



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Justice (Sexual Offences and Trafficking
Victims) Bill: Professor Clare McGlynn,
Durham Law School

18 November 2021

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Members present for all or part of the proceedings:

Mr Mervyn Storey (Chairperson)
Ms Sinéad Bradley
Ms Jemma Dolan
Mr Peter Weir
Miss Rachel Woods

Witnesses:

Professor Clare McGlynn Durham Law School

The Chairperson (Mr Storey): Professor Clare McGlynn from Durham Law School at Durham University is joining us via StarLeaf. The session will be reported by Hansard, and the transcript will be published on the Committee's web page. I invite Professor McGlynn to outline briefly the key issues in the Bill and any gaps or issues that she wishes to draw to the attention of the Committee. There will then be an opportunity for members to ask questions. Professor, you are very welcome. I am delighted that you are able to join us this afternoon. Thank you.

Professor Clare McGlynn (Durham Law School): Hello, everybody. Thank you very much for inviting me this afternoon and giving me the opportunity to contribute to your discussions. In general, I very much welcome the legislation. It will, hopefully, modernise laws around sexual harassment and sexual offences. My main message is that we need some new laws in this area and that we really must get them right first time. The challenge is in trying to amend the law so that it is comprehensive and reflects victims' experiences, so that we can use it as the basis for the sorts of campaign measures and education measures that have been discussed.

I will very briefly address a few issues, and then they can be followed up in questions. The first issue is downblousing. I very much welcome the fact that that is in the legislation. It can be used as an exemplar across the rest of UK, which does not have legislation on that issue. I very much agree with the scope of the images that are covered in the Bill. It limits the images to breasts or underwear that would not otherwise be visible. That is really important. The English proposals go much further; in my view, they cover too many types of images. I very much endorse the approach that has been taken here. However, there is a limit on the provision around downblousing: it covers only offenders where you can prove motivations of sexual gratification or causing distress. That unnecessarily limits the scope of the law.

That is also the case with upskirting, so I will move on to talk about that. I very much welcome the fact that the legislation covers that issue. I am hearing a bit of an echo, which is why I am hesitating. I hope that you can hear me OK. You can let me know if you are not.

The Chairperson (Mr Storey): Yes, we can hear you.

Professor McGlynn: Thank you.

It is very welcome that the legislation covers upskirting. The problem is that it is limited and will not cover all forms of upskirting. If we limit legislation to just those two motivations of sexual gratification and causing distress, we will not cover the cases in which individuals are motivated for a prank, a laugh or humour, or a whole range of cases in which men are sharing those images among themselves, effectively to boost their status — digital trophies, if you like. Those areas will not be covered by the legislation.

There is also a particular reason why that provision is problematic in the context of Northern Ireland. The Committee will be aware that those proposals have come forward in Northern Ireland following the case in Enniskillen Royal Grammar School, where two teachers had photos taken up their skirts by one of their male pupils. Those two teachers had to fight tooth and nail to get a prosecution for that behaviour. We have talked about how devastating it has been and how it has seriously impacted on their trust in others. I know that the Committee has received evidence that, in their view, the draft legislation would not cover their particular case were it to come before the police again. I agree. The offender in that case talked about it being a prank. The police, effectively, took him at his word. Therefore, we must not limit the draft legislation to certain motives, and we must talk about just consent and apply it to all cases of upskirting.

Let me also talk about cases of image-based sexual abuse. You have just been talking about the proposals to extend the law to cover the threat of sharing internet images without consent. I very much agree that that must be covered. It is a gaping hole in the law. Just to respond to one of the questions: Scots law already covers threats to distribute internet images, the recent legislation in Ireland also covers threats, and, just last year, English law was extended to cover threats. That is an important step that must be taken.

I also recommend that the Committee consider recommending a change to cover altered or fake images — what are sometimes called "deepfakes". That is where everyday, ordinary images are made pornographic and sexual using technology. They are often shared onto porn sites. It is a real, growing problem. It would be very easy to change the draft legislation to include fake porn and altered images. I urge the Committee to do that. Again, Scots law has covered it. Irish law and the law in England and Wales do not cover it yet.

I want to turn to cyber-flashing, which you have already discussed. It is an incredibly common practice now. It is becoming normalised. We have seen it increase since the start of the pandemic. Unfortunately, it is even more common for young girls under 18 years of age. The time is right to introduce legislation now. However, again, the legislation must be comprehensive. At the moment, English proposals focus only on certain motives, the irony being that most cases of cyber-flashing would not, therefore, be covered.

I want to finish by saying that the point of having comprehensive legislation is this: if we send a message that upskirting, downblousing and cyber-flashing are now against the law, but, in practice, they are in only a few of those cases, women will get more and more distrustful of the criminal justice system, as we have seen in discussions over the past few years. Therefore, I urge the Committee and the Northern Ireland Assembly to take a stand, show the rest of the United Kingdom what can be done, and enact comprehensive legislation.

The Chairperson (Mr Storey): Thank you, Professor, for that brief but comprehensive view. We could all take lessons from that in making presentations.

Can you expand on your reasoning that downblousing images should fall within the definition of an intimate image only when the victim's breasts are involuntarily exposed and not in respect of the other two types of image that you have identified in your submission?

Professor McGlynn: Absolutely. What I have tried to explain is that there are, if you like, three types of downblousing image. One is where an individual is, say, wearing a bikini on a beach, and someone might take a photograph of them. Theoretically, that could be a photograph of their cleavage, and the camera might even have zoomed in on their cleavage. However, it is a photograph that is taken in everyday circumstances on the beach. Having that image taken would be an invasion of privacy, and it would be creepy, but we cannot criminalise the taking of such images.

The second type of image is, in some ways, what you would call a "downblouse". The classic example is where a woman wearing a low-cut top is sitting down on public transport when someone standing above her takes an image of her. There is no covert act: it is another image of a woman going about her daily life and wearing the clothes that she has chosen to wear. Again, that sort of activity is creepy, it is invasive and it is harassment, but I do not think that we can criminalise it.

What we can criminalise is the covert, surreptitious act; in other words, where the breast or partially exposed breast would not otherwise have been revealed, because the women did not choose to reveal her cleavage or her breasts in that way. For example, if an image is taken as she leans over in a low-cut top and her breasts are revealed, she would not have chosen to reveal her cleavage in that way. It is that surreptitious and covert action that we can criminalise. For me, to criminalise the other two examples would be going too far. It would mean criminalising the taking of photographs that breach privacy but are not criminal.

The Chairperson (Mr Storey): You suggest that the upskirting proposals be amended to cover all forms of upskirting, regardless of motive. Do you have any views on why the Bill has been limited by the inclusion of a requirement for proof of specific motives. I am asking you to delve into the thinking of draughtspeople in a Department, which can be a very dark place to go. Given the experience of other jurisdictions, when this Bill was being drafted, there was other legislation that could have given direction on the motive element. Can you give us some understanding of why you think that that motivation might have been included?

Professor McGlynn: Obviously, I do not know what is in the mind of your draughtspeople. I imagine that you have taken the English and Welsh legislation, which is limited in its motives. In turn, England just followed the example of the Scottish legislation. I think that England did that because, in essence, there was a rush to legislate, and the Government simply wanted something adopted. They wanted to say, "We have legislation on upskirting, so let's just take what's already there and put it into law", without going into the detail and changing it to make it more effective and more comprehensive in light of what we know about why people take upskirting images and share them. That is probably the reason why, and I guess that what we are saying is this: please use this opportunity to recognise that there are problems in the other legislation, and be more comprehensive. An example of that is the Irish legislation, which is comprehensive and does not require the specificity of motives. Similarly, legislation in some Australian states does not cover motives.

The Chairperson (Mr Storey): That is good counsel and commentary on rushed legislation that is the result of people saying, "Let's get something out there; we can, at least, say that we have legislation." I have been in this post for only a short number of months, but the one thing that I have picked up during that period is this: having legislation is one thing; making legislation that can be practically implemented and that deals with the problem and the perpetrator is far more important. So, what you have said is very useful.

A number of members have indicated that they have questions.

Ms Dolan: Thank you, Clare. I will keep my camera turned off to stop my sound breaking up. Clare, thank you so much for your briefing. It was very interesting.

You mentioned the case in Enniskillen, which is in my constituency, that prompted the reform. I find it bizarre that the proposed law would be unlikely to cover the same upskirting case, and I think that the Department has a couple of questions to answer about that.

Can you talk a bit more about the operation of the Canadian model of abuse of trust laws? Does the non-prescriptive nature of the positions of trust provide any problems for the prosecutors?

Professor McGlynn: I do not have any up-to-date statistics or information on the number of prosecutions or how effective they are. I can try to find out and inform the Committee. I do not want to talk off the top of my head about the most recent practice in Canada.

Ms Dolan: OK. That is fine. I just find that very interesting, and the Committee would be interested in exploring that further. If you could provide some information, it would be much appreciated. Apart from that, I have no other questions. You have covered all my questions. Thank you, Clare.

Miss Woods: Thank you for your submission and for coming to the Committee today, Clare. I will pick up on clause 1 and downblousing. I raised concerns in the Second Stage debate about images of

women breastfeeding in public not being covered. I still think that the clause does not cover that. Have you looked at that? There is a campaign in England to get that into legislation. Have you an opinion on that? In your opinion, does the current clause 1 cover women who have had pictures taken of them for a laugh or for any other reason when they are breastfeeding in public?

Professor McGlynn: Thank you for that point. You are right that it is being discussed and debated in England and Wales. A provision is proposed for one of the Bills going through the English Parliament.

In the current draft in Northern Ireland, a woman simply breastfeeding her child would probably not be covered. That is because, again, it would not be a covert image unless there was a circumstance that meant that it was covertly taken. Simply taking a photo of a woman breastfeeding would not be covered under those particular provisions. My view is that there is a space for particular legislation to target the act of breastfeeding. To guarantee women's privacy and encourage them to breastfeed, the legislation should say that breastfeeding is a protected act that cannot, because of its nature, be photographed. My concern is that, if the voyeurism legislation is used to cover breastfeeding, effectively, a woman sitting on a train with a low-cut top or an image taken from on high in a theatre or supermarket would also be covered. That would be problematic for the law. We should restrict the scope of downblousing, but there is space or room for a specific provision that covers only breastfeeding.

Miss Woods: Thank you. The focus on where that could go is very interesting.

You mentioned upskirting and the specific case in Northern Ireland that this legislation tries to deal with. I agree with your comments on motives, what is and is not covered and what gaps will, if the Bill is enacted as is, remain. From your experience and research, do you see any problems or issues in criminalising other motives such as "just for a laugh" or male bonding? From your research, have there been any problems with the legislation in New South Wales? Certainly, I wish to close the gap in the legislation. Not covering motives in the Bill would blow open the defence of "just for a laugh" or male bonding.

Professor McGlynn: You are right that, if we do not cover the sorts of cases that you have talked about, the law will be ineffective. We know from the police that having provisions around motives in similar legislation, such as that on distributing intimate images without consent, means that they are less likely to take cases forward. Motive is very difficult to evidence and prove, so it is an additional hurdle. That is one of the reasons for the high attrition level.

The solution is not to list more motivations but to focus on consent. In other words, the legislation would be that taking an image up a woman's skirt "without her consent" is the offence. If you intentionally take that image without her consent or without a reasonable belief in her consent, that is the offence; motives do not need to be proven. It is important to remind ourselves that, in practice, most criminal and sexual offences do not require motive. Therefore, there is no reason for introducing motives in these offences, which particularly affect women. The focus on consent is what is required, not the listing of more motives.

Miss Woods: Thank you. There are really interesting pieces in your submission about deepfakes, or fake porn, and cyber-flashing. Is there anywhere to where the Committee can look for good practice in that area? We modelled a previous Bill very much on Scotland: the Domestic Abuse (Scotland) Act 2018 was the so-called gold standard for criminalising coercive control. I am interested to see whether you can point us to anywhere to see good practice on deepfakes.

Another issue that we keep coming across in Northern Ireland is that we do not have powers to govern telecommunications. Those are reserved matters, meaning that Westminster is responsible for them. Is there any way for the Bill to work around that? Would it, for example, work to have provisions covering deepfakes, fake porn and cyber-flashing without our having control over telecommunications primary legislation? Is that a barrier, or could we look at that?

Professor McGlynn: Thank you for that. The Scottish legislation covers the criminal offence of distributing fake porn, or deepfakes. The Irish provisions cover that, and so do those of many other countries. It is very straightforward: it is about removing from the existing legislation a couple of clauses that exclude altered images. Remove those clauses, and the law will then apply to them. It is quite straightforward, and it is the law in many other jurisdictions.

When talking about control over telecommunications, we need to think about the fact that there are different ways of trying to control deepfake pornography. One is to criminalise the person who shares the deepfakes, and that, I guess, is what we are talking about here. Other ways to control it include, for example, getting the platforms to remove the deepfakes. That may be what you are getting at when you talk about telecommunications powers. Of course, that is one of the issues to be debated as the Online Safety Bill goes through Westminster. That Bill needs to be much tougher to ensure that platforms remove material such as image-based sexual abuse and deepfake porn. That part may be for the Westminster Government, but the criminal offences that relate to sharing images, or cyber-flashing, fall within the competence of the Northern Ireland Assembly, as I understand it.

Miss Woods: Thank you. It is just that we are looking at things that obviously need to be covered in legislation. Barriers and hurdles may well come down the line with a lot of things that we are doing, including in the Protection from Stalking Bill, which includes online stalking, so there will be a question of how we work around our lack of control of telecommunications legislation. If, however, it is about removing something from our legislation, we need to look at that.

Cyber-flashing has been brought up recently, and we know that it is increasingly an issue. You have provided your research findings and recommendations. I read your submission. I have to admit, however, that I did not read the whole policy briefing, but I will. Among your data and information on reports of cyber-flashing, did you come across any data on Northern Ireland specifically, or was your research based on the UK- or GB-wide experience?

Professor McGlynn: That is a very good question. I would have to go back to some of the studies to see whether any specific pieces apply just to Northern Ireland. I am not sure that they do, but I will double-check.

Miss Woods: No problem. Chair, I could go on all afternoon about this submission, but I will not. Thank you very much, Clare.

The Chairperson (Mr Storey): Again, the submission has given us a lot of food for thought on the practice in other jurisdictions when dealing with deepfake porn, cyber-flashing and all of that. It might be useful for the Committee to initiate some research. We will do that now so that we do not lose sight of it, if members are agreed. Rachel raises a valid point about telecommunications. We might be able to include that in the research as well, in light of the proposed Online Safety Bill in the House of Commons.

Ms S Bradley: Thank you, Clare, for your submission and your presentation. May I be so bold as to say that its content is standout? It certainly made me sit up in my chair and have thoughts about areas of the Bill to which I genuinely had not given that level of consideration. It has taken my thinking off in directions that I had not tended to go. I genuinely thank you for your submission and presentation, both of which are so rich in content. We have gone through quite a bit of the submission with you, and I will not take you back over those points.

One of your points was about motivation. I hear you: forget about that, go in earlier in the Bill on consent, and look at whether consent was there. You referred to a "covert"-type event leading to an image — maybe an image was doctored to be a deepfake — and how it was originally sourced. Clare, are you saying that the Bill should be absolutely silent on motivation and that, if we pin down the earlier piece on consent, we do not need to visit that all? Rather than visiting all those things that, as you rightly point out, we have missed, such as distribution, financial gain, the network and people speaking up, is it as simple as being silent on motivation?

Professor McGlynn: Yes, in essence. There are examples from other countries. I have drafted some suggested text for a cyber-flashing offence, which, as I said, is quite straightforward. In essence, if you take an image without someone's consent and you distribute that etc, that is the offence. There is still the element of intention. You still have to prove that the person intended to distribute that intimate image without your consent. You still have to prove that, but you do not have to prove the particular motive as well. That can be the case for deepfakes, distributing intimate images, taking such images, as happens with upskirting and downblousing, or sending them, as happens with cyber-flashing. It is quite straightforward. I can send some more examples of legislation in other jurisdictions to show you what that looks like, if that would be helpful. You do not list the motivations; you focus only on the consent.

Ms S Bradley: I would appreciate that information, Chair, if it is possible to get that via the Committee.

Rightly, Clare, you have steered us in the direction of some things that we should be researching ourselves as we look at the powers that we have in Northern Ireland.

I will jump ahead, because colleagues have covered some of the content. You talked about education and the agencies engaged in dealing with victims before or after offences occur. Your research led you to say that minority groups, particularly black women, are much more likely to be subjected to online abuse. Are there good examples of practice where thinking has become refined in how you reach out to those minority groups and help them directly?

Professor McGlynn: That is a very important point to highlight. Online abuse, and harassment particularly, affects some groups more than others. Black and minority ethnic women are particularly affected. I can speak about examples of support and reaching out in England and Wales, where organisations like Imkaan and the Angelou Centre work specifically with black and minoritised women. In this field, they have been powerful voices in raising awareness about the ways in which women from those communities are affected by things like image-based and online abuse. My understanding is that what is important is to resource organisations that work directly with black and minoritised women to understand their experiences, thereby ensuring that we raise those voices in this sort of debate and that they get the support.

Is there anything else?

Ms S Bradley: That is helpful. I would appreciate those follow-up pieces, Clare, because your paper will be on my desk for many weeks. Thank you so much. I appreciate that.

The Chairperson (Mr Storey): No other members have indicated that they wish to ask a question. Thank you, Clare, for your submission, your time today and your thought-provoking comments, which, as Sinéad said, will give us all food for thought as to how we scrutinise the Bill and try to get to a point where the Bill is fit for purpose. That is the thrust of what you, along with others, have been saying. Thank you, and we look forward to further engagement with you on some of the information that was mentioned. I wish you well.

Professor McGlynn: Thank you very much, and I will send that information to you.

The Chairperson (Mr Storey): Thank you, Clare.