



SEXUAL OFFENCES AND OBSCENE PUBLICATIONS BILL 2019

EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, Dr Alex Allinson, MHK.

INTRODUCTION

1. These explanatory notes relate to the Sexual Offences and Obscene Publications Bill 2019. They have been prepared by the Department of Home Affairs in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.
2. These notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.

SUMMARY AND BACKGROUND

3. Current law relating to sexual offences and obscene publications is found in the Sexual Offences Act 1992, the Sexual Offenders Act 2006, sections 1, 2 and 3 of, and Schedules 1, 2 and 3 to, the Criminal Justice Act 2001 and in the Obscene Publications and Indecent Advertisements Act 1907.
4. Over the years since the legislation mentioned in paragraph 3 has been enacted, language, the variety of offences, and the means by which the offences may be committed, have expanded. Technological advances of one kind or another mean that sexual offences may additionally be committed at the click of a button and, furthermore, affect a great number of people not just in the Island but across the world.
5. Whilst the Island has, in the past, amended its legislation, in a piecemeal fashion, in relation to matters covered by this Bill, it is now considered developments in technology, social attitudes and priorities are such that a complete overhaul of sexual offences and obscene publications legislation is required. This Bill therefore places the legislation relating to these matters within one, consolidated, piece of law. In doing so the Bill not only consolidates, but enacts more comprehensive legislation, reflecting the concerns of society and through the use of language considered appropriate to the 21st Century.
6. Whilst the provisions within the Bill are drawn primarily from similar provisions in England and Wales and in Scotland, some are drawn from other Commonwealth jurisdictions. In particular, the provisions addressing image based abuse are based on those found in New South Wales, Australia.
7. The Bill consists of 233 clauses and 6 Schedules dealing in Part 2 (clauses 4 to 94) with serious sexual offences, including specific offences against children, familial offences, offences against persons with mental health difficulties impeding capacity or choice, and those that abuse positions of trust. Other provisions within Part 2 include the definition of "consent", create an offence of sexual activity in a public place, and make provision regarding offences committed outside the Island. Parts 3, 4 and 5 (clauses

95 to 108) deal with indecent displays, extreme pornographic images and obscene publications and indecent advertisements. Part 6 (clauses 109 to 117) deals with voyeurism and addresses image based sexual abuse. Part 7 (clauses 118 to 136) deals with closure orders relating to pornography and prostitution. Part 8 (clauses 137 to 145) provides for the anonymity of victims and others. Part 9 (clauses 146 to 149) places restrictions on questions about a complainant's sexual history. Part 10 (clauses 150 to 209) provides for notification, sexual harm prevention orders and sexual risk orders. Part 11 (clauses 210 to 224) makes provision for the pardoning of historic homosexual offences and the disregard of related cautions and/or convictions. Part 12 (clause 225) introduces provisions into the Organised and International Crime Act 2010 to enable the forfeiture of land vehicles, ships or aircraft used in the offence of trafficking in persons. Part 13 (clause 226) introduces amendments to the Prohibition of Female Genital Mutilation Act 2010 to bring the legislation in line with legislative developments in the UK. Part 14 (clauses 227 to 233) deals with general and closing matters and provides that the Department may apply UK sentencing guidelines, with appropriate modifications, to any offence within the Bill.

8. Should the Bill be passed by the Branches, it will be brought into operation by Appointed Day Order either in whole, or in part, at an appropriate time following the announcement of Royal Assent to Tynwald.

9. EUROPEAN CONVENTION ON HUMAN RIGHTS

Section 16 of the Human Rights Act 2001 requires the Member moving the Bill to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). In the opinion of the Member moving the Bill, the provisions of the Sexual Offences and Obscene Publications Bill 2019 are compatible with the Convention rights.

10. FINANCIAL EFFECTS OF THE BILL

In the view of the mover of the Bill, it is not expected to increase or decrease revenue or have any financial or personnel implications.

NOTES ON CLAUSES

PART 1 – INTRODUCTORY

11. **Clauses 1 and 2** provide that the short title of the Act will be the Sexual Offences and Obscene Publications Act 2019 and that the Act will be brought into operation by Appointed Day Order either in whole, or in part, at an appropriate time following the announcement of Royal Assent to Tynwald.
12. **Clause 3** provides some general definitions which apply throughout the Bill (unless specifically disapplied). In respect of the definition of a child, in this Bill that generally means a person under the age of 16 although there are places where the context indicates, and/or it is stated, that the age is under 18.

Part 2 – SEXUAL OFFENCES

13. **Part 2 (clauses 4 to 94)** sets out the sexual offences through 19 divisions dealing with rape (Division 1), assault (Division 2), causing sexual activity without consent (Division 3), rape and other offences against children under 13 (Division 4), child sex offences (Division 5), abuse of positions of trust (Division 6), familial child sex offences (Division 7), offences against persons with a mental disorder (Divisions 8, 9 and 10), sexual exploitation of children (Division 11), exploitation of prostitution (Division 12), suppression of brothels (Division 13), preparatory offences (Division 14), sex with an adult relative (Division 15), indecent photographs and prohibited images of children

(Division 16), other offences (Division 17), offences outside the Island (Division 18) and supplementary and general matters (Division 19).

14. Division 1 (Rape) – Clause 4 describes the actions constituting the offence of rape. Subsection (3) provides that a person is not incapable of rape merely because they are under the age of 14. Subsection (4) confirms that being married or in a civil partnership does not of itself constitute consent to sexual intercourse with the other party. Subsection (5) applies sections 90 and 91 (both about consent) to an offence under this section. The maximum penalty is custody for life.

15. Division 2 (Assault) – Clause 5 (assault by penetration) differs from clause 4 in that the offence is committed by penetrating another person by or with something other than a penis without that person's consent. The maximum penalty is custody for life.

Clause 6 (sexual assault) is where a person is touched in a sexual manner without that person's consent. The maximum penalty is 10 years custody on information or 12 months custody, a Level 5 fine, or both on summary conviction.

16. Division 3 – Clause 7 (causing a person to engage in sexual activity without consent) carries a maximum penalty of 10 years custody on information or 12 months custody, a Level 5 fine or both on summary conviction unless subsection (4) applies. Subsection (4) specifies the particulars of the offence where the sexual activity a person is caused to engage in involves penetration and the maximum penalty in that case is custody for life. As with Divisions 1 and 2, consent is a key issue and so clauses 90 and 91 (that specifically define the concept of consent) apply.

17. Division 4 – (clauses 8 to 11) sets out the corresponding offences where they are committed against a child under the age of 13. As within Division 3, the maximum penalty for rape and/or penetration is custody for life. Within clauses 10 and 11, the maximum penalty which in the case of an adult victim in Division 3 would have been 10 years is 14 years; summary conviction is as per Division 3. A person under the age of 13 is deemed not to have given consent and therefore clauses 90 and 91 do not apply.

18. Division 5 (clauses 12 to 19) describes a number of offences that may be committed by a person aged 18 or over against children under the ages of 16 and 13.

Clause 12 is where a person is aged 18 or over and engages in sexual activity with a person under the ages of either 16 or 13. The maximum penalty is 14 years custody where the activity is penetrative (subsection (2)). In any other case it is 14 years custody on information, or 12 months custody or a level 5 fine, or both on summary conviction.

Clause 13 is where a child under 16 or 13 is caused or incited to engage in sexual activity. The sentences are as per clause 12.

Clause 14 is where a person aged 18 or over engages in sexual activity in the presence of a child under the ages of 16 or 13, and does so for the purposes of obtaining sexual gratification. Maximum penalty is 10 years custody on information or 12 months custody, or a level 5 fine, or both on summary conviction.

Clause 15 is where a person aged 18 or over causes a child under 16 or 13 to listen to, or watch, a third person engage in sexual activity either directly or by looking at an image, for the purposes of their own sexual gratification. The sentences are as per clause 14.

Clause 16 applies the offences described in clauses 12 to 15 to a perpetrator under the age of 18, with the difference that the maximum penalty in these cases is 5 years custody on information or 12 months custody, or a level 5 fine, or both on summary conviction.

Clause 17 sets out the offence of arranging or facilitating the commission of a child sex offence. Subsection (1) sets out the offence and provides that a person commits an offence if the person intentionally arranges or facilitates something he or she intends to do, intends another person to do, or believes that another person will do in any part of the world. Secondly, it must be the case that doing so will involve the commission of an offence under any of clauses 12 to 16.

Subsection (2) points out that a person does not commit an offence under this section if the person arranges or facilitates something that he or she believes another will do but the person nevertheless does not intend to do it or intend that other person to do it.

Subsection (3) protects the person responsible for health care or health promotion and others responsible for the welfare of the child providing the person does not act to obtain sexual gratification or encourage any activity prohibited by clauses 12 to 16.

The maximum penalty in these cases is 14 years custody on information, or 12 months custody, or a level 5 fine, or both on summary conviction.

Clause 18 makes it an offence for a person aged 18 years or over to meet a person under the age of 16 following sexual grooming etc. Maximum penalty on information is 10 years custody or 12 months custody, or a level 5 fine, or both on summary conviction.

Clause 19 makes it an offence for a person aged 18 years or over to communicate in a sexual way with a person under the age of 16 for the purpose of sexual gratification. The definition of "sexual" is what a reasonable person would consider to be sexual. The maximum penalty is 2 years custody on information or 12 months custody, or a level 5 fine, or both on summary conviction.

19. Division 6 (clauses 20 to 26) set out the types of offences of abuse of a position of trust with a child or a vulnerable adult and the sentences that may be applied.

Clauses 20 to 23 set out similar offences to earlier clauses where the key factor is that the person is in a position of trust in relation to the child or vulnerable adult. Clauses 20 and 21 attract a maximum penalty of 15 years custody on information or 12 months custody, a level 5 fine or both on summary conviction. Clauses 22 and 23 attract a maximum penalty of 11 years custody on information or 12 months custody, or a level 5 fine, or both on summary conviction.

Clause 24 defines "position of trust" for the purposes of clauses 20 to 23. Subsection (1) gives three ways in which a position of trust is defined. Firstly, that a person is in position of authority towards the other person. Secondly, that the other person is in a relationship of dependency to the person. Thirdly, that the person is in a relationship that is exploitative of the other person. Subsection (2) defines to whom the Division applies. Subsection (3) gives five factors that will help the court determine whether a relationship is exploitative. These include the age of the other person, the age difference between them, the evolution of the relationship, the degree of control exercised and the degree of vulnerability in the case of a vulnerable adult. Other subsections refer to guidance the Department may issue in this matter.

Clauses 25 and 26 provide exceptions to offences under clauses 20 to 23 in the case of spouses or civil partners and sexual relationships that pre-date a position of trust.

20. Division 7 (clauses 27 to 32) set out the type of offences that may be committed against a child family member and the sentences that may be applied.

Clauses 27 and 28 set out the offence of sexual activity with a child family member and that of inciting a child family member to engage in sexual activity. Subsection (1) in both clauses outlines the offence and subsections (4) and (5) apply for the

determination of the maximum penalty and venue of trial. Where a guilty person is both 18 years of age or over and is guilty of any of subsection (5) then the maximum penalty on information is 14 years custody. Where a guilty person is 18 years of age but subsection (5) does not apply then the case may alternatively be dealt with in the summary court where the maximum penalty is 12 months custody, a level 5 fine or both. Where the guilty person is under 18 the maximum penalty is 5 years custody on information or 12 months custody or a Level 5 fine, or both on summary conviction.

Subsection (2) concerns belief as to whether the person against whom the offence was committed is 18 or over and subsection (3) concerns the relationship, or reasonable knowledge of the relationship of a description falling within clause 29 (family relationships) between the defendant and the other person.

Clauses 29 to 31 provide exceptions to the offences in clauses 27 and 28.

Clause 29 defines the family relationships which apply to clauses 27 and 28.

Clause 30 provides an exception in the case of spouses or civil partners.

Clause 31 provides an exception for relationships that would otherwise be an offence under clauses 27 and 28, where the sexual relationship that is already established would have been lawful under the existing law.

Clause 32 provides an exception for relationships that pre-date the coming into operation of clauses 27 and 28, where the other person is 16 or over, and on the date clauses 27 and 28 come into operation, the person and the other person are living as partners in an enduring family relationship and where that relationship would have been lawful under the existing law.

21. Division 8 (clauses 33 to 36) concern offences and penalties against persons with a mental disorder impeding choice, and are similar to clauses 12 to 15. The key difference is that in this Division, the issue is the lack of capacity to make a choice, where the other person (person B) is unable, or is likely to be unable, to refuse or to communicate such a choice to the person (person A). The maximum sentences within these clauses range between 14 years or 10 years on information; or 12 months custody, or a fine at level 5, or both on summary conviction.

22. Division 9 (clauses 37 to 40) are where inducements, threats or deception are employed by a person in relation to sexual activity involving persons with a mental disorder that impedes their choice. The offences and penalties are similar once more to clauses 33 to 36 (and 12 to 15) in that the maximum sentences within these clauses range between 14 years or 10 years on information; or 12 months custody, or a fine at level 5, or both on summary conviction. However, the key components are that not only is the other person living with a mental disorder but the person knows, or could reasonably be expected to know this, and commits sexual offences by the application of inducements, threats or deception.

23. Division 10 (clauses 41 to 47) makes provision in relation to care workers involved in the care of a person who has a mental disorder that impedes their choice. The offences are similar in clauses 41 to 44 but the penalties differ in some cases.

Clause 41 defines who is a care worker for the purposes of this Division.

Clauses 42 and 43 provide that the maximum penalty for sexual activity by a care worker with a person with a mental disorder (clause 42) or causing or inciting another person to engage in sexual activity (clause 43) is 10 years on information or 12 months custody, a Level 5 fine or both on summary conviction where subsection (1) (activity involving touching the other person) applies, however higher maximum penalties of 14 years custody on information are specified when subsection (3) (activity involving penetration of the other person) applies.

Clauses 44 and 45 provide that the maximum penalty for engaging in sexual activity in the presence of a person with a mental disorder or causing a person with a mental disorder to watch or listen to a sexual act is 7 years custody on information or 12 months custody, a level 5 fine or a fine or both on summary conviction.

Clause 46 makes an exception where the other person is 16 years or over and they are married or civil partners of each other.

Clause 47 makes an exception where the sexual relationship pre-dates the care relationship.

24. Division 11 (clauses 48 to 52) deals with the sexual exploitation of children.

Clause 48 outlines the offence and penalties for paying for the sexual services of a child, and the maximum penalties available reflect whether the child is under 18, under 16 or under 13, as well as whether penetration is involved or not. Maximum penalties therefore are –

- custody for life (on information) where the child is under 13 and the activity involves penetration (see subsections (3) and (6));
- where the child is aged between 13 and 16 the penalty is 14 years on information where penetration is involved, or 14 years on information or 12 months custody, or a level 5 fine, or both on summary conviction in any other case;
- where the child is aged between 16 and 18 years of age the penalty is 14 years custody where penetration is involved, or 7 years custody or 12 months custody, or a level 5 fine, or both on summary conviction in any other case.

Clauses 49, 50 and 51 deal with causing or inciting, controlling or arranging or facilitating the sexual exploitation of a child and each clause carries the same maximum penalty of 14 years custody on information or 12 months custody, or a level 5 fine, or both on summary conviction.

Clause 52 provides interpretation of what is "sexual exploitation" and "payment", referred to in clauses 49 to 51, and includes in this the recording of an indecent image of the child.

25. Division 12 (clauses 53 to 57) addresses the exploitation of prostitution.

Clause 53 outlines through 9 subsections the offence of soliciting and loitering or soliciting for the purposes of prostitution in a street or a public place. The maximum penalty for soliciting or loitering in subsections (1) and (2) is a level 2 fine on summary conviction. As an alternative to imposing a fine for an offence under subsection (2) (persistently loitering or soliciting in a street for the purpose of prostitution) the court has powers under subsection (3) etc. to make an order requiring the offender to attend 3 meetings with a person specified in the court's order.

Clauses 54 and 55 set out the offences of causing or inciting and controlling prostitution for gain, which both attract a maximum penalty of 7 years custody on information, or 12 months custody, or a level 5 fine, or both on summary conviction.

Clause 56 is the offence a person (A) commits of paying, or promising to pay, for the services of a prostitute (B) subjected to force, threats, or any other form of coercion or deception by a third person (C) who expects to gain either for them or another person. Subsection (2) makes it clear it is irrelevant where in the world or whether those services are provided or whether person (A) is aware the third person (C) has engaged in exploitative conduct. The maximum penalty is a level 2 fine.

Clause 57 provides interpretation as to the meaning of "gain", "prostitute" and "payment" referred to in clauses 53 to 56.

26. Division 13 (clauses 58 to 64) sets out a series of measures for the suppression of brothels.

Clause 58 establishes the offence of keeping a brothel used for prostitution and the maximum penalty is 7 years custody on information or 12 months custody, or a level 5 fine, or both on summary conviction.

Clauses 59, 60 and 61 set out the offences a landlord or a tenant commit by letting or permitting premises to be used as a brothel or where the tenant permits their premises to be used for prostitution. In each case the maximum penalty is 12 months custody, or a level 5 fine, or both on summary conviction.

Clause 62 provides powers for a constable to apply to a justice for a warrant then, if granted, to enter and search any premises used for, or obtained with earnings from prostitution; and then on to arrest as necessary in accordance with subsections (1), (2) and (3). Subsections (4) and (5) are supplementary and relate to children/vulnerable adults.

Clause 63 sets out the rights of a landlord, where a tenant is convicted of an offence under this Clause 60, to determine the lease.

Clause 64 deals with the offence of allowing a person aged between 4 and 16 years for which the person has responsibility to reside in or frequent a brothel. The maximum penalty is 12 months custody, or a level 5 fine, or both on summary conviction.

27. Division 14 (clauses 65 to 67) concern the preparatory offences of administering a substance with intent, committing an offence with intent to commit a sexual offence (for example, burglary), and trespass with intent to commit a sexual offence. The maximum sentences are 10 years custody on information, or 12 months custody, or a level 5 fine, or both on summary conviction.

28. Division 15 (clauses 68 and 69) makes it an offence for a person aged 16 or over to intentionally have a sexual relationship with a relative aged 18 or over. Clause 68 deals with instances where the person intentionally consents to penetrate their adult relative, and clause 69 is where they are penetrated by their adult relative, after consenting to the penetration. Each clause carries a maximum penalty of 2 years custody on information or 12 months custody, or a level 5 fine, or both on summary conviction.

29. Division 16 (clauses 70 to 80) deals with indecent photographs and prohibited images of children.

Clause 70 makes it an offence for a person to have, take, permit to be taken, make, distribute or publish any indecent photograph or pseudo-photograph of a child (subsection (1)). Subsections (4) and (5) provide defences that a person would have to prove showing a legitimate reason for having in his or her possession or distributing or showing the indecent photograph or pseudo-photograph. Other defences include the photographs etc. being sent to the person without their prior request, and not having kept it for an unreasonable time, or that the person had not seen the photograph or pseudo-photograph and did not know, or have any reasonable cause to suspect, the photograph or pseudo-photograph to be indecent.

The maximum penalty for an offence specified in subsection (1)(a) (possession of photograph/pseudo-photograph) is 5 years custody or a fine or both on information, or 12 months custody, or a level 5 fine, or both on summary conviction. The maximum penalty for any offence under this section (excluding 1(a)) is 10 years custody or a fine or both on information, or 12 months custody, or a level 5 fine or both on summary conviction.

Clause 71 makes similar provision to that found in clause 70 in subsection (1), in respect of the possession, distribution etc. of prohibited images of children. Subsection (2) defines a prohibited image as that which is pornographic, that it falls within sub-section (6), and is grossly offensive, disgusting or otherwise of an obscene character. Subsection (6) defines pornographic. Other subsections provide further details about how an image can be interpreted and the nature of the content the image depicts. The maximum penalties are the same as for clause 70.

Clause 72 disapplies the offence specified in clause 71 in respect of excluded images in connection with a classified film. "Excluded image" is defined in subsection (2). Subsection (3) states that if an image is contained within a classified work but is extracted (with or without other images), and is of such a nature that it must be assumed it was extracted solely or principally for the purpose of sexual arousal, then it is not an "excluded image". Subsection (4) speaks about the context being important in determining whether or not an image, or series of images, is pornographic.

Clause 73 is about proceedings in relation to clauses 70 and 71 where the defendant is able to prove that the photograph, pseudo-photograph, image or prohibited image was of a child aged 16 years or over, and that, at the time of the alleged offence the child and the defendant were either married, civil partners of each other, or living together as partners in an enduring family relationship. If the respective relationship is proved then the defendant has a defence. Subsection (3) clarifies that the image of the child must be alone or with the defendant but not with any other person. Subsections (4), (5) and (6) concern the proven consent of the child in relation to the photograph, pseudo-photograph or prohibited image, and any distribution of the image.

Clause 74 is about exceptions or defences in relation to offences under clauses 70 and 71, where the actions were undertaken for the purposes of the prevention, detection or investigation of crime or was by and for the functions of the Constabulary.

Clause 75 specifies the defences which would need to be proven to offences under clauses 70(1) and 71(1).

Clause 76 is about evidence in relation to proceedings and explains that a person is taken as having been a child if it appears at any material time from the evidence as a whole that he or she was under the age of 18.

Clause 77 provides the police with the necessary powers to obtain a warrant to enter premises for the purposes of search and seizure in respect of indecent photographs, pseudo-photographs or prohibited images of children.

Clause 78 applies Schedule 1 which sets out special rules in relation to persons providing information society services; these are in connection with the operation of clauses 70 and 71.

Clause 79 applies Schedule 2 that makes provision about the forfeiture of indecent photographs, pseudo-photographs and prohibited images of children.

Clause 80 provides interpretation for words and terms used in clauses 70 to 79.

- 30. Division 17 (clauses 81 to 86)** outlines other offences and the duties of those in regulated professions/regulated activities to notify the police of possible victims of child sexual abuse.

Clause 81 outlines the offence of exposure, which carries a maximum penalty of 2 years custody on information or 12 months custody, or a level 5 fine or both on summary conviction. A person commits that offence by exposing his or her genitals intending that someone will see them and be caused alarm or distress.

Clause 82 outlines the offence of sex with an animal and carries a maximum penalty of 2 years custody on information or 12 months custody, or a level 5 fine, or both on summary conviction.

Clause 83 outlines the offence of sexual penetration of a corpse and carries a maximum penalty of 2 years custody on information or 12 months custody, or a level 5 fine, or both on summary conviction.

Clause 84 outlines the offence of engaging in sexual activity in a place to which the public have access, within the sight or hearing of a person likely to be caused harassment, alarm or distress (who is not a Police Constable). Subsection (3) provides a defence that the accused had no reason to believe there was anyone within sight or hearing to be caused such harassment, alarm or distress. The maximum penalty is a level 3 fine on summary conviction.

Clause 85 carries a maximum penalty of 14 years custody on information for the offence of abducting, or detaining, a person for the purposes of committing a sexual offence outlined in this Part (Part 2) of the Bill (other than clause 86).

Clause 86 imposes a duty on any person who works in a regulated profession or works with children in a regulated activity to notify the police if they discover a child appears to have been the victim of sexual abuse. The duty applies regardless of whether a complaint has been made or a person has been charged with an offence under this Part of the Bill. Subsection (2) defines "regulated profession" and "regulated activity". Subsection (4) specifies how and the time period in which the notification is to be made. Subsection (5) makes clear when the duty does not apply and subsection (6) says that a disclosure made in accordance with this duty does not breach any obligation of confidence or any other restriction on disclosure of information. Failure to comply with this duty carries a maximum penalty of 2 years custody or a fine on information or 12 months custody, or a level 5 fine, or both on summary conviction as stated in subsection (9).

31. Division 18 (clause 87) provides that if a person who is a resident of the Island, or meets the residency requirement, commits an act outside the Island that would constitute an offence if committed here, in the Island, then proceedings for the offence may be taken in the Island.

32. Division 19 (clauses 88 to 94) deal with supplementary and general matters including the definition of "consent" and presumptions around this.

Clause 88 provides exceptions to the offences of aiding, abetting and counselling the commission of certain offences against children where the action taken is for the purpose of protecting the child from sexually transmitted infection; protecting the physical safety of the child; preventing the child from becoming pregnant; or promoting the child's emotional well-being by the giving of advice. The action must not have been taken for the purpose of obtaining sexual gratification or for the purpose of causing or encouraging the activity constituting the offence or the child's participation in it.

Clause 89 defines the meaning of "consent" in relation to the provisions where it is relevant in this part of the Bill. A person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. Consent has to be explicit and a conviction for a sexual offence does not have to rely on the presence of injuries or a history of violence.

Clause 90 sets out the evidential presumptions about consent. In the event that the three propositions in subsection (1) are proved the complainant is taken not to have consented to the relevant act. They are that the defendant did the relevant act, that any of the circumstances in subsection (2) existed and that the defendant knew they

existed. Subsection (2) sets out seven sets of circumstances including the threat of, fear of or use of violence, unlawful detention and the administration or taking of a stupefying substance (e.g. drugs/alcohol).

Clause 91 provides conclusive presumptions about consent, which include deceiving the complainant as to the nature or purpose of the relevant act or inducing the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

Clause 92 defines the meanings of "relevant act" and "complainant" in the offences to which clauses 90 and 91 apply.

Clause 93 defines the meaning of "sexual" and **clause 94** provides general interpretation of terms used in Part 2 of the Bill.

PART 3 – INDECENT DISPLAYS

33. Part 3 (clauses 95 to 97) of the Bill makes provision about indecent displays.

Clause 95 defines the offence of publicly displaying indecent material and that the person making the display and any person causing or permitting the display shall be guilty of an offence. "Public place" mentioned in subsection (2) is defined in subsection (3). Exclusions from the offence are provided for in subsection (4) and include a programme service, a display within an art gallery or museum, plays and films; in the case where these are visible only from within the art gallery etc. Subsections (5) and (6) cover the definition of "matter" and instances in which a warning notice may be adequate. Subsection (7) defines certain other terms. The maximum penalty for the offence is 2 years custody, a fine, or both, on information or a level 5 fine on summary conviction.

Clause 96 provides a constable with powers of arrest, seizure and entry. Subsection (2) empowers a justice of the peace to issue the requisite warrant.

Clause 97 empowers the Department to make a code of conduct about the display of material that it considers may be offensive including adult titles and lifestyle magazines, and revise this code once issued as it requires.

PART 4 – EXTREME PORNOGRAPHIC IMAGES

34. Part 4 (clauses 98 to 101) is about extreme pornographic images.

Clause 98 makes it an offence to possess an extreme pornographic image. Subsection (2) sets out a threefold test, that to be defined as an "extreme pornographic image", the image must be obscene (see clause 102), pornographic, and extreme. Subsection (3) says an image is pornographic if it is reasonable to assume its production is solely for the purpose of sexual arousal. Subsections (4) to (7) go into more detail as to how to define an image as pornographic or indeed extremely pornographic and an important factor is the context. Subsections (8) to (10) are supplementary and/or provide further definitions e.g. "image". Maximum penalties where subsection (8) applies are 3 years custody, or a fine, or both on information where (9) applies 2 years custody, or a fine, or both; in either case 12 months custody, a level fine or both on summary conviction.

Clause 99 states that an offence is not committed under clause 98 if it is an "excluded image", which is defined in subsection (2) as all or part of a classified work. Subsections (3) and (4) explain when an image is not an excluded image and subsection (5) defines terms used in this clause.

Clause 100 sets out defences and **Clause 101** applies Schedule 1, which makes special rules relating to providers of information society services, in connection with Clause 98.

PART 5 – OBSCENE PUBLICATIONS AND INDECENT ADVERTISEMENTS

- 35. Part 5 (clauses 102 to 108)** deals with obscene publications and indecent advertisements

Clause 102 sets out in subsection (1) the test of obscenity where an article is likely to deprave or corrupt persons who are likely to read, see or hear the matter contained or embodied in it. Subsection (2) defines "article" and subsections (3) and (4) define publishing an article. Subsections (5) and (6) define "programme" and "programme service".

Clause 103 applies Part 5 to anything intended to be used for the reproduction or manufacture of articles containing or embodying matter to be read, looked at or listened to.

Clause 104 makes it an offence to publish obscene matter or to have such matter (in his or her ownership, possession or control) for publication, whether for gain or not. Subsections (2) to (7) give further details concerning the offence. In particular, subsection (5) indicates how a person may not be convicted of an offence if the person can show he or she had not examined the article and had no reason to suspect the article would render him or her liable for an offence. Subsection (6) looks at how the question of whether an article is obscene will be determined in any proceedings. Subsection (7) gives the maximum penalty as 5 years custody or a fine or both on information, or 12 months custody or a level 5 fine or both, on summary conviction.

Clause 105 provides the defence of public good. The opinion of experts as to the literary, artistic, scientific or other merits of the article in question may be admitted in any proceedings to confirm, or otherwise, these grounds.

Clause 106 sets out the maximum penalties for printing, selling etc. indecent or obscene publications as 5 years custody or a fine or both on information, or 12 months custody or a level 5 fine or both, on summary conviction.

Clause 107 describes what a classified video recording is and excluded from offences and **Clause 108** provides powers of search and seizure of obscene articles within premises subject to the issue of a warrant by a justice of the peace.

PART 6 – VOYEURISM AND IMAGE BASED SEXUAL ABUSE

- 36. Part 6 (clauses 109 to 117)** deals with voyeurism and image based sexual abuse.

Clause 109 sets out the offence of voyeurism for which the maximum penalties are 3 years custody or a fine or both on information, or 12 months custody or a level 5 fine or both, on summary conviction. The offence is defined as being committed by observing another person doing a private act for the purpose of sexual gratification, whilst knowing the other person does not consent to such observation. **Clause 110** provides further interpretation.

Clauses 111 to 117 deal with image based abuse. **Clauses 111, 112 and 113** outline the respective offences committed by recording an intimate image without consent, enabling the recording of an intimate image without consent, distributing an intimate image and/or threatening to record or distribute an intimate image. These address the practices sometimes known as "up-skirting" and "revenge porn" but which are better described as image based abuse due to their potential effect on victims. The maximum penalty in respect of each of these offences is 3 years custody or a fine or both on information, or 12 months custody, or a level 5 fine or both, on summary conviction.

Clause 114 provides that where a person is convicted of an offence under sections 111 or 112 that the court may order the person to take reasonable actions to remove, retract, recover, delete or destroy any intimate image they recorded or distributed, this

would be within a set time period set by the court. A person who, without reasonable excuse, fails to carry out the order is liable to a maximum penalty of 12 months custody, or a level 5 fine or both, on summary conviction.

Clause 115 provides exceptions where the alleged conduct was done for genuine medical or scientific purposes, or law enforcement, or legal proceedings or where a reasonable person would consider the conduct acceptable given the factors set out in subsection (1)(d).

Clause 116 defines the meaning of consent in relation to intimate image cases.

Clause 117 provides interpretation of terms relating to clauses 109 to 116 e.g. "distribute", "image" etc.

PART 7 – CLOSURE ORDERS

- 37. Part 7 (clauses 118 to 136)** provides for closure notices for premises in respect of specified prostitution, pornography or child sex offences.

Clause 118 gives the meaning of specified prostitution, pornography and child sex offences.

Clause 119 empowers a police officer of the rank of inspector or above to authorise the issue of a closure notice to a premises where activities related to prostitution or pornography are suspected; **Clause 120** does likewise in respect of premises where activities related to child sex offences are suspected.

Clause 121 sets out the information that a closure notice must contain and how it is served on a premises. Where a closure notice has been issued, **Clause 122** requires a constable to apply to a court of summary jurisdiction for power to make a closure order and describes this process; **Clause 123** makes supplementary provision related to closure orders.

Clause 124 provides for the enforcement of closure orders on premises.

Clause 125 provides the penalties for the offences of remaining on, or entering, premises in contravention of a closure notice or a closure order, or, the obstruction of a constable, or a person authorised by the Chief Constable. The maximum penalties are 12 months custody, or a level 5 fine, or both on summary conviction.

Clauses 126 and 127 deal with the processes around applications to extend a closure order and the orders extending closure orders. Closure orders may be extended by 3 months but the total period for which a closure order has effect may not exceed 6 months.

Clause 128 provides for the discharge (ending) of a closure order and **clause 129** provides for appeals against closure orders/extensions to closure orders.

Clause 130 makes provision for a person to apply for access to premises contained in a closed premises. This is relevant where another person occupies, or has an interest in any part of the building or structure in which the closed premises are situated, but in respect of which the closure order does not have effect.

Clause 131 provides for the reimbursement of costs where the Constabulary have incurred expenditure while clearing, securing, repairing or maintaining closed premises.

Clause 132 relieves the Constabulary from liability for certain damages. However, subsection (5) states the exemptions from liability in subsections (1) to (4) cease to apply if the act or omission is shown to have been in bad faith or to prevent an award of damages made in respect of an act or omission that was unlawful by virtue of section 6(1) of the Human Rights Act 2001.

Clause 133 makes provision for a person who claims to have incurred financial loss as a result of a closure notice or a closure order to apply for compensation.

Clause 134 empowers the Department to issue guidance relating to the discharge of functions under this part by a constable/authorised person.

Clause 135 empowers the Department by order to extend the power to authorise the issue of a closure notice to persons other than members of the Constabulary.

Clause 136 provides interpretation or terms used in this part e.g. "closure notice", "closure order" etc.

PART 8 – ANONYMITY OF VICTIMS AND OTHERS

- 38. Part 8 (clauses 137 to 145)** makes provision for the anonymity of victims and others involved in a case to which this part applies, from allegation of offence, to disposal, or for life, depending on the persons involved and nature of the case.

Clause 137 makes provision for the protection of the identity of the complainant (victim).

Clause 138 makes provision for the identity of the person against whom an allegation of an offence (suspect/defendant), to which this Part applies, to be kept from publication. Subsection (3)(c) provides that the restriction on publication ceases in the event of a subsequent conviction from the date of conviction.

Clause 139 empowers the prosecution or the defence to restrict the publication of details of any witness, on any of the grounds specified in subsection (2). The grounds can include, for example, the age or maturity of the witness, the physical, intellectual, psychological or psychiatric impairment of the witness, trauma and fear of intimidation. Subsection (3) has the safeguard that the court must have regard to the need to ensure a fair trial, the views of the witness and the need to promote the recovery of the complainant from the alleged offence and any other factor that is relevant to the just determination of the proceedings.

Clause 140 specifies the offences to which this Part applies in relation to anonymity. The provisions include the offences in part 2 of the Bill except those mentioned in subsection (1)(c).

Clause 141 empowers a person charged with an offence, and before trial, to apply to a court for a direction to displace clause 137, concerning the anonymity of victims or witnesses, for the purpose of inducing persons who are likely to be needed as witnesses at the trial, and that the conduct of the applicant's defence is likely to be substantially prejudiced if a direction is not given. Subsection (2) further empowers the judge at a trial to lift restrictions to the extent set out in his or her direction, if satisfied a substantial and unreasonable restriction is placed upon the reporting of proceedings at trial, and it is in the public interest to remove or relax the restriction.

Clause 142 provides in subsection (2) that an officer of the rank of superintendent or above may apply to a justice of the peace for a direction that the displacement of clause 138 is required and that the naming of a suspect is necessary for the protection of the victim or any other person; or is otherwise necessary in the public interest.

Similarly, a constable or the prosecution may apply under this clause either before the commencement of a trial or during a trial for the lifting of restrictions on the publication of the identity of the accused/defendant by the displacement of clause 138.

This clause further empowers the judge, at a trial, to lift restrictions to the extent set out in his or her direction if satisfied a substantial and unreasonable restriction is placed upon the reporting of proceedings at trial and it is in the public interest to remove or relax the restriction.

Clause 143 sets out the offence of publishing anything in breach of sections 137, 138 or 139 i.e. breaching anonymity. Subsection (1) sets out who is liable for the offence and includes newspapers, broadcasters and, in the case of any other means of publication, any person who publishes the information. There are possible defences in subsections (2), (3), (4) and (5). This offence is in addition to clause 145. The maximum penalty is 12 months custody, or a level 5 fine, or both on summary conviction.

Clause 144 provides interpretation of terms used in for clauses 137 to 142 e.g. "complainant", "picture" etc.

Clause 145 looks at disclosure of identity to which clauses 137, 138 or 139 apply, and makes it clear that a police officer, other person employed by the Constabulary or a prosecutor employed in the office of the Attorney General may not disclose either the identity of a person who is the victim or witness to an offence to the person accused/suspected of an offence, or vice versa. This applies if the parties are strangers to each other, a non-disclosure would not impact on the completion of a fair trial; and it is reasonable to assume that such a disclosure would put the victim or witness at risk of harm. This clause applies to disclosures made at police premises; and whether or not the person accused of the offence has been charged with the offence. This section also defines "appropriate judge".

PART 9 – COMPLAINANT’S HISTORY

- 39. Part 9 (clauses 146 to 149)** makes provisions for the restriction on evidence, or questions, about a complainant’s sexual history, and what may, or may not be discussed, and the procedures governing this in court. This part also gives guidance on interpreting the terms used around sexual history and the meaning of types of offences mentioned within this part.

PART 10 – NOTIFICATION AND ORDERS

- 40. Part 10 (clauses 150 to 209)** makes provisions for the notification process and any related types of notification order which may be made, the information to be shared and with whom it may be shared. This Part also covers both sexual harm and sexual risk orders and all associated processes and penalties for these and any ancillary matters which are covered in Division 9 (General). This Part also provides definitions within each division, and specifically within clause 207 to assist interpretation of the terms used in the Part.

Division 1 (clauses 150 to 168) outlines the notification requirements for any relevant offender who is subject to these requirements, and specifies when those requirements apply and for how long they apply. This Division also defines the notification periods, what happens when any variation to these requirements is required e.g. for travel, and those notifications which effect young persons. The maximum penalties specified for failure to comply with a notification order without reasonable excuse are 5 years custody on information, or 12 months custody, or a level 5 fine, or both on summary conviction.

Division 2 (clauses 169 and 170) outlines the people from whom, and to whom, the Chief Constable may be provided/provide information relating to verification notified under this clause; this would be in order to prevent, detect, investigate or prosecute offences committed under Part 10, and the specifics of this information.

Division 3 (clause 171) empowers the Department to make Regulations around the release or transfer of offenders into the custody of another person and the information disclosure responsibilities around this.

Division 4 (clauses 172 and 173) allows for the application of the notification periods mentioned earlier in this Part (e.g. clause 152) and how they will apply for an offence committed outside of the Island.

Division 5 (clause 174) outlines the powers of entry and search which can be exercised by the police under this Part.

Division 6 (clauses 175 to 179) describes the process by which notification orders and interim notification orders may be made, the effect of these orders, the offences for which they shall apply and how an appeal may be lodged.

Division 7 (clauses 180 to 202) outlines the process around both sexual harm prevention and sexual risk orders, determines when these orders shall apply and what the effect of these orders shall be. This Division also describes the process by which the orders are made and how any change/variation to them is made e.g. in the case of travel and all other related processes. Clause 190 gives the Department power to issue guidance to the police related to sexual harm prevention and sexual risk orders. The penalties for breach of these orders without reasonable excuse are 1) as per clause 189 for breach of a sexual harm prevention order 2) as per clause 199 for breach of a sexual risk order; a maximum penalty of 5 years custody on information, or 12 months custody, or a level 5 fine, or both on summary conviction.

Division 8 (clause 203) provides the Department with the power to amend, by order, Schedules 3 or 4 and describe the limitation of what can be amended. Schedule 3 gives the sex offences for the purposes of Part 10 and Schedule 4 for other offences for the purposes of Part 10.

Division 9 (clauses 204 to 209) details information termed as general for the purposes of Part 10 and covers the following: clause 204 look at orders impacting on young offenders made via another power e.g. armed forces, young offenders, UK prison; clause 205 relates to offences with thresholds and how these are defined in conjunction with this Part and Schedules 3 and 4; clause 206 specifically disapplies Section 75 of the Summary Jurisdiction Act 1989, the time limit for complaints, for the purposes of this Part; clause 207 provides general interpretation of the terms used in this Part e.g. "admitted to hospital", "community order" etc.; clause 208 disapplies certain specified legislation for the purposes of this Part in relation to conditional discharge or probation orders; clause 209 provides interpretation related to mentally disordered offenders.

PART 11 – PARDONS AND DISREGARDS

- 41. Part 11 (clauses 210 to 224)** relates to pardons and disregards for matters covered within this legislation for example historic sex offences which are now no longer a criminalised offence.

Division 1 (clauses 210 to 212) comprises clause 210 which is an interpretation clause, clause 211 which gives the purpose of the division as acknowledgement of the wrong and discriminatory effect of past convictions for certain historic sex offences and the pardons those convicted of the historic sex offences defined within clause 212.

Division 2 (clauses 213 and 214) comprises of clause 213 which is the power by which pardons are extended and clause 214 which is a supplementary clause specifying that despite clause 213, the pardon does not affect any conviction or sentence or give rise to any right, entitlement or liability.

Division 3 (clauses 215 to 221) defines the process by which an application can be made to have a historic sex offence disregarded, how this will be determined, any appeals to this process, what the effect of the disregard will be, the removal from

official records of the offence and the possible appointment of advisors by the Department in order to review/make determination on these matters.

Division 4 (clauses 222 to 224) contains general provisions in relation to the following: clause 222 savings for pardons; clause 223 specifies that this division applies in relation to any conduct constituting a historical sex offence in respect of which an alternative to prosecution has been given; clause 224 empowers the Department to make regulations related to this division.

PART 12 – AMENDMENT OF ORGANISED AND INTERNATIONAL CRIME ACT 2010

- 42. Part 12 (clause 225)** makes an amendment to the Organised and International Crime Act 2010 by inserting new sections 4A, 4B and 4C that provide power to detain and/or seize any land vehicle, ship or aircraft in either used by, intended to be used by, or in connection with, or owned by a person convicted of, trafficking in persons. This also provides in new section 4B for the potential release of seized vehicle/vessel/aircraft depending on circumstances.

PART 13 – PROHIBITION OF FEMALE GENITAL MUTILATION

- 43. Part 13 (clause 226)** makes an amendment to the Prohibition of Female Genital Mutilation Act 2010 by inserting new sections 6A, 6B, 6C and substituting section 7, along with inserting a new Schedule relating to the new section 6B. The effect of these insertions is to add a requirement for the police to be notified when a person who works in a regulated profession becomes aware/observes that Female Genital Mutilation (FGM) has occurred or will occur. A power to make FGM Orders is detailed in the new Section 6B and the specifics of this process are laid out in the Schedule. Section 6C allows for the offence of FGM committed outside the Island to be treated as if they had occurred here. Section 7 gives the maximum penalties for offences under sections 4 and 6 as 14 years custody, or a fine, or both on information, not more than 6 months custody, or a fine not to exceed £5,000, or both on summary conviction; for offences under the new section 6A a maximum penalty of 2 years custody, or a fine, or both on information or 12 months custody, or a fine not exceeding level 5, or both on summary conviction. The new Schedule gives the maximum penalties for breaching a FGM Order as 5 years custody, or a fine, or both on information, 12 months custody, or a fine, or both on summary conviction.

PART 14 – GENERAL

- 44. Part 14 (clauses 227 to 233)** this Part is entitled General and makes provision for matters related to this legislation as follows.

Clause 227 refers to the service courts e.g. those that related to the Armed Services and are convened under applicable legislation. They include the Court Martial Appeal Court (CMAC), the Supreme Court (on appeal from the CMAC), a court-martial, a Standing Civilian Court, and this clause determines when judgements from those courts apply for the purposes of offenses covered by this legislation.

Clause 228 empowers the Department to apply sentencing guidelines to the Island with such caveats as are detailed in this Clause.

Clause 229 sets out the Tynwald procedure which will need to be followed for the Orders and Regulations made under this legislation e.g. approval of Tynwald is required in most cases, this clause also supplements what these Orders or Regulations may provide.

Clause 230 refers to Schedule 5 which contains the minor and consequential amendments made by this legislation.

Clause 231 refers to Schedule 6 which contains the Repeals made by this legislation.

Clause 232 makes transitional and savings provisions that, put simply, allow the seamless changeover from existing legislation to that found within this legislation. The purpose of this is to ensure that any orders that existed under legislation being revoked by this new legislation, e.g. Orders under the Sex Offenders Act 2006, remain active until they are replaced by Sexual Harm/Sexual Risk Prevention Orders under this new legislation. A similar provision within this clause specifies how judgements shall be made by a presiding Deemster in court until the first rules of court are made. Subsection (4) restates the position that the presumption of criminal law that a boy under the age of 14 is incapable of sexual intercourse was abolished by the Sexual Offences Act 1992 (now repealed but the effect of the original legislation to abolish this presumption remains in force - legislation that repeals something and then is itself repealed does not cease to have the effect it had by making a repeal as per section 57(2) of the Legislation Act 2015).

Clause 233 gives the extent of the legislation and savings, this states that this legislation applies to the Island only in the context of clause 227 (service courts) and under subsection (2) states that, unless otherwise provided, any amendment, repeal or revocation made by this legislation has the same extent as the provision to which it relates.

- 45. Schedule 1** sets out the special rules relating to providers of information society services, the specific definition of these services is given within the cited European Directive however in brief these are *"any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service"*. This Schedule looks at the process and liability of both domestic (on Island) and non-Island service providers along with any exceptions (for conduits, caching and hosting), this Schedule also looks at the way in which proceedings are brought.
- 46. Schedule 2** describes the processes around forfeiture of indecent photographs of children and prohibited images of children and all administrative processes around this including claims, proceedings and disposal of property.
- 47. Schedule 3** sets out a numerical list of sexual offenses for the purposes of Part 10.
- 48. Schedule 4** sets out a numerical list of other offences for the purpose of Part 10.
- 49. Schedule 5** gives the minor and consequential amendments made by this legislation to other current Acts, in most cases this is to make a substituted reference to this new legislation in place of legislation being made obsolete e.g. references to the Sexual Offences Act 1992.
- 50. Schedule 6** gives the repeals made by this legislation to other Acts which in most cases are being wholly replaced e.g. the Sexual Offences Act 1992.