



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Justice (Sexual Offences and Trafficking
Victims) Bill: Northern Ireland Human Rights
Commission

25 November 2021

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Members present for all or part of the proceedings:

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

Witnesses:

Miss Rhyannon Blythe	Northern Ireland Human Rights Commission
Ms Alyson Kilpatrick	Northern Ireland Human Rights Commission
Ms Sarah Simms	Northern Ireland Human Rights Commission

The Chairperson (Mr Storey): I welcome the witnesses from the Northern Ireland Human Rights Commission: Alyson Kilpatrick, the chief commissioner; Rhyannon Blythe, the director of legal policy research and investigation; and Sarah Simms, a policy and research officer. You are all very welcome. I advise you that Hansard will record the proceedings and that a transcript will be published on the Committee web page. Alyson, I ask you to briefly outline the key issues with the provisions of the Bill and any gaps that you see. We will then have an opportunity for members to ask questions. You are all very welcome to the Justice Committee. Thank you for your written submission and for joining us today. Alyson, I hand over to you. Thank you.

Ms Alyson Kilpatrick (Northern Ireland Human Rights Commission): Good afternoon. Chair, thank you very much for inviting us. I am delighted to be here. It is my first appearance before you as chief commissioner, and I am here with, as you said, the two real experts, Rhyannon and Sarah Simms, who did the work on the submission; it was before my time. We are here to help in any way that we possibly can.

You have our written submission. In fact, you have had a number of written submissions over the last two years on many of the issues addressed in the Bill, so what I will do, with your permission, is confine myself to a few short points of a more general nature. That will leave more time for you to point me where you are most interested. I know that you have a packed agenda, so I should say at this stage that we are ready and willing to follow up on any points in writing, if that would be helpful. I had the opportunity to listen to Victim Support, and already there are some additional documents I can think of that might be useful, but I will come back to that at the end.

I start by saying that we broadly welcome the Bill, but we regret that a number of issues intended for inclusion did not make their way into this Bill as a comprehensive enactment. Those are, for example, biometric retention and the criminal age of responsibility and, probably more importantly, given the thrust of the Bill and what we are talking about today, the reversal of the burden of proof in relation to sexual offending and minors. We remain strongly of the view that the burden should be reversed if the criminal justice system is to be effective in protecting the most vulnerable from grave human rights violations. In fact, the commission has been calling for that since at least 2013 and certainly since 2014, when it made a written submission. In our submission, we have set out the various human rights standards that apply, including how the right to a fair trial and the right against conviction without proof can be balanced. We have balanced the rights of the suspect with the rights of the victim in those situations, and we can come back to that, as I say, if needs be. We also welcome the proposed amendments, and we have made a full response on those.

I said that I would be brief, and I intend to stick to that. I will make three general points, if I may. The first is that domestic and sexual violence and abuse are all part of the same thing. They are all grave violations of human rights, against which victims have a legal right to protection and redress through the courts. They involve the breach of a number of rights, most particularly the right to life, the right not to be tortured or subject to inhuman or degrading treatment, and the right to bodily integrity. You could say that those are the three most fundamental rights of all. That is the foundation for the commission's approach to the Bill, which we say is not just desirable but essential.

It is seen that victims have been failed so far, so any opportunity should be taken to correct that. In our view, it goes beyond the criminal justice system and links directly to, for example, housing, welfare, childcare, healthcare etc. No Bill alone will tackle all the issues if those are not linked together. I mention in passing the family justice centre that will be opened next year in Foyle by Foyle Women's Aid, which will try to pull all those sectors together.

The Lanzarote convention has been mentioned. The UK Government say that they intend to ratify that, so I ask the Committee, when considering any provisions in the Bill or any future provisions, to press for ratification. That would be an important step forward and particularly timely, given that today is the International Day for the Elimination of Violence against Women. The commission would also like to remind you of the relevance of article 2 of the protocol and the particular relevance of the EU victims directive, which falls within the scope of the UK's non-diminution obligation. That must be considered, together with relevant Court of Justice jurisprudence, when developing and implementing legislation that has an impact on victims. I am sure that the Committee knows that the commission, with the Equality Commission, forms a dedicated mechanism, and we can advise further, if required.

Secondly — very much tied to that same point — is the need for really good disaggregated data. There needs to be an acceptance, in the commission's view, that domestic violence and abuse are gendered. Unless that is recognised and informs the response, we will keep going around in circles. There is a worrying tendency to use gender neutrality, which is very laudable in most instances, in a way that can actually undermine attempts to protect victims. The vast majority of victims are female, and there are many reasons for that. The research backing that up is abundant. Recognising the gendered nature of violence and abuse does not neglect male victims. Male victims are not served well either if the nature and scale are not properly understood. We really need to know what and whom we are dealing with. Once and for all — people keep calling for this, and Janice did so again — there must be a concerted effort to gather reliable data. The law needs to be tailored to meet the needs of victims, strategies need to be developed to tackle the myriad issues in a very practical way and, therefore, resources need to be allocated appropriately. In our view, that data should be published widely so that it can be used and drawn on by experts, not just in the legal field or in the protection field.

Local expert training has been mentioned, so I will not labour that point, but we would strongly endorse the evidence, statistics and data collection feeding into that training. What cannot be allowed to happen is for that data collection to be left to, for example, Women's Aid or academic researchers alone, because they do not have access to much of the information that is held by the police, the Public Prosecution Service (PPS) and the Courts and Tribunals Service. It needs to be done very formally and centrally. We know that the success rate is very poor, but we do not know with any real certainty where the main focus should be. As I said, the PPS, the police and the Courts and Tribunals Service all hold the information that allows cases to be tracked through the system and to find out where in particular they are falling out. We also lack reliable information about victims' experience of the court system, civil and criminal. They are linked. Rarely is there a criminal or civil case alone; often there is a mix of the two. Before much more money or time is spent, those views should be sought directly from victims.

Lastly, there is a risk that the focus is disproportionately on sexual offences — I do not say that it has been so far in this debate — as traditionally seen, such as rape and sexual assault. The commission therefore welcomes the inclusion of emerging, new types of offending using the internet and social media. We also simply make the point that those forms of offending are symptomatic of the issues that we have been seeing for decades, albeit they are committed differently and more visibly. It is quite important to keep that in mind. In the same context, we ask the Committee not to lose sight of offending within intimate partner relationships, which is all part of the same package. It is still the most common crime of all and is often overlooked. That is rape, for example, and other sexual offences within intimate relationships. No doubt, you will hear from representatives from Women's Aid and people like that with particular experience and expertise who can help.

I propose to leave it at that and to invite your questions. I will include Rhyannon and Sarah at that stage, because they have been working on the detail of the clauses. However, having heard some of the questions earlier and the evidence of Victim Support, I should perhaps just deal with two issues straight on.

The first is in relation to exclusion from court. Perhaps that is one that the commission can help a little bit more on. We addressed that at some length in our submission, but the commission looks at this, as it must, as a balancing of the rights of victims and suspects. It is not our view that a blanket banning of all access to courts hearing sexual offences is appropriate, but we would certainly welcome proper and effective training for judges and everyone concerned in the criminal justice system so that individual decisions in individual cases are considered properly. It should be victim-led. From my professional experience, I know victims who actually wanted to have public court hearings, for any number of different reasons; they did not want them to be closed to the public. It should be considered on a case-by-case basis, but we should make sure that it is properly considered. In the past, the problem was not properly considered and victims were not invited to give testimony about that.

The other point is in relation to the rough sex defence, which was specifically mentioned. Rhyannon can talk more about that, but we also addressed that in our written submission. We say that it cannot be a defence to serious harm for sexual gratification, but we did submit an earlier written response that gave some advice about what the legislation could be. That was back in January 2021, and it is noted on page 23 of our written submission, but we can certainly pull that together and send that on if it would be helpful. That is a detailed analysis of what the legislation could be.

I will remain in your hands, if you want some of the detail to be addressed first or if you want to simply ask questions. I can split the answers up between myself, Rhyannon and Sarah.

The Chairperson (Mr Storey): Alyson, it would be good if we could go to members, and we can call on Sarah and Rhyannon if any clarity is needed on particular aspects. It was an oversight on my part at the start not to welcome and congratulate you and to wish you well in your new role. There was an overlap between you leaving a previous occupation and me taking up a role on the Policing Board, but I assure you —

Ms Kilpatrick: I have caught up with you. *[Laughter.]*

The Chairperson (Mr Storey): I saw many of the submissions and papers that you worked very extensively on, and that was very much appreciated. Congratulations on your new role.

Ms Kilpatrick: That is kind of you, thank you.

The Chairperson (Mr Storey): I will ask a question in a general sense. Obviously, the ambit of international human rights is very wide. Are you concerned that there are any other provisions in the Bill or the proposed draft amendments that may not be fully compliant with international human rights standards, in that broadest sense of what we understand those to be?

Ms Kilpatrick: The provisions in our submission where we deal with omissions probably cover all of that. I will invite Rhyannon to come in on that. She drafted the section on omissions and the proposed amendments, which we also welcome. Rhyannon, do you want to say a few words on the omissions?

Miss Rhyannon Blythe (Northern Ireland Human Rights Commission): Yes, thanks very much. One of the commission's concerns is that the reversal of the burden of proof has not been dealt with in the present Bill. That, perhaps, is very much a missed opportunity. It is an issue that the commission has flagged for quite a number of years now. International UN treaty bodies have also raised a

concern about it in respect of the UK. Both the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child have called for the reversal of the burden of proof in sexual offences from the prosecution to the defence. We hoped that that would have been addressed in the Bill, but it does not appear to feature in it. The reason behind that is to ensure that all children are protected from legislation of that nature and that there is no impunity for the exploitation of children. The treaty bodies have taken the view that the burden-of-proof issue contributes to that.

The Chairperson (Mr Storey): On that point, when we come to this Bill, there is an elephant in the room. I suppose that it is better that we all try to have an understanding of this. There was an attempt to have a focused Bill, because the difficulty with a miscellaneous provisions Bill is that it covers everything from Dan to Beersheba. It can become very wide and broad. Of course, the reverse of that is, when you try to narrow down a Bill, you can be accused, or it can lead to unintended consequences of something not being included. It is maybe unfair to ask this question, and we are happy for you to come back to us on it. Do you see anywhere in the Bill where the burden-of-proof issue could be included, which would not take away from the intent of the Bill? Obviously, any amendments and so on have to pass a certain threshold of admissibility.

Miss Blythe: Chair, we have not taken a particular view on a particular clause to which an amendment could be drafted to bring the issue in. We have not commented on that in our submission. We recognise the practicalities of a more streamlined Bill, and we recognise that time is very much of the essence before the end of the mandate. One of the things that we want to flag to the Committee is that, if it is not possible for it to be brought in within the scope of the present Bill, the Committee may wish to raise that with the Department with regard to bringing in a separate piece of legislation in the new mandate.

The Chairperson (Mr Storey): OK. Thank you.

Ms Kilpatrick: I will add to that. We appreciate that there is a danger both ways: of having too much in the Bill or too little in the Bill. We recognise the genuine, practical efforts to address issues quickly, but we hope that the other issues are not forgotten about for future Bills.

On something specific that could be done about the reversal of the burden of proof, something could possibly go into the Sexual Offences (Northern Ireland) Order 2008. I direct you back to the Marshall report, which made a specific recommendation. If we are going to give you more information, perhaps I can pull together the relevant paragraph and send it through to you. That may just help in relation to where that —

The Chairperson (Mr Storey): Thank you. That would be very helpful. I have one more question, and then I will open up to members. Some of the evidence received by the Committee suggests that the Bill should be amended to cover all forms of upskirting, rather than requiring sexual gratification as the motive. What is your view on that?

Ms Kilpatrick: We would endorse that. The motive makes it much too difficult. Whether it is for sexual gratification or whether it is a prank, if a person has not consented to it, it should not happen. Sarah has looked at that in more detail. Sarah, do you want to say something about that?

Ms Sarah Simms (Northern Ireland Human Rights Commission): I support what Alyson has just said, and I will come in, off the back of that, to highlight that we made an additional recommendation regarding the summary conviction. In the draft Bill it is six months, but it is 12 months in the rest of the UK, and we should seek to ensure that there is equal protection across all UK jurisdictions.

The Chairperson (Mr Storey): OK. I will open it up to members.

Miss Woods: Thank you very much for your submission and for giving evidence today. On the last point, about the person guilty of an offence on summary conviction and the difference between the six-month term, which is in the current Bill, and the 12-month term, it is my understanding that those provisions in the English legislation have not been commenced, so it is currently the same. I am not sure whether I picked that up wrong, but my understanding is that the standard term on summary conviction is six months. I am not too sure why that happened, but would the Human Rights Commission support us putting that on the same footing and then commencing it, if we are able to do that?

Ms Kilpatrick: The Human Rights Commission's concern is that there is a danger of trivialising the offence if there is a different sentencing framework in a different jurisdiction in the UK. I am not sure whether it has been brought into force yet. It is my understanding that they intended to bring it into force. Sarah, do you know what the current position is in GB?

Ms Simms: No. I would have to double-check that. Women's Aid also raised that point in its submission.

Ms Kilpatrick: To be blunt, the main issue is probably with the symbolic aspect of having different sentencing thresholds on these islands rather than with six or 12 months being a deterrent.

Miss Woods: Thank you. I am still trying to get confirmation of whether or not it has been commenced, but I know that this draft Bill looks different from the law in England and Wales. I agree that the fact that — for no apparent reason — there is a difference makes it look different on the surface. If it has not been commenced in England and Wales, that is a different situation, but that does not mean that it should not be the same here.

I have couple of other questions. We received some evidence last week and discussed deepfakes, fake porn and cyber-flashing. Would the Human Rights Commission support us looking to include that in the Bill to make sure that it is covered?

Ms Kilpatrick: Yes.

Miss Woods: OK, great

Ms Kilpatrick: Yes — that is the short answer. *[Laughter.]*

Miss Woods: That is fine. I love a short answer. I was at the Economy Committee yesterday, and it was the same. It is good when you just give one-word answers.

This is a very specific question. From a human rights point of view, and from your experience and research elsewhere, are you aware of whether there are any circumstances available for an adult to masquerade as a child online? That is not just in relation to the purposes outlined in this Bill. We received evidence from the children's sector and were trying to figure out whether there is ever an occasion when an adult can masquerade as a child online. I am struggling to find out where that is. Have you ever looked at or come across anything that would be covered under human rights?

Ms Kilpatrick: There is a very short answer to that, and it is in the word "masquerading". Forgive me if I sound facetious, but an adult can be a puppet, a clown or something along those lines, but there is no disguising the fact that it is an adult. It is a person communicating with a child entirely properly, and any adult with the child can know exactly who the child is engaging with.

I cannot think of an example; I certainly have not come across one in practice. There is no right to misdescribe yourself online, so I cannot think of any right that would be protected or even engaged in relation to an adult's right to masquerade. I cannot think of any job in which an adult would be prejudiced in any way by not being able to masquerade online.

The only potential area that you might have to look at, although, I am pretty sure, it is already provided for, relates to criminal justice in investigations — essentially, covert human intelligence sources and that sort of thing — but that is closely circumscribed, and there are very strict rules around it under the surveillance provisions in the Regulation of Investigatory Powers Act 2000 (RIPA). It becomes very dangerous when, for example, vigilante groups engage in that sort of activity to try to, in their words, "flush out" perpetrators.

I said that the answer would be short; it was not as short as I meant it to be.

Miss Woods: That is fine.

Ms Kilpatrick: I cannot think of any situation; if I am wrong and my colleagues can think of one, they will interrupt. We have not been made aware of one.

Miss Woods: OK. Thank you. We will have the police today as well. The issue of human intelligence was evident in their submission too. Why anybody would use that to monitor a child is beyond me, but that is a whole other aspect. Thank you for that.

You brought up the question of gender in relation to data collection. I am looking at that, and we have discussed it a number of times with the last couple of Bills that the Committee has looked at. Similar issues have been brought up in many other areas and in relation to data collection around children, especially through the criminal justice system. I want to check again on this: given the Human Rights Commission's opinion, do you see any issue at all with collecting and publishing disaggregated data based on, for example, section 75 lines?

Ms Kilpatrick: No.

Miss Woods: OK. Thank you.

Ms S Bradley: Thank you for the presentation and the last answer in particular. Let me run this by you, if possible. I hear you about the age of consent, the burden of proof and the bigger pieces that have been missed out of the Bill; to be honest, I could not agree more. I go back to what the Chair said about the burden of proof, particularly in sexual cases or exploitation. For example, is the conversation that we are having about moving from writing descriptors of intent to focusing on consent not a vehicle in itself? It may not speak directly to the bigger picture about burden of proof, but could small but significant amendments be made throughout the Bill to support the victim with the burden of proof? Are there opportunities for us to go further that we have, perhaps, overlooked? I would appreciate any further thoughts on that.

Ms Kilpatrick: I will give a general, short answer to that and invite my colleagues to say something in more detail if I have not covered it. With things like this, there is a real danger in itemising or providing too many indicative factors. From a practical, legal perspective, what can end up happening is that courts, lawyers and juries start ticking off checklists, and if something has not appeared in the evidence, it is almost seen as consent having been given or motivation having been different. It almost would take us back to the days when people would say, "There is no evidence that she resisted". I know that that is not directly an answer to your question, but it is part of the general context and principle behind approaching all these provisions. Rhyannon, do you want to answer that shorter point?

Miss Blythe: Apologies, Chair and members. I dropped out there, and I have been struggling to get back in, so I missed the question.

Ms S Bradley: I do not mind going over it again, Rhyannon. I will do it briefly. While I appreciate that the Bill in front of us and the clauses in it is not the body of work on the burden of proof that you and I had hoped would be in front of us, are there chinks of opportunity throughout the Bill where we could say, "Looking at this part, we could ease the burden of proof to a victim"? Maybe we are just not going far enough on that particular objective.

Miss Blythe: Yes, potentially. On having a Bill that could potentially make some changes there, I suppose we just need to look at the specific clauses to see just where a drafting amendment could be made. As I said, we would have to look at that. Again, I would not be able to give you an answer on the spot on that one. It is not something that we had specifically looked at for the evidence today.

Ms S Bradley: Thank you. Chair, if possible, I think that that would be helpful because, whilst I do not doubt the Minister's word when she talks about a commitment to the next mandate, I am not sure that any Minister has the gift of speaking to the next mandate. So, whilst she may leave Post-its on her desk, that certainly would not be enough to satisfy me. I would not want us to miss any opportunities, if there are any at all. I am not suggesting that there are, but I know that, if anybody had an eye to it, it would be you. I would genuinely appreciate it, Chair, if that could come back to the Committee.

The Chairperson (Mr Storey): Thanks, Sinéad. I do not see any other members indicating that they want to ask a question. Alyson, I thank you and your colleagues for joining us today. Again, thank you for your submission and for your commitment to provide some further information to us. We look forward to continuing to work with you during the passage of this Bill and in relation to all the other work that the commission undertakes.

Ms Kilpatrick: Thank you very much. We have enjoyed being here.