

Public Consultation: Sexual Offences and Obscene Publications Bill 2018

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Contact: Tom Bateman
Email: tom.bateman@gov.im

Overview

The Department of Home Affairs (the 'DHA') is consulting on a draft Sexual Offences and Obscene Publications Bill 2018 (the 'Bill'). The purpose of the Bill is to modernise and consolidate the legislation and address important matters such as;

- the pardoning and removal of criminal records relating to historic consensual homosexual offences
- updating the definition of 'consent' to ensure that it provides appropriate and clear protection for victims
- reviewing sentences for offences
- image-based abuse
- the legislation relating to pornography and obscene publications

Why we are consulting

The DHA is seeking views on a number of aspects of the legislation to ensure it provides an appropriate framework for preventing, protecting from, and prosecuting sexual offences.

Introduction

Our current laws regarding sexual offences have not been updated since 2006. The Chief Constable has pointed out gaps in the provision of services to victims. With the increasing use of the internet to distribute images, the new legislation will better protect those who may be at risk.

This consultation seeks your views and opinions in relation to exploitative sexual activity and addresses the Programme for Government commitment to ensuring we live our lives safe from crime or danger.

In the consultation –

Sexual offences are defined as 'Intentional touching of a sexual nature, including rape, exposure, voyeurism, sexual activity with a relative, or administering a substance with the intent to commit a sexual offence.'

Obscene publications includes the 'Possession or production of illegal images/pictures/video of adults or children in sexualised ways.'

Going through the Bill, there were a number of areas where we are keen to gauge your views on a number of identified themes.

A. CONSENT

Consent is a key issue in sexual offences. The courts need to be presented with legal definitions that leave no room for reasonable doubt; showing conclusive presumption that the defendant did, or did not, commit the relevant sexual offence.

This Bill defines:

- what constitutes consent
- who can give consent
- who cannot give consent
- in what circumstances is consent not possible

In this Bill, a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice, and did so without brute force, forced drink, administered drugs, threats of violence, exploitation, or coercion.

Sentencing for causing a person to engage in sexual activity will vary dependent on the age of the victim. The Department is looking to hear public opinion on age ranges suggested for respective offences.

There is legal definition of the word 'child'. In this Bill, the ages of 18 and 16 years are used in specific circumstances, e.g.; age of consent for any sexual activity is 16 years and over. However, like the UK provision, the Bill makes it an offence for a person aged 18 or over to have any sexual activity with a person under the age of 18 if the older person holds a position of trust.

Q1. At what age do you feel a person can consent to sex?

- 16 years of age
- 17 years of age
- 18 years of age
- Other – please specify

Q2. Do you agree that consent should be shown to be sought and explicit rather than implied?

- Yes
- No

B. ABUSE OF POSITIONS OF TRUST:

The Bill aims to improve safeguarding of vulnerable adults and children from unwanted sexual advances, activity or from being made to watch sexual activity.

The draft Bill considers a person to be in a position of trust where he or she;

- has responsibility for persons under 18 detained in an institution by virtue of a court order, or are resident in a home, accommodated or provided by the Department of Health and Social Care (including within a hospital), or provided by the third sector
- provides education in an educational institution and/or is regularly involved in the provision of services under section 36 of the *Education Act 2001* on an individual one-to-one basis, or as part of a group
- was appointed as an officer under section 96 of the *Children and Young Persons Act 2001*, or a guardian appointed under the *Adoption Rules 2003*

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- ensures the requirements imposed by or under an enactment on a person's release from detention for a criminal offence are met.

Teachers, voluntary group leaders, and adults working in sports associations can all be, at some time, in positions of trust.

Clause 23(1)(b) permits the DHA to further define others whom it regards as being in a position of trust by order in the event that becomes necessary. The aim is to future proof the legislation so that as the DHA become aware of new positions of trust, not currently covered by legislation, these can quickly be included.

The Bill proposes the offences relating to breaches of a position of trust carry a maximum penalty of five years' custody on information, or 12 months' custody, or a fine of Level 5 on the standard scale, or both on summary conviction.

We would like to know:

Q1. Are there other persons, bodies or jobs you wish to see included in the list of those in 'Positions of Trust'?

- Yes
- No

(If yes, please say who or what)

C. POWERS OF THE POLICE

The Bill would provide that should a Justice of the Peace (magistrate) be content that a complaint made under oath by or on behalf of the Attorney General - or by a constable - that there are reasonable grounds for suspecting that, in any premises, there is an indecent photograph or pseudo-photograph of a child or a prohibited image of a child, a warrant may be issued to search the accused's property by force, if needed, and seize evidence.

The seizing of images relating to a person under the age of 18 would include;

- Indecent film including any form of video recording, downloading, or streaming a copy of an indecent photograph or film, and an indecent photograph comprised in a film
- Photographs, negatives, physical images, data that's stored on a computer, a computer disk, or by other electronic means capable of conversion into a photograph
- References include tracing or other images, whether made by electronic means, or other means, which isn't a photograph or pseudo-photograph

An indecent image or photograph (still, moving image, or data), or pseudo-photograph, of a child will be treated as such if it is shown as a child, or the predominant impression is that it is of a child.

Q1. Do you believe the powers given to the police to enable them to search property and seize images and other evidence are proportionate?

- Yes
- No

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Q2. Do you feel that future legislation might be needed to enable the police to gain access to computer files which may be password protected, or encrypted?

- Yes
- No

D. NOTIFICATION ORDERS AND SEXUAL OFFENCES ORDERS

Notification requirements apply to a person who is cautioned, or is convicted by a court for specified sexual offences.

In the most serious cases, the person will be subject to notification requirements for an indefinite period meaning the rest of that person's life. This is a way of ensuring the most dangerous offenders are known to the police.

In less serious cases, the offender will be subject to the notification requirements for a fixed period. The notification period starts from the date of a conviction, finding, or caution. This is called the 'relevant date', and is subject to sentence thresholds.

In the Bill, the person subject to the notification requirements must tell the police if they change their address or are going to be absent from their place of residence for more than three days. Furthermore, the DHA is given powers to make regulations requiring such offenders to provide details of travel and on what date they are expected to return to the Isle of Man. In turn, our police are aware of anyone convicted off Island who is coming to the Island.

Two other means by which the public may be protected from sexual harm, or the risk of sexual harm, are through a Sexual Harm Prevention Order (SHPOs) or a Sexual Risk Order (SRO). The proposed SHPO is designed to enable the Court to make an order preventing the offender from communicating, or seeking to communicate, either directly or indirectly with a victim, or victims. An SHPO may also restrict or prohibit travel off the Island.

The Chief Constable may apply to the Summary Court for a SRO. The purpose of an SRO is to protect members of the public from harm from the defendant by placing restrictions on them. Where the Court has granted the Chief Constable an SRO the defendant becomes subject to notification requirements for the length of the SRO.

Q1. Do you agree that the notification requirements should remain in the Bill and continue to be imposed on convicted sex offenders?

- Yes
- No

Q2. Do you agree with the ability of the court to make Sexual Harm Prevention Orders?

- Yes
- No

Q3. Do you agree with the ability of the Chief Constable to apply to a court for a Sexual Risk Order where he has reasonable cause to believe it is necessary to protect the public?

- Yes
- No

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Q4. Do you agree with the powers to restrict travel by sexual offenders?

Yes

No

E. PROPOSED PARDON FOR NOW REPEALED HISTORICAL HOMOSEXUAL OFFENCES

Consenting sexual activity between men aged 21 years of age and over was decriminalised in the Isle of Man in 1993. Those previously convicted under the now decriminalised legislation still have a criminal record. This section of the Bill looks to pardon those men convicted of having consensual sex with other men before it was decriminalised. This will enable them or, if they are deceased, their relatives, to apply to have that specific conviction removed.

Questions:

Q1. Which of the following are preferred methods of proposing pardon and repeal for criminal convictions against homosexual offences in the Isle of Man?

Option 1:

That each individual or their family would apply and have their case looked at in isolation with a pardon being granted if it met the criteria and the past conviction or caution being disregarded and removed from all records. This is the system currently used in England and Wales.

Option 2:

That all persons convicted of those offences are pardoned automatically by virtue of the Act. It is then up to the person or the person's relatives to formally apply to have the past conviction or caution disregarded and removed from all records. This is the situation being developed in Scotland.

F. WITNESS AND VICTIM ANONYMITY

Anonymity for victims would continue to be available in rape cases, but has been extended in this Bill to include witnesses who the court considers to be vulnerable. All children under 18 years of age are already protected by court powers. A vulnerable adult is described in the Bill as 'a person aged 18 or over whose ability to protect himself or herself from physical or psychological harm is significantly impaired through physical or mental disability or illness, through intellectual, physiological or psychiatric impairment, through old age or otherwise'.

The Department is well aware of debate surrounding the question of whether or not defendants can in specific circumstances be offered anonymity. There may be cases where the defendant would qualify for the definition of a vulnerable person. In any event, the court may order the accused's identity to be subject to anonymity to protect the identity of the victim by applying reporting restrictions, similar to those that can be found in the *New Zealand Evidence Act 2006*.

Whilst providing evidence, the court is expected to have regard for the need to ensure fairness in a trial; including views of witnesses and any degree of stress caused, and in promoting the recovery of the complainant from the alleged offence.

Q1. Do you agree that the Court should be able to keep the name of any victims and witnesses anonymous in cases related to sexual offences and that any admissible evidence should be justified?

Yes

No

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Q2. Currently the penalty for disclosing details of a witness or victim without the permission of the court is by fine only. Do you agree the court should have the power to impose a custodial sentence?

- Yes
- No

Q3. If yes, do you think the maximum sentence of 12 months proposed in the Bill is appropriate?

- Yes
- No

If no, what length do you believe would be appropriate?

Q4. Do you think the identity of the defendant could, in certain circumstances, be anonymised and protected from publication?

- Yes
- No

Q5. If you do agree, in what circumstances does the identity of a defendant need to be anonymised and protected against identifiable publication? (e.g. Only until charged? Or until convicted? In order to protect the identity of the victim or because the defendant is vulnerable?)

G. OBSCENE IMAGES AND PUBLICATIONS

Obscene images are those comprising of two or more distinct items i.e. any publication and a sound recording, and where these are used to deprave and corrupt anyone likely to come into contact with it.

In relation to 'extreme pornography' the Bill provides the following definition:

'An image which is both an extreme image and is of such a nature that it must be reasonably assumed to have been produced solely or principally for the purpose of sexual arousal that is grossly offensive, disgusting or otherwise of an obscene character.'

For publications deemed as pornographic, such as magazines, it was recommended these should be placed with some protections; for example, on the top shelf of a shop magazine display so it is out of the eye-line of children and perhaps also covered. Although this is adopted by most retailers, it was suggested this should remain the decision of the retailers rather than being addressed through legislation.

Q1. Do you agree that there should be specific provision to cover extreme pornography and that this should be treated differently in terms of sentencing?

- Yes
- No

If no, why not?

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Q2. Do you agree with the definition of pornography and extreme pornography used in the Bill?

- Yes
- No

Q3. Do you think there are enough protections to allow for art and free expression which may involve nudity or images seen by some to be sexual in nature?

- Yes
- No

H. IMAGE-BASED SEXUAL ABUSE

The Bill is responding to technological advances which have allowed some people to commit offences by using smart phones and social media to make and distribute harmful or distressing images.

'Upskirting' is a term used to describe the act of taking an image up someone's skirt without their permission. The Bill expands the Isle of Man's 'Voyeurism' provisions to make this act of recording an intimate image without consent a criminal offence. The prospective penalties are outlined as follows:

Maximum penalty —

- (a) (on information) — 3 years' custody;*
- (b) (summary) — 12 months' custody, or a fine of level 5 on the standard scale or both.*

While 'upskirting' is illegal in Scotland (though not in England and Wales), it isn't currently criminalised as an individual act in the Isle of Man and therefore the police aren't required to record it. This means it is difficult to accurately identify the full extent of the problem in the Island.

Q1. Would you agree that 'upskirting' is a form of image-based sexual abuse?

- Yes
- No

Q2. Should 'upskirting' be punishable under sentencing for "Recording an intimate image without consent" (and therefore be subject to the same penalties) or should it be treated as a separate and specific offence?

- Should be treated as an offence punishable under 'intimate image recorded without consent'
- Should be treated as a separate offence.

Protections against what is termed as 'revenge porn' are also covered. In the Bill this is covered by provisions addressing "voyeurism and image-based sexual abuse".

Image-based sexual abuse is addressed by Clauses 112 to 118 in Part 6 of the Bill, which will;

Outline the offence of recording an intimate image without consent, make distributing such an image (without consent) or threatening to record or distribute such an image an offence, define what is meant by consent, provide some exemptions to the offence and interpret key terms.

Officers within the Isle of Man Constabulary are frequently tasked with handling cases where explicit imagery is digitally shared among all age demographics; but none more so than with school age teenagers.

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According to police, heightened use of the internet, social media and other technological instruments are used to humiliate, control and threaten individuals. We would like to know:

Q3. Do you agree that 'image-based sexual abuse' should be made a criminal offence?

- Yes
- No

I. Sentencing

The sentences in each case within the Bill, other than in respect of unauthorised disclosure of a victim or other witness's identity, follow those applying in the equivalent UK legislation.

Q1. Do you consider the levels of the maximum sentences a court may impose, as set out within the Bill, to be reasonable in all the circumstances?

- Yes
- No

Q2. The Bill currently empowers the sentencing in child image cases to be assisted by UK sentencing guidelines. Do you think provision for sentencing guidelines should be extended to all the offences within this Bill?

- Yes
- No

An additional matter for consultation

J. FEMALE GENITAL MUTILATION

As the Explanatory Note to the UK's Female Genital Mutilation Act 2003 says –

Female Genital Mutilation (FGM) involves procedures which include the partial or total removal of the external female genital organs for cultural or other non-therapeutic reasons. The practice is medically unnecessary, extremely painful and has serious health consequences, both at the time when the mutilation is carried out, and in later life.

The Island recognised this and enacted the Prohibition of Female Genital Mutilation Act 2010. UK legislation now offers further provisions:

- a. to provide for extra-territorial effect so that offences committed by a Manx resident in another jurisdiction could be prosecuted in the Island
- b. assign penalties for assisting a female to mutilate her own genitalia
- c. to make provision for penalties on non-reporting of FGM
- d. to provide for the protection of victims from being identified in any broadcast or publication
- e. to create protection orders so that girls may be protected from any danger of being subjected to FGM.

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Q1. Do you feel that updating the current law regarding FGM along the lines suggested in A to E should be included in the Sexual Offences and Obscene Publications Bill?

- Yes
- No

If no, would support the changes being made through a separate amendment Bill?