

THE SEXUAL OFFENCES (NORTHERN IRELAND) ORDER 2008

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

EXPLANATORY MEMORANDUM

1. INTRODUCTION

- 1.1 This explanatory memorandum has been prepared by the Northern Ireland Office and is laid before Parliament by Command of Her Majesty.

2. DESCRIPTION

- 2.1 This Sexual Offences (Northern Ireland) Order 2008 seeks to consolidate sexual offences law in Northern Ireland into one statute and modernize, strengthen and harmonise the body of offences and penalties with the rest of the England and Wales.

3. MATTERS OF SPECIAL INTEREST TO THE JOINT COMMITTEE ON STATUTORY INSTRUMENTS

- 3.1 None

4. LEGISLATIVE BACKGROUND

- 4.1 This Order is being made by Order in Council procedure under Section 85 of the Northern Ireland Act 1998 and is subject to affirmative resolution. As required by the Act, the Order is being laid along with a statement of the representations made during consultation, a report on the proposal by the Northern Ireland Assembly, and a statement containing details of changes made after consultation.
- 4.2 The provisions in the Order place the law on sexual offences in Northern Ireland on a par with Part 1 of the Sexual Offences Act 2003 and anticipates changes to the offences of grooming, sex with an adult relative, and offences committed outside the United Kingdom proposed in the Criminal Justice and Immigration Bill currently before Parliament.
- 4.3 The Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 amends a number of UK Acts of Parliament as a consequence of the Sexual Offences (Northern Ireland) Order 2008.

5. TERRITORIAL EXTENT AND APPLICATION

- 5.1 This instrument applies to Northern Ireland.

6. EUROPEAN CONVENTION ON HUMAN RIGHTS

6.1 The Minister, Paul Goggins has made the following statement regarding human rights:

“In my view the provisions of the Sexual Offences (Northern Ireland) Order 2008 are compatible with the Convention rights.”

7. POLICY BACKGROUND

7.1 The provisions in the Order are the result of the first fundamental review of the law on sexual offences in Northern Ireland. The review of the law on sexual offences was motivated by a desire to achieve a strengthened, modernised and harmonised body of law, based on the Sexual Offences Act 2003, and sought views on how the law should distinguish, for the 21st century, between acceptable sexual behaviour and criminal activity, and suggested appropriate penalties for behaviour in the criminal category. No previous review of this body of law had ever been undertaken in Northern Ireland. Consequently, many of the statutes currently used date from the 19th century and are disparate and often difficult to apply to current circumstances. The review was informed by a similar review of the law on sex offences carried out in England and Wales by the Home Office which preceded the Sexual Offences Act 2003 and adopted the position that unless there was good reason and sufficient justification, the law here should, as far as possible, match that in England and Wales.

7.2 The Order therefore not only presents an opportunity to consolidate sexual offences law in Northern Ireland into one statute, but also provides a unique opportunity to modernize, strengthen and harmonise the body of offences and penalties with the rest of the United Kingdom.

7.3 All current sexual offences which apply in Northern Ireland, including the provisions in the Sexual Offences Act 2003 which currently extend to Northern Ireland, will be superseded by the offences in the Order, with the exception of the trafficking offences which remain in Sections 57 – 60 of the Sexual Offences Act 2003.

Consultation

7.4 A proposal for an Order was prepared; referred to the Northern Ireland Assembly under Section 85(4) of the Northern Ireland Act 1998; and put out to public consultation on 20 November 2007. The consultation period formally ended on 5 February 2008. A total of 369 responses were received on the Order. This included responses from 29 organisations, political parties and elected representatives, in addition to a response in the form of a report from the Northern Ireland Assembly. However, a majority of responses received (340) were from individuals responding in a personal capacity and opposing the reduction in the so called ‘age of consent’ from 17 to 16 years of age.

7.5 The Assembly report considered that in general terms the sweep of the proposed legislation was sound and that it was the right approach to take, with the exception of the ‘age of consent’ issue.

7.6 A number of provisions were changed in light of the representations made and further policy consideration during the consultation period. These are detailed in a statement

being laid before Parliament with the Order, a copy of the Assembly's report and a statement containing a summary of representations.

Guidance

- 7.7 Guidance on the offences set out in the Order will be prepared and consulted on before the legislation is commenced.

Overview of the proposals

- 7.8 The Sexual Offences (Northern Ireland) Order 2008 is divided into seven parts. After an Introductory Part, the Order deals with: sexual offences which are offences because consent is absent, e.g. rape and assault; sexual offences against children; sexual offences against persons with a mental disorder; prostitution; and miscellaneous sexual offences. These are followed by three Schedules dealing with: minor and consequential amendments; transitional provisions and savings; and repeals.
- 7.9 Part 1 is introductory dealing with commencement and interpretation. Part 2 covers the non-consensual offences of rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent. A new definition for the offence of rape includes penetration of the mouth by the penis, together with new offences of assault by penetration with a body part (other than the penis) or anything else and sexual assault, and causing a person to engage in sexual activity without consent. Part 2 also provides for new evidential and conclusive presumptions about consent, where consent is deemed to be absent unless evidence provided to the contrary, or, in some circumstances, conclusively deemed to be absent (e.g. if deception used or impersonation).
- 7.10 Part 3 provides a range of sex offences against a child under 16 to make it as easy as possible for any unacceptable behaviour to be prosecuted successfully. It also allows the main non-consensual offences of rape and assault to be used in cases involving children under 13 without any issue of consent being raised, e.g., if someone has sexual intercourse with a child under 13 the offence is automatically rape. It also provides that a child under 13 does not, under any circumstances, have any capacity to consent to any form of sexual activity.
- 7.11 Also included are provisions relating to offences where an adult is in a position of trust with a child. These offences cover all children under 18, however it is principally designed to protect young people aged 16 and 17 who, even though they are over the age of consent for sexual activity, are considered to be vulnerable to sexual abuse and exploitation from those who hold a position of trust or authority in relation to them.
- 7.12 Positions of trust include, for example, those employed in a residential home or detention centre or in an educational establishment.
- 7.13 There are provisions to cover sexual offences committed against children by family members and 'extended family' members, which reflects the modern nature of the family in society and aims to ensure that this area of sexual abuse against children, by far the most common circumstances where offending against children is found, is capable of returning a high rate of prosecutions.

- 7.14 The ‘core family relationships’ covered are: parent, grandparent, brother, sister, half-brother, half–sister, aunt, uncle, the same adoptive relationships, foster parent.
- 7.15 The second category of ‘other family members’ must have shared living accommodation or been in regular care of the child to be covered by the offence. They are: step-parent, cousins, step-siblings, foster siblings.
- 7.16 The third category is ‘other persons’ who live in the same household and who regularly care for the child. They include live-in partners.
- 7.17 Provision is also made for a set of offences specifically dealing with the exploitation of children through prostitution and pornography, including paying for the sexual services of a child, which provide protection for all children up to the age of 18.
- 7.18 The Protection of Children (Northern Ireland) Order 1978 and the Criminal Justice (Evidence, etc) (Northern Ireland) Order 1988 are amended so that offences relating to indecent photographs of children will now also be applicable where the photographs concerned are of children of 16 or 17 years of age. It also creates a number of conditions which if satisfied will mean that the defendant is not guilty of an offence, for example, if they are married to the person, or in an established relationship.
- 7.19 Part 4 covers offences designed to give protection to persons with a mental disorder. The offences cover situations where the victim is unable to agree to sexual activity because of a mental disorder which impedes their capacity to make an informed choice, or where it might appear that the victim had agreed to the sexual activity but because of a mental disorder which makes them vulnerable to inducements, threats or deceptions, or because they are in a relationship of care, their consent was not or could not be deemed to have been freely given.
- 7.20 Part 5 of the proposed Order covers offences relating to prostitution, including new offences to deal with the problem of loitering or persistent soliciting and kerb crawling. All offences relating to prostitution are drafted in gender-neutral terms.
- 7.21 Part 6 provides for preparatory offences, such as administering a substance with intent to commit a sexual offence, committing an offence with intent to commit a sexual offence and trespass with intent to commit a sexual offence. These offences offer protection in circumstances where the essence of the crime was of a sexual nature, rather than being the initial criminal offence itself. The common thread throughout these offences is that they apply regardless of whether the actual intended sexual act occurs.
- 7.22 It is also an offence for a person aged 16 or over intentionally to penetrate sexually a close relative who is aged 18 or over if he knows or could reasonably have been expected to know that it is his close relative. It is also an offence for a person aged 16 or over to consent to being penetrated sexually by a close relative aged 18 or over if he knows, or could reasonably have been expected to know, that it is his close relative.
- 7.23 This Part also covers miscellaneous sexual offences ranging from exposure and voyeurism to sexual penetration of a corpse. Also included is the offence of sexual activity in a public lavatory.

- 7.24 Part 7 provides that if an offence has been committed against someone under 16 outside of Northern Ireland, which would constitute an offence if done here, then the courts here can prosecute the offender if he resides in Northern Ireland. Part 7 also provides exceptions to aiding, abetting and counselling the commission against a child of an offence; amendment to the Sexual Offences Act 2003 and the Criminal Law Act (Northern Ireland) 1967; defines order or rule making powers by the Secretary of State; and details other minor and consequential amendments and repeals.

The Provisions

Part 1 – Introductory

Article 2: Interpretation

- 7.25 Article 2 gives a number of definitions relevant to offences in the Order. *Paragraph (5)* is needed so that where, for example, a person consents at the time of entry to penetration, but then withdraws his consent and the penetration continues, the person penetrating may be guilty of rape or assault by penetration.

Article 3: “Consent”

- 7.26 Article 3 defines “consent” for the purposes of this Order. This definition is relevant to many Articles in the Order including, for example, the offence of rape (Article 5). The Article refers to a person’s capacity to make a choice. A person might not have sufficient capacity because of his age or because of a mental disorder.

Article 4: “Sexual”

- 7.27 Article 4 defines “sexual” for the purposes of this Order. This definition is relevant to many of the offences in the Order. For example, Article 6(1)(b) refers to penetration which is sexual and Article 7(1)(b) refers to touching which is sexual.

- 7.28 There are two alternative limbs to the definition of “sexual” in Article 4. *Sub-paragraph (a)* covers activity that the reasonable person would always consider to be sexual because of its nature, such as sexual intercourse. *Sub-paragraph (b)* covers activity that the reasonable person would consider, because of its nature, may or may not be sexual depending on the circumstances or the intentions of the person carrying it out, or both: for example, digital penetration of the vagina may be sexual or may be carried out for a medical reason. Where the activity is, for example, oral sex, it seems likely that the reasonable person would only need to consider the nature of the activity to determine that it is sexual. But where it is digital penetration of the vagina, the reasonable person would need to consider the nature of the activity (it may or may not be sexual), the circumstances in which it is carried out (e.g. a doctor’s surgery) and the purpose of any of the participants (if the doctor’s purpose is medical, the activity will not be sexual; if the doctor’s purpose is sexual, the activity also is likely to be sexual).

- 7.29 If, from looking at the nature of the activity, it would not appear to the reasonable person that the activity might be sexual, the activity does not meet the test in either *sub-paragraph (a)* or *(b)*, even if a particular individual may obtain sexual gratification from carrying out the activity. The effect of this is that obscure fetishes do not fall within the definition of sexual activity.

Part 2 – Non-consensual sexual offences

Rape

Article 5: Rape

7.30 Article 5 makes it an offence for a person (A) intentionally to penetrate with his penis the vagina, anus or mouth of another person (B) without that person's consent if A does not reasonably believe that B consents. *Paragraph (2)* provides that whether a belief in consent is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents. This and the offence in Article 12 are the only offences that can only be committed by a male, because they relate to penile penetration. *Paragraph (3)* provides that Articles 9 and 10 apply to this offence. Articles 9 and 10 deal with evidential and conclusive presumptions about consent. The Article also abolishes the common law offence of rape.

Assault

Article 6: Assault by penetration

7.31 Article 6 covers the situation where a person (A) intentionally penetrates the vagina or anus of another person (B). The offence is committed where the penetration is by a part of A's body (for example, a finger) or anything else, (for example, a bottle); where the penetration is sexual (as defined in Article 4, so that it excludes, for example, intimate searches and medical procedures; where B does not consent to the penetration; and where A does not reasonably believe that B consents. What is said in the note to Article 5 about whether a belief in consent is reasonable also applies here. This and all subsequent offences in the Order save the offence at Article 12 can be committed by a male or female, against a male or female. *Paragraph (3)* provides that Articles 9 and 10 apply to this offence. Articles 9 and 10 deal with evidential and conclusive presumptions about consent.

Article 7: Sexual assault

7.32 Article 7 makes it an offence for a person (A) intentionally to touch sexually another person (B) without that person's consent, if he does not reasonably believe that B consents. What is said in the note to Article 5 about whether a belief in consent is reasonable also applies here. The meaning of "touching" is explained at Article 2(11); "sexual" is defined at Article 4. The effect of these sections is that the offence covers a wide range of behaviour including, for example, rubbing up against someone's private parts through the person's clothes for sexual gratification. *Paragraph (3)* provides that Articles 9 and 10 apply to this offence. Articles 9 and 10 deal with evidential and conclusive presumptions about consent.

Causing sexual activity without consent

Article 8: Causing a person to engage in sexual activity without consent

7.33 Article 8 makes it an offence for a person (A) intentionally to cause another person (B) to engage in sexual activity (as defined in Article 4) without that person's consent, if he does not reasonably believe that B consents. What is said in the note to Article 5 about whether a belief in consent is reasonable also applies here. A may cause B to engage in sexual activity with A (for example, a woman who compels a man to penetrate her); on B himself (for example, where one person forces someone else to masturbate himself); or

with another person (for example, where one person makes someone else masturbate a third person). *Paragraph (3)* provides that Articles 9 and 10 apply to this offence. Articles 9 and 10 deal with evidential and conclusive presumptions about consent.

Article 9: Evidential presumptions about consent

- 7.34 This Article applies to the offences of rape (Article 5), assault by penetration (Article 6), sexual assault (Article 7) and causing a person to engage in sexual activity without consent (Article 8). The Article provides for presumptions that may be challenged by the defendant. The presumptions arise in the circumstances described in *paragraph (2)*. The difference between *paragraphs (a)* and *(b)* of *paragraph (2)* is that *paragraph (a)* covers violence and threats of violence used against the complainant whereas *paragraph (b)* covers violence and threats of violence used against a person other than the complainant. The violence or threat must occur either at the time of the relevant act or immediately before it began.
- 7.35 The effect of *paragraph (3)* is that where, for example, the relevant act for which the person is being prosecuted is penetration, but the penetration is the culmination of a series of sexual activities, then if the violence or threat occurred immediately before the first sexual activity (as opposed to before the penetration), the presumptions still arise.
- 7.36 Where the prosecution proves that the defendant did a relevant act (as defined in Article 11), that the circumstances described in *paragraph (2)* existed and that the defendant knew that those circumstances existed, the complainant will be presumed not to have consented to the relevant act and the defendant will be presumed not to have reasonably believed that the complainant consented. In order for these presumptions not to apply, the defendant will need to satisfy the judge from the evidence that there is a real issue about consent that is worth putting to the jury. In practice (although this is not mentioned in the Order) the evidence produced may be from evidence that the defendant himself gives in the witness box, or from evidence given on his behalf by a defence witness, or resulting from evidence given by the complainant during cross-examination. If the judge is satisfied that there is sufficient evidence to justify putting the issue of consent to the jury, he will so direct; if not, he will direct the jury to find the defendant guilty.

Article 10: Conclusive presumptions about consent

- 7.37 This Article creates conclusive presumptions about lack of consent and the absence of belief in consent in situations where the defendant deceived the complainant into sexual activity. *Paragraph (2)(a)* covers the situation where, for example, the defendant intentionally tells the complainant that digital penetration of her vagina is necessary for medical reasons when in fact it is for his sexual gratification. *Paragraph (2)(b)* covers the situation where, for example, the defendant impersonates the complainant's partner and thereby causes the complainant to consent to the relevant act. Where the prosecution prove that the defendant did a relevant act (as defined in Article 11) and that any of the circumstances described in *paragraph (2)* existed, it is conclusively presumed that the complainant did not consent to the relevant act and that the defendant did not believe that the complainant consented to the relevant act. The defendant will therefore be convicted.

Article 11: Articles 9 and 10: relevant acts

7.38 Article 11 defines the relevant acts to which the provisions in Articles 9 and 10 apply.

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, 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.

- 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.
- 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 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 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:
- 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)).

Part 4 – Sexual offences against a person with a mental disorder

Offences against persons with a mental disorder impeding choice

Article 43: Sexual activity with a person with a mental disorder impeding choice

Article 44: Causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity

Article 45: Engaging in sexual activity in the presence of a person with a mental disorder impeding choice

Article 46: Causing a person, with a mental disorder impeding choice, to watch a sexual act

7.111 All the offences in these Articles are concerned with the situation where a person (A) involves another person (B) in sexual activity where B has a mental disorder and because of that mental disorder, or for reasons related to it, B is unable to refuse involvement in the sexual activity. "Mental disorder" is stated at Article 2(9) to have "the meaning given by Article 3 of the Mental Health (Northern Ireland) Order 1986". In section 1(2) of that Act, subject to section 1(3), mental disorder is defined as "mental illness, mental handicap and any disorder or disability of mind." A person with a "learning disability" would fall within this definition. The definition of sexual activity is at Article 4. *Paragraph (2)* of each section contains a definition of what is meant by B being unable to refuse.

7.112 The offences are divided according to the different types of sexual activity (the types of sexual activity covered are the same as for the child sex offences (Articles 16 to 19).

7.113 Article 43 covers touching, which as Article 2(11) explains, includes any type of physical contact including penetration.

7.114 Article 44 covers the situation where A causes or incites B to engage in sexual activity, for example, where A causes B to have sexual intercourse with A's friend, or incites him to do so, even if the incitement does not result in B engaging in sexual activity.

7.115 Article 45 covers the situation where, for the purpose of obtaining sexual gratification, A engages in sexual activity in the presence of B, or in a place from which B can observe him. The offence is only committed, however, where A knows or believes that B is aware of the sexual activity or intends him to be aware of it. B might be aware of the sexual activity because he is watching it at A's behest or because A is describing what he is doing to B.

7.116 Article 46 covers the situation where A, for his sexual gratification, causes B to watch a third person engaging in sexual activity or to look at an image of a person engaging in sexual activity. "Image" is defined in Article 2(8).

Inducements etc. to persons with a mental disorder

Article 47: Inducement, threat or deception to procure sexual activity with a person with a mental disorder

Article 48: Causing a person with a mental disorder to engage in or to agree to engage in sexual activity by inducement, threat or deception

Article 49: Engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder

Article 50: Causing a person with a mental disorder to watch a sexual act by inducement, threat or deception

7.117 Like the previous set of offences, these Articles are concerned with the situation where a person (A) involves another person (B) in sexual activity where B has a mental disorder. However, for these offences, there is no need to prove that B is unable to refuse. Instead, the offences address the situation where A uses inducements, threats or deceptions to obtain B's agreement to the sexual activity. The definition of mental disorder is at Article 2(9); the definition of sexual activity is at Article 4. An inducement might be A promising B presents of anything from sweets to a holiday; a threat might be A stating that he will hurt a member of B's family; and a deception might be A stating that B will get into trouble if he does not engage in sexual activity, or persuading him that it is expected that friends should engage in sexual activity. The division of the Articles according to the type of sexual activity involved is similar to that in the previous set of offences.

Care workers for persons with a mental disorder

Article 51: Care workers: sexual activity with a person with a mental disorder

Article 52: Care workers: causing or inciting sexual activity

Article 53: Care workers: sexual activity in the presence of a person with a mental disorder

Article 54: Care workers: causing a person with a mental disorder to watch a sexual act

7.118 Like the previous two sets of offences, these Articles are concerned with the situation where a person (A) involves another person (B) in sexual activity where B has a mental disorder. The difference here is that A and B must be in a relationship of care. There is no need to prove that B is unable to refuse. The definition of mental disorder is at Article 2(9); the definition of sexual activity is at Article 4. The relationships of care that are covered by these offences are set out at Article 55. The offences are divided according to the different types of sexual activity involved. The division is the same as for Article 43 to 46 and what is said in the notes for those Articles about the different types of sexual activity covered applies here too. The prosecution must prove, in addition to the other requirements, that the defendant knew or could reasonably have been expected to know that B had a mental disorder. *Paragraph (2)* 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 B's mental disorder, it is presumed that he did know or could reasonably have been expected to know of this.

Section 55: Care workers: interpretation

7.119 This Article defines a relationship of care for the purposes of Articles 51 to 54. An example of a relationship covered by *paragraph (2)* is where A is a member of staff in a care home and B is a resident there. An example of a relationship covered by *paragraph (3)* is where A is a receptionist at the clinic that B attends every week. *Paragraph (4)* covers any situation where A provides care, assistance or services to B in connection with

B's mental disorder. An example of a relationship covered by *paragraph (4)* is where A takes B on outings every week or treats B for his learning disability with complementary therapies in B's own home. In all cases, A must have, or be "likely to have", regular face to face contact with B. The "likely to have" limb is to cover persons who provide care to B in these situations from day one of their involvement with B.

Article 56: Articles 51 to 54: exception for spouses and civil partners

7.120 This Article provides A with a defence to the offences under sections 51 to 54 if he proves he was lawfully married or a civil partner to B at the time of the sexual activity and B was over 16.

Article 57: Articles 51 to 54: sexual relationships which pre-date care relationships

7.121 This Article provides A with a defence to the offences under Articles 51 to 54 if he proves that his sexual relationship with B pre-dated his relationship of care with B. But the sexual relationship must have been lawful for this defence to apply. So if A and B had a lawful sexual relationship before B developed his mental disorder and A started caring for him, A would not commit an offence by continuing that sexual relationship.

Part 5 – Prostitution

Article 58: Interpretation of this Part

7.122 This Article defines terms used Articles 59 to 61. *Paragraph (2)* applies the Article 41(2) definition of "prostitute" or "prostitution" to the offences. *Paragraphs (3) and (4)* define "payment" and "gain" as any financial advantage, including the discharge of a debt or obligation to pay, or the provision of goods or services (including sexual services) for free, or at a discount. The reference to "sexual services" would, for example, cover someone who controls the activities of a number of women in prostitution, where the gain or payment he derives from them is their engaging in sexual intercourse with him. *Paragraph (4)* also covers the goodwill of any person likely to bring such a financial advantage. For example, this would cover A inciting B to work as a prostitute for C, where A expects this will lead to C providing him (A) with cheap drugs at a later date. *Paragraph (5)* provides that conduct is persistent if it takes place on two or more occasions in any period of three months. *Paragraph (6)* defines "motor vehicle" and *paragraph (7)* defines "street" for the purposes of the offence as any bridge, road, lane, footway, subway, square, court, alley or passage whether thoroughfare or not, which is open to the public.

Article 59: Loitering or soliciting for purposes of prostitution

7.123 Article 59 makes it an offence for a person persistently to loiter or solicit in a street or public place for the purpose of prostitution.

Article 60: Kerb-crawling

7.124 Article 60 makes it an offence for a person A to solicit another person B (or different persons) for the purpose of prostitution from a motor vehicle while it is in a street or public place; or in a street or public place while in the immediate vicinity of a motor vehicle that he has just got out of or off. The soliciting must be persistent or in such a manner or in such circumstances as to be likely to cause annoyance to the person B (or other persons) solicited, or nuisance to other persons in the neighbourhood.

7.125 *Paragraph (3)* provides that soliciting another person for the purposes of prostitution is a reference to A soliciting that other person B to provide services as a prostitute to A.

Article 61: Persistent soliciting

7.126 Article 61 makes it an offence for a person A if in a street or public place to persistently solicit another person B (or different persons) for the purpose of prostitution. *Paragraph (3)* provides that soliciting another person for the purposes of prostitution is a reference to A soliciting that other person B to provide services as a prostitute to A.

Exploitation of prostitution

Article 62: Causing or inciting prostitution for gain

7.127 Article 62 makes it an offence for a person (A) intentionally to cause or incite a person (B) into prostitution anywhere in the world where A does so for or in expectation of gain for himself or for a third party. Although this offence is not specifically limited to where B is aged 18 or over, it is aimed at cases where B is an adult, as the offence at Article 38 specifically covers cases where B is under 18. Although prostitution by adults aged 18 or over is not an offence in itself, this offence is intended to cover those who, for gain, recruit others into prostitution, whether this be by the exercise of force or otherwise.

Article 63: Controlling prostitution for gain

7.128 Article 63 makes it an offence for a person (A) intentionally to control another person's activities relating to prostitution, in any part of the world, where A does so for, or in the expectation of, gain for himself or a third party. This offence covers the same behaviour as Article 39, but is limited to prostitution. Although this offence is not specifically limited to cases where the person controlled is aged 18 or over, it is aimed at those cases, as the offence at Article 39 specifically covers cases where the person controlled is under 18.

Article 64: Keeping a brothel used for prostitution

7.129 Article 64 makes it an offence to keep a brothel used for prostitution. The new offence is triable either way with a maximum penalty on indictment of 7 years imprisonment.

Part 6 – Miscellaneous sexual offences

Preparatory offences

Article 65: Administering a substance with intent

7.130 Article 65 makes it an offence for a person (A) intentionally to administer a substance or to cause any substance to be taken by another person (B) where A knows that B does not consent to taking that substance and where A intends to stupefy or overpower B so that any person can engage in sexual activity involving B.

7.131 The offence is intended to cover use of so-called "date rape drugs" administered without the victim's knowledge or consent, but would also cover the use of any other substance with the relevant intention. It would cover A 'spiking' B's drinks with alcohol where B did not know he was consuming alcohol, but it would not cover A encouraging B to get drunk so that A could have sex with B, where B knew that he was consuming alcohol.

- 7.132 The substance may be administered to B in any way, for example, in a drink (as in the example given above), by injection or by covering B's face with a cloth impregnated with the substance.
- 7.133 The offence applies both where A himself administers the substance to B, and where A causes the substance to be taken by B, for example where A persuades a friend (C) to administer a substance to B, so that A can have sex with B, because C knows B socially and can more easily slip the substance into B's drink than A can.
- 7.134 However, the intended sexual activity need not involve A. In the example given above it could be intended that C or any other person would have sex with B.
- 7.135 The term "sexual", used in this Article in the phrase "sexual activity", is defined in Article 4. The sexual activity in this offence could involve A having sexual intercourse with or masturbating B; could involve A causing B to commit a sexual act upon himself (for example, masturbation); or could involve B and a third party engaging in sexual activity together, regardless of whether the third party had administered the substance.
- 7.136 The offence would be made out where A administers the substance or causes B to take it (with the relevant intent) regardless of whether any sexual activity took place, for example because a friend of B saw what was happening and intervened to protect B.

Article 66: Committing an offence with intent to commit a sexual offence

- 7.137 Article 66 makes it an offence for a person (A) intentionally to commit any criminal offence with intent to commit any relevant sexual offence as defined in *paragraph (2)*. This offence is intended to capture the situation where A commits a criminal offence but does so with the intention of committing a subsequent sexual offence, regardless of whether or not the substantive sexual offence is committed. It would apply, for example, where A kidnaps B so that he can rape him but is caught by the police before committing the rape. It would also apply where A detained B in his flat with this intention, or assaulted B to subdue him so that he could more easily rape him. If A does commit the intended offence, he could be charged with the substantive sexual offence in addition to this offence. The offence has a maximum life sentence for circumstances where there is an assault with the intent to commit rape or sexual assault by penetration.

Article 67: Trespass with intent to commit a sexual offence

- 7.138 Article 67 makes it an offence for A to intend to commit a "relevant sexual offence" (defined at *paragraph (2)* of Article 66) whilst he is on any premises where he is a trespasser, either knowing, or being reckless as to whether, he is trespassing. A person is a trespasser if he is on any premises without the owner's or occupier's consent, or other lawful excuse. This offence is intended to capture, for example, the situation where a person (A) enters a building owned by B, or goes into B's garden or garage without B's consent, and he intends to commit a sexual offence against the occupier. The offence applies regardless of whether or not the substantive sexual offence is committed. A will commit the offence if he has the intent to commit a relevant sexual offence at any time while he is a trespasser. The intent is likely to be inferred from what the defendant says or does to the intended victim (if there is one) or from items in possession of the defendant at the time he commits the trespass (for example, condoms, pornographic images, rope etc.). A separate offence is needed to cover trespass (as opposed to relying on Article 66) because trespass is a civil tort and not a criminal offence. The offence has

a maximum sentence of 14 years for circumstances where there is an intent to commit rape or sexual assault by penetration.

Sex with an adult relative

Article 68: Sex with an adult relative: penetration

Article 69: Sex with an adult relative: consenting to penetration

7.139 Article 68 makes it an offence for a person (A) aged 16 or over intentionally to penetrate sexually a relative (B) who is aged 18 or over if he knows or could reasonably have been expected to know that B is his relative. Article 69 makes it an offence for a person (A) aged 16 or over to consent to being penetrated sexually by a relative (B) aged 18 or over if he knows or could reasonably have been expected to know that B is his relative. For either offence to be committed the penetration must be "sexual", as defined at Article 4. This requirement ensures that penetration for some other purpose, for example where one sibling helps another to insert a pessary for medical reasons, is not caught by this offence. *Paragraph (2)* of each Article defines "relative" for the purposes of each offence. *Paragraph (3)* of each section includes adoptive relatives in each offence.

7.140 The effect of *paragraph (4)* of each section is 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 that B is his relative, it is presumed that he did know or could reasonably have been expected to know it.

Other offences

Article 70: Exposure

7.141 Article 70 makes it an offence for a person intentionally to expose his genitals where he intends that someone will see them and be caused alarm or distress. It is not necessary for A's genitals to have been seen by anyone or for anyone to have been alarmed or distressed. For example, if a person exposes his genitals to some passers-by, he may (depending on his state of mind) commit the offence regardless of whether they actually see his genitals or whether they have been alarmed or distressed by seeing them.

Article 71: Voyeurism

7.142 Article 71 makes it an offence, under *paragraph (1)* for a person, (A), to observe, for the purpose of his own sexual gratification, another person doing a private act, for instance by looking through a window or peephole at someone having sexual intercourse, where A knows the person observed does not consent to being looked at for this purpose.

7.143 *Paragraph (2)* covers a person (A) operating equipment with the intention of enabling another person, for his sexual gratification, to observe a third person (B), doing a private act, where A knows that B does not consent to being so viewed. This would cover, for example, a landlord (A) operating a webcam to allow people on the internet for their sexual gratification to view live images of his tenant (B) getting undressed, if A knew that B did not consent to this.

7.144 *Paragraph (3)* covers a person (A) recording another person (B) doing a private act with the intention of looking at the recording for his own sexual gratification, or intending other people to look, for their sexual gratification, at the recording, and where he knows that B does not consent to the recording of that act with that intention. This would therefore cover the person (A) who secretly films someone (B) masturbating in B's

bedroom to show to others for their sexual gratification. Proof that the intention was the sexual gratification of others could be derived from, for example, the fact that the image was posted on a pornographic website, or in a pornographic magazine. A will be caught by the offence whether or not those looking at the image know that the person filmed did not consent to being filmed with that intention.

- 7.145 *Paragraph (4)* would cover someone who, for example, drilled a spy-hole or installed a two-way mirror in a house with the intention of spying on someone for sexual gratification or allowing others to do so. A would be caught even if the peephole or mirror was discovered before it was used.

Article 72: Voyeurism: interpretation

- 7.146 Article 72 defines "private act" and "structure" for the purposes of Article 71.

Article 73: Intercourse with an animal

- 7.147 Article 73 makes it an offence for a man intentionally to penetrate the vagina or anus of a living animal with his penis where he knows or is reckless as to whether that is what he is penetrating. The reference to vagina or anus in this context is further explained at *paragraph (13)* of Article 2. *Paragraph (2)* makes it an offence for a person intentionally to cause or allow her vagina or his or her anus to be penetrated by the penis of a living animal where he or she knows or is reckless as to whether that is what is doing the penetrating. This offence is related solely to penile penetration in relation to animals and does not replace existing legislation covering cruelty to animals.

Article 74: Sexual penetration of a corpse

- 7.148 Article 74 makes it an offence for a person (A) intentionally to penetrate any part of the body of a dead person (B) with his penis, any other body part (for example his finger), or any other object, where that penetration is sexual. The offence is committed when A knows or is reckless as to whether he is penetrating any part of a dead body. This is intended to cover when A knows he is penetrating a dead body, for example in a mortuary, or where A is reckless as to whether B is alive or dead. It will not cover situations where A penetrates B fully believing B to be alive, but in fact B is dead, or where B unexpectedly dies during intercourse. The penetration must be sexual. A definition of sexual is given in Article 4. This is to exclude legitimate penetration of corpses, for example that which occurs during an autopsy.

Article 75: Sexual activity in a public lavatory

- 7.149 Article 75 makes it an offence intentionally to engage in sexual activities in a public lavatory. *Paragraph (1)(a)* defines a public lavatory. The term "sexual" for the purposes of this clause is defined in *paragraph (2)*. A definition distinct from that in Article 4 is used in Article 75 so as to include only sexual activities that a reasonable person would take to be sexual without knowledge of the purpose of the person carrying out the activity.

Part 7 – Supplementary and general

Article 76: Offences outside the United Kingdom

- 7.150 *Paragraph (1)* of Article 76 makes it an offence in Northern Ireland for a British citizen or UK resident to commit certain acts overseas against a child under 16. The act done must amount to a sexual offence in Northern Ireland. The exact description of the

offence does not need to be the same in both countries. For example, the provisions could apply to someone who raped a child in another country although that offence was described differently under the law in that country. *Paragraph (6)* provides that the defendant can require the prosecution to prove that what was done was an overseas offence.

Article 77: Exceptions to aiding, abetting or counselling

7.151 Article 77 provides that, in certain defined circumstances, a person is not guilty of aiding, abetting or counselling a sexual offence under Articles 12 to 14 (offences against children under 13), Article 16 (sexual activity with a child), Article 20 (where the offence would be an offence under Article 16 if the offender were over 18) and Articles 23, 32, 43, 47 and 51 (where the victim is a child under 16). The exception applies where the person is acting for the purpose of protecting a child from pregnancy or sexually transmitted infection, for the purpose of protecting the physical safety of a child, or for the purpose of promoting a child's emotional well-being. In this last case, however, the exception only applies where the person provides advice.

7.152 In all cases, the person must not be causing or encouraging the commission of an offence or a child's participation in it. Nor must the person be acting for the purpose of obtaining sexual gratification. So a person who was providing advice to a child under 16 about sexual health or contraception, in order to protect the child from becoming pregnant would not fall within the exception if he was at the same time meaning to encourage the child to have sex or was giving that advice in order to get sexual gratification for himself.

Article 78: Amendments of Sexual Offences Act 2003

7.153 Article 78 provides details of amendments to the Sexual Offences Act 2003 which no longer apply to Northern Ireland as a result of this Order.

Article 79: Amendment of the Criminal Law Act (Northern Ireland) 1967

7.154 Article 79 amends "relevant offence" for section 5(1) of the Criminal Law Act (Northern Ireland) 1967 to exclude from the mandatory reporting requirements an offence under Article 20 (sexual offences against children committed by children or young persons).

Article 80: Orders

7.155 Article 80 provides that any orders made by the Secretary of State under the Order shall be subject to annulment in pursuance of a resolution of either Houses of Parliament.

Schedules

Schedule 1: Minor and consequential amendments

7.156 Schedule 1 provides for amendment to various legislative provisions resulting from the Order. In general these amendments are necessary to omit offences which are no longer necessary as result of the offences in the Order or to reflect the offences in the Order in existing legislation which rely on the body of sexual offences law in Northern Ireland.

Schedule 2: Transitional provisions and savings

7.157 Schedule 2 provides that where a person is charged in respect of conduct that is an offence under this Order and was an offence under one of the repealed offences in *paragraph (2)* of Schedule 2, and the only thing preventing the person being found guilty is that it cannot be proven beyond reasonable doubt whether the conduct took place

before or after the commencement of this Order, then it shall be conclusively presumed for the purpose of determining guilt that the conduct took place at a time when the offence in question had a lower penalty.

Schedule 3: Repeals

7.158 Schedule 3 provides for repeals arising from the Order.

8. IMPACT

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

9. CONTACT

9.1 Stephen Cowan at the Northern Ireland Office Tel: 02890 527511 or e-mail: stephen.cowan@nio.x.gsi.gov.uk can answer any queries regarding the instrument.

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