **Article 22** makes it an offence for a person (A) aged 18 or over to meet intentionally, or to travel with the intention of meeting, or otherwise arranges to meet, a child aged under 16 in any part of the world, if he has met or communicated with that child on at least two earlier occasions, and intends to commit a "relevant offence" against that child either at the time of the meeting or on a subsequent occasion. An offence is also committed if the child communicated with travels with the intention of meeting A in any part of the world. An offence is not committed if A reasonably believes the child to be 16 or over.
- 7.52. The offence is intended to cover situations where an adult (A) establishes contact with a child through, for example, meetings, telephone conversations or communications on the Internet, and gains the child's trust and confidence so that he can arrange to meet the child for the purpose of committing a "relevant offence" against the child. The course of conduct prior to the meeting that triggers the offence may have an explicitly sexual content, such as A entering into conversations with the child about the sexual acts he wants to engage her in when they meet, or sending images of adult pornography. However, the prior meetings or communication need not have an explicitly sexual content and could for example simply be A giving the child swimming lessons or meeting her incidentally through a friend.
- 7.53. The offence will be complete either when, following the earlier communications, A meets the child or travels to meet the child, or arranges for the child to travel to meet him with the intent to commit a relevant offence against the child. The intended offence does not have to take place.

*This Explanatory Memorandum refers to the Sexual
Offences (Northern Ireland) Order 2008 No. 1769 (N.I. 2)*

- 7.54. The evidence of A's intent to commit an offence may be drawn from the communications between A and the child before the meeting or may be drawn from other circumstances, for example if A travels to the meeting with ropes, condoms and lubricants.
- 7.55. *Paragraph (2)(a)* provides that A's previous meetings or communications with the child can have taken place in or across any part of the world. This would cover for example A emailing the child from abroad, A and the child speaking on the telephone abroad, or A meeting the child abroad. The travel to the meeting itself must at least partly take place in Northern Ireland.

Article 23: Abuse of position of trust: sexual activity with a child

Article 24: Abuse of position of trust: causing or inciting a child to engage in sexual activity

Article 25: Abuse of position of trust: sexual activity in the presence of a child

Article 26: Abuse of position of trust: causing a child to watch a sexual act

- 7.56. These Articles provide that it is an offence for a person (A) aged 18 or over intentionally to behave in certain sexual ways in relation to a child aged under 18, where A is in a position of trust (as defined in Article 28) in respect of the child. The prohibited behaviour in each of the Articles is identical to that prohibited by the child sex offences in sections 16, 17, 18 and 19 respectively, except that for the abuse of position of trust offences, the child may be 16 or 17.
- 7.57. Except where the child is under 13, one of the requirements of the offence is that A does not reasonably believe that the child is 18 or over, and A is subject to an evidential burden in relation to this aspect of the offence (*paragraph (3)* of each Article). An evidential burden means that, unless A shows from the evidence that there is an arguable case as to whether he reasonably believed the child to be 18 or over, it is presumed that he did not reasonably believe this. Where the child is under 13, the offence is committed regardless of any belief A might have in relation to the child's age.
- 7.58. The effect of *paragraph (1)(d)* (or in the case of Article 25, *paragraph (1)(e)*) is that, where A is in a position of trust by virtue of one of the first four categories of position of trust set out at Article 28, the prosecution must prove, in addition to the other requirements, that he knew or could reasonably have been expected to know of the facts placing him in a position of trust with the child. *Paragraph (4)* of each Article puts an evidential burden on A in this respect. This means that, unless A shows from the evidence that there is an arguable case as to whether or not he knew or could reasonably have been expected to know of the facts giving rise to the position of trust, it is presumed that he did know or could reasonably have been expected to know them. The first four categories of position of trust all concern situations where A looks after persons under 18 at an institution and the child is at that institution. *Paragraph (4)* of each Article is designed to cover cases where, for example, the institution where A works is very large or has a number of different sites, and A may not therefore know that the child is at the institution.

Article 27: Abuse of position of trust: acts done in England and Wales or Scotland

- 7.59. **Article 27** provides that any act that would, if done in Northern Ireland, constitute an offence under Articles 23 - 26 of this Order, also constitutes an offence if carried out in England, Wales or Scotland.

Article 28: Positions of trust

Article 29: Positions of trust: interpretation

- 7.60. **Article 28** defines "position of trust" for the purposes of the offences in Articles 23, 24, 25 and 26. *Paragraph (1)(b)* of Article 28 also provides a power for the Secretary of State to specify further conditions that will constitute a position of trust. The power is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 (Article 80(1)).
- 7.61. The conditions in *paragraphs (2) to (5)* use the term "looks after". This term is defined, in broad terms, at *paragraph (2)* of Article 29.
- 7.62. *Paragraph (2)* applies where the child is detained following conviction for a criminal offence, for example in a secure training centre or a young offenders' institution.
- 7.63. *Paragraph (3)* applies to a wide range of settings in which young people are accommodated, including foster care; residential care (accommodation provided by a Health and Social Services Board); and semi-independent accommodation.
- 7.64. *Paragraph (4)* covers places where young people with medical conditions, physical or learning disabilities, mental illness or behavioural problems might be accommodated and includes NHS, private and voluntary accommodation.
- 7.65. *Paragraph (5)* covers the situation where the child is receiving education in an educational institution. This concept is further explained at *paragraph (4)* of Article 29. The effect of that paragraph is that where the child is registered at a college but receives education at another college with which the former has arrangements, A will still be in a position of trust in relation to the child if A works at the former college.
- 7.66. *Paragraph (6)* covers children's guardians appointed under Article 159 or 160 of the Children (Northern Ireland) Order 1995.
- 7.67. *Paragraph (7)* covers those who have unsupervised contact with children in the context of their duties under Article 21 or 23 of the Children (Northern Ireland) Order 1995. Such persons arrange accommodation for children who, for whatever reason, are not being looked after by those who have parental responsibility for them, and check that their welfare is being looked after once such accommodation has been found. They include Health and Social Services Board staff such as social workers and family assistance staff who visit the accommodation in which a child has been placed in order to oversee the child's welfare.
- 7.68. *Paragraph (8)* covers persons who have unsupervised contact with children by virtue of their appointment as child reporters under Article 4 of the Children (Northern Ireland) Order 1995. These persons present reports for the court relating to children's welfare.
- 7.69. *Paragraph (9)* covers personal advisers who look after children on an individual basis (as defined at Article 29(3)) having been appointed under the Children (Northern Ireland) Order 1995. Such personal advisers generally provide help and support to children aged 16-17 who have been in Health and Social Services Board care.
- 7.70. *Paragraph (10)* covers persons who supervise children pursuant to a care order, supervision order or educational supervision order under various provisions in the Children (Northern Ireland) Order 1995 and, in that capacity, look after children on an individual basis (again, as defined at Article 29(3)).
- 7.71. *Paragraph (11)* covers a range of persons who, in the course of their duties, regularly have unsupervised contact with children. These are persons appointed to act as children's guardians ad litem under Article 60(1) of the Children (Northern Ireland) Order 1995.

*This Explanatory Memorandum refers to the Sexual
Offences (Northern Ireland) Order 2008 No. 1769 (N.I. 2)*

- 7.72. *Paragraph (12)* includes adults who supervise children under bail supervision, a community sentence (for example a probation order, combination order, community service order, supervision order, attendance centre order) and children under conditions following release from detention resulting from a criminal conviction (e.g. those released on licence from a young offenders institution). This would include those released on licence from a Juvenile Justice Centre or someone providing counselling or drug rehabilitation services to the child pursuant to the terms of a court order.

Article 30: Articles 23 to 26: exception for spouses and civil partners

- 7.73. **Article 30** provides that A will not commit an offence under Articles 23 to 26 if he can prove that, at the time of the sexual activity, B was aged 16 or over and he and B were lawfully married or civil partners of each other.

Familial sex offences against children under 18

Article 31: Articles 23 to 26: sexual relationships which pre-date position of trust

- 7.74. **Article 31** provides A with a defence to abuse of position of trust offences if he can prove that his sexual relationship with B pre-dated his relationship of trust with B. So if A could prove that he and B had a sexual relationship before A went to work at the school at which B is a pupil, he would not commit an offence by continuing that sexual relationship. The effect of *paragraph (2)* is to limit this to the situation where the sexual relationship that pre-dated the relationship of trust was lawful, so it would not cover for example a relationship with a child of under 16.

Article 32: Sexual activity with a child family member

- 7.75. **Article 32** makes it an offence for a person (A) intentionally to touch a family member (as defined in Article 34) aged under 18, where the touching is sexual. The meaning of touching is explained at Article 2(11). It covers all forms of physical contact including sexual intercourse. The definition of sexual is at Article 4. Additional elements of the offence are that A must know, or be in a position where he could reasonably be expected to know, that the child is his family member and that, except where the child is under 13, he does not reasonably believe that the child is 18 or over.
- 7.76. So if, for example, A has never met the child before, and so does not know, and could not reasonably be expected to know, that she is his sister, and reasonably believes she is over 18, he will not commit this offence by engaging in sexual activity with her, even though she is in fact his sister, and only 14.
- 7.77. In relation to both these last two elements of the offence A is under an evidential burden (*paragraphs (2) and (3)*). This means that unless A shows from the evidence that there is an arguable case about these issues, it is presumed that he did not reasonably believe the child to be 18 or over, and that he knew or could reasonably have been expected to know that the child was his family member. Whether or not the child consented to the touching is irrelevant.

Article 33: Inciting a child family member to engage in sexual activity

- 7.78. **Article 33** makes it an offence for a person (A) intentionally to incite a child family member (defined in Article 34) aged under 18 either to touch A or to allow himself to be touched by A, where the touching is sexual. The meaning of touching is at Article 2(11). It covers all forms of physical contact including sexual intercourse. The definition of sexual is at Article 4. An example of this offence would be where A encourages B to masturbate A or cajoles B into agreeing to have sex with him. The offence is committed whether or not the sexual touching takes place. So where in the above example A has encouraged B to masturbate him, but the masturbation does not take place because another person enters the room, the offence is nevertheless complete. The two additional elements of the offence (and the evidential burdens) described in relation to Article 32

*This Explanatory Memorandum refers to the Sexual
Offences (Northern Ireland) Order 2008No. 1769 (N.I. 2)*

apply to this section too (*paragraphs (1)(d) and (e), (2) and (3)*). Whether or not the child consented to the incitement, or the activity being incited is irrelevant.

Article 34: Family relationships

- 7.79. **Article 34** lists the relationships relevant for the purposes of Articles 32 and 33. Article 40 of the Adoption (Northern Ireland) Order provides that an adoptive child is the child of the adoptive parents and not the biological parents. Adoptive relationships are therefore covered by *paragraphs (1)(a)*. The categories at *paragraphs (2) to (4)* also apply (by virtue of *subsection (1)(b)*) to the adoptive child's biological family relationships. These relationships fall into three categories.
- 7.80. The first category of relationships is listed in *paragraph (2)*. Definitions of the relationships mentioned at *paragraph (2)* are at *paragraph (5)(a) to (c)*. Persons whose relationships fall within this category will always be each other's family members for the purposes of Articles 32 and 33. Even where there is no blood relationship and the relationship can therefore cease - as in the case of foster parents - this offence may be committed for as long as the victim is under 18. So for example even where A is no longer a child's foster parent, A will commit an offence by having sex with that child while the child is under 18.
- 7.81. The second category of relationships is listed in *paragraph (3)*. The relationship between A and a child will only fall within this category for the purposes of Articles 32 and 33 if A lives, or has lived, in the same household as the child or is, or has been, regularly involved in caring for, training or supervising or being in sole charge of the child. *Paragraph (3)(a)* relates to step-parents, *(3)(b)* relates to cousins, *(3)(c)* relates to step-siblings and *(3)(d)* relates to foster-siblings. The definition of foster parent is at *paragraph (5)(c)* and the definition of step-parent, stepbrother and stepsister is at *paragraph (5)(e)*. An example within this category would be a person (A) who lives or has lived in the same house as his first cousin who is under 18. If the cousins had never lived in the same household, A would not commit this offence by having a sexual relationship with the cousin. As with the first category, if the relationship ceases (for example A ceases to be the partner of the child's mother), the offence will still be committed if A has sex with the child while the child is under 18.
- 7.82. An example of the third category of relationships (at *paragraph (4)*) would be where a child is living in the same household as an au pair who looks after him. This category of relationship differs from the other two categories in that an offence will not be committed if A has a sexual relationship with the child after the relationship has ceased, even where the child is under 18. So, in this example, if the au pair were to leave the household and/or cease to have responsibility for the child, then the relationship would no longer be relevant for the purposes of Articles 32 and 33.

Article 35: Articles 32 and 33: exceptions for spouses and civil partners

- 7.83. This Article provides A with a defence to the offences under Articles 32 and 33 if he can prove that at the time of the act the child was aged 16 or over and he was lawfully married or a civil partner to the child.

Abuse of children under 18 through prostitution and pornography

Article 36: Articles 32 and 33: sexual relationships which pre-date family relationships

- 7.84. This Article provides A with a defence to the offences under Articles 32 and 33 if he can prove that his sexual relationship with the child pre-dated the start of the familial relationship as defined in Article 34. Thus, for example, where two divorced people meet because their respective 16 and 17 year old children are engaged in a sexual relationship and the parents decide to marry, if all four persons were to move into the same household the criminal law would not interfere in the ongoing sexual relationship between the children, even though they would otherwise have been brought within the

*This Explanatory Memorandum refers to the Sexual
Offences (Northern Ireland) Order 2008No. 1769 (N.I. 2)*

scope of the offence. This defence is not available where A and the child are related as set out in Article 34(2) (whether by blood or adoption). The effect of *paragraph (2)* is to limit this to the situation where the sexual relationship was lawful so it would not cover for example a relationship with a child of under 16.

Article 37: Paying for sexual services of a child

- 7.85. **Article 37** makes it an offence for any person (A) intentionally to obtain for himself the sexual services of a child (B) aged under 18, where those services have been paid for or where payment has been promised. The offence covers the situation where A pays for the services or promises payment either directly to B or to a third party (C) (for example where C is B's pimp) or where A knows that another person (D) has paid for the services or promised such payment. Where B is 13 or over, the offence will not be committed where A reasonably believes that B is 18 or over. (It will be for the prosecution to prove that A does not reasonably believe that B is 18 or over.) However, where B is under 13, A will commit the offence regardless of any reasonable belief he may have about B's age. *Paragraph (2)* defines payment widely. It covers not only a payment of money but any financial advantage. This includes the discharge of an obligation to pay (for example, B owes A a debt for a car but A agrees to waive the debt if B provides him with sexual services) and the provision of goods or services gratuitously or at a discount (for example, where A provides drugs to B at no or reduced cost on condition that B provides sexual services to A).

Article 38: Causing or inciting child prostitution or pornography

- 7.86. **Article 38** makes it an offence for a person (A) intentionally to cause or incite a child under 18 (B) into prostitution or involvement in pornography anywhere in the world. The offence is aimed at persons who recruit into prostitution or pornography (whether on a one-off basis or longer term) those who are not involved or not currently involved in it. This could be where A makes a living from the prostitution of others and encourages new recruits to work for him or another (whether those recruits do actually then engage in prostitution or not). It could also cover the situation where A and B live together and A compels B to become involved in pornography, for example in order to pay their rent, or for any other reason. Unlike the prostitution offence at Article 62, there is no requirement that the causing or inciting of a child prostitute must be done for gain. The prostitution or pornography can take place, or be intended to take place, in any part of the world. Where B is 13 or over, the offence will not be committed where A reasonably believes that B is 18 or over. (It will be for the prosecution to prove that A does not reasonably believe that B is 18 or over.) However, where B is under 13, A will commit the offence regardless of any reasonable belief he may have about B's age. The terms "pornography" and "prostitute" are defined in Article 41.

Article 39: Controlling a child prostitute or a child involved in pornography

- 7.87. **Article 39** makes it an offence for a person (A) intentionally to control any of the activities of a child (B) that relate to the child's prostitution or involvement in pornography in any part of the world. The offence is committed even if B's activities in relation to prostitution or pornography are controlled for part of the time by another person. An example of the behaviour that might be caught by this offence is where A requires or directs B to charge a certain price or to use a particular hotel for her sexual services or to pose for a certain photographer and B complies with this request or direction. The prostitution or pornography can take place in any part of the world. Where B is 13 or over, the offence will not be committed where A reasonably believes that B is 18 or over. (It will be for the prosecution to prove that A does not reasonably believe that B is 18 or over.) However, where B is under 13, A will commit the offence regardless of any belief he may have about B's age. The terms "pornography" and "prostitution" are defined in Article 41.

Article 40: Arranging or facilitating child prostitution or pornography

- 7.88. **Article 40** makes it an offence for a person (A) to arrange or facilitate the involvement of a child (B) in prostitution or pornography in any part of the world. This offence would cover for example, delivering B to a place where he will be used to make pornography or making arrangements for B's prostitution to take place in a particular room. Where B is 13 or over, the offence will not be committed where A reasonably believes that B is 18 or over. (It will be for the prosecution to prove that A does not reasonably believe that B is 18 or over.) However, where B is under 13, A will commit the offence regardless of any reasonable belief he may have about B's age. The terms "pornography" and "prostitution" are defined in Article 41.

Article 41: Articles 38 to 40: Interpretation

- 7.89. **Article 41** defines the terms "pornography", "prostitute", "prostitution" and "payment" as used in Article 38 to 40.

Indecent photographs of children under 18

Article 42: Indecent photographs of persons aged 16 or 17

- 7.90. This Article redefines a "child" for the purposes of the Protection of Children (Northern Ireland) Order 1978 ("the 1978 Order") as a person under 18 years, rather than under 16 years, of age. This change means the offences under that Order of taking, making, permitting to take, distributing, showing, possessing with intent to distribute, and advertising indecent photographs or pseudo-photographs of children will now also be applicable where the photographs concerned are of children of 16 or 17 years of age. The same change applies to the offence of possessing an indecent photograph or pseudo-photograph of a child at Article 15 of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988 (Article 15(5) of that Order applies the 1978 Order definition of "child").
- 7.91. However, the clause also creates a number of conditions which if satisfied will mean that the defendant is not guilty of an offence under Article 3(1)(a), (b) or (c) of the 1978 Order (provided that the offence charged relates to a photograph and not a pseudo-photograph).
- 7.92. The conditions in relation to an offence under Article 3(1)(a) of the 1978 Order (taking or making indecent photographs) are as follows:
- 7.93. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over and that at the time of the taking or making of the photograph he and the child were married or living together as partners in an enduring family relationship (Article 3B(1)).
- 7.94. Secondly, the photograph must not be one that shows a person other than the child and the defendant (Article 3B(3)).
- 7.95. Thirdly, the defendant must show that there is enough evidence to raise an issue as to whether the child consented to the photograph being taken or made, or as to whether the defendant reasonably believed that the child consented (Article 3B(4)).
- 7.96. If any of these conditions is not satisfied, the prosecution need only prove the offence as set out in Article 3(1)(a) of the 1978 Order. But if the three conditions are satisfied, the defendant is not guilty of the offence unless the prosecution also prove that the child did not consent and that the defendant did not reasonably believe that the child consented (Article 3B(4)).
- 7.97. The conditions in relation to an offence under Article 3(1)(b) of the 1978 Act (distributing or showing indecent photographs) are as follows:

*This Explanatory Memorandum refers to the Sexual
Offences (Northern Ireland) Order 2008No. 1769 (N.I. 2)*

- 7.98. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over, and that either at the time of distributing or showing it, or at the time of obtaining it, he and the child were married or living together as partners in an enduring family relationship (Article 3B(1) and (2)).
- 7.99. Secondly, the photograph must not be one that shows a person other than the child and the defendant (Article 3B(3)).
- 7.100. If either of these conditions is not satisfied, the prosecution need only prove the offence as set out in Article 3(1)(b) of the 1978 Order. But if both the conditions are satisfied, the defendant is not guilty of the offence unless the prosecution prove that the showing or distribution was to a person other than the child (Article 3B(5)).
- 7.101. The conditions in relation to an offence under Article 3(1)(c) of the 1978 Order (being in possession of indecent photographs with a view to their being distributed or shown) are as follows:
 - 7.102. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over and that either at the time of his possession of it with a view to distributing or showing it, or at the time when he obtained it, he and the child were married or living together as partners in an enduring family relationship (Article 3B(1) and (2)).
 - 7.103. Secondly, the defendant must show that there is enough evidence to raise an issue as to whether the child consented (or the defendant reasonably believed that the child consented) to the photograph's being in the defendant's possession, and also as to whether the defendant had the photograph in his possession with a view to distributing or showing it to a person other than the child (Article 3B(6)).
 - 7.104. Thirdly, the photograph must not be one that shows a person other than the child and the defendant (Article 3B(3)).
 - 7.105. If any of these conditions is not satisfied, the prosecution need only prove the offence as set out in Article 3(1)(c) of the 1978 Order. But if the three conditions are satisfied, the defendant is not guilty of the offence unless the prosecution also prove either that the child did not so consent and that the defendant did not reasonably believe that the child so consented, or that the defendant had the photograph in his possession with a view to its being distributed to a person other than the child.
- 7.106. Similar provision is made in relation to an offence under Article 15 of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988 (possession of indecent photograph of a child). The conditions are as follows:
 - 7.107. Firstly, the defendant must prove that the photograph in question was of the child aged 16 or over and that at the time when he possessed the photograph, or at the time when he obtained it, he and the child were married or living together as partners in an enduring family relationship (Article 15A(1) and (2)).
 - 7.108. Secondly, the photograph must not be one that shows a person other than the child and the defendant (Article 15A(3)).
 - 7.109. Thirdly, the defendant must show that there is enough evidence to raise an issue as to whether the child consented to the photograph being in his possession or as to whether the defendant reasonably believed that the child so consented (Article 15A(4)).
 - 7.110. If any of these conditions is not satisfied, the prosecution need only prove the offence as set out in Article 15(1) of the Criminal Justice (Evidence, Etc.) (Northern Ireland) Order 1988. But if the three conditions are satisfied, the defendant is not guilty of the offence unless the prosecution prove that the child did not consent and that the defendant did not reasonably believe that the child consented (Article 15A(4)).