

Northern Ireland Assembly, Committee for Justice
Justice (Sexual Offences and Trafficking Victims) Bill
Supplementary Evidence Submission, [Professor Clare McGlynn QC \(Hon\)](#),
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During my oral evidence to the Justice Committee on 18th November 2021, the Committee asked for further information on a number of matters. I undertook to provide supplementary evidence responding to those requests. This supplementary evidence is best read alongside my [written evidence](#) and includes the following:

1. Cyberflashing

- a. A review of survey data on cyberflashing and whether any such info on Northern Ireland; and
- b. Draft text for a consent-based cyberflashing law

2. Consent-based criminal laws as models for provisions on downblousing and upskirting

- a. Recommendations to amend existing draft Bill to include reckless intention which would expand the scope of the proposed offences, drawing on examples from Ireland and Scotland (new recommendation); and
- b. Recommendations to amend draft Bill to a consent-based provision, drawing on laws in Australia and the US (further evidence the Committee requested).

3. Canadian laws on sexual exploitation of 16 and 17 year olds

- a. Available information on Canadian provisions on abuse of trust and exploitation.

1. Cyberflashing

Northern Ireland stats on cyberflashing

- The Committee asked whether there were any statistics on cyberflashing covering Northern Ireland. Unfortunately, the survey from [You Gov](#) finding that 4 in 10 millennial women have been sent a penis image without consent only applies to England, Wales and Scotland.
- The recent survey from the dating app [Bumble](#) which found 48% of women had received a sexual photo they did not want only covers England & Wales.
- Statistics from [British Transport Police](#) of reports on cyberflashing only cover England, Wales and Scotland.
- Nonetheless, while there are no specific statistics covering Northern Ireland, there is no evidence to suggest that there is a lower incidence of cyberflashing or other forms of online abuse in Northern Ireland.

Proposed Text of Consent-based cyberflashing offence

- My [previous evidence](#) to the Committee recommended introducing a cyberflashing offence which is based on principles of consent, rather than the motive-based focus of English Law Commission proposals. The 'consent-based' approach is recommended as it is comprehensive,

covering all forms of cyberflashing, and addresses the core wrong, ie non-consensual sexual conduct.

- The possible introduction of a cyberflashing offence is also being debated in England & Wales. In that context, I have drafted a consent-based provision which can be considered for adoption. The proposed text is below and further explanation of supplementary definitions can be found [here](#).

Distribution of genital images without consent

A person (A) commits an offence if –

- (a) A intentionally distributes a photograph or film of A's or any other person's genitals to another (B) and*
- (b) B does not consent to the distribution and*
- (c) A does not reasonably believe that B consents to the distribution.*

2. Consent-based criminal laws - downblousing and upskirting

The Committee requested further information on consent-based criminal laws on intimate image abuse. In this supplementary evidence, I first briefly set out the three possible approaches to legislation which includes the possibility of a recklessness standard being introduced (not considered in previous evidence). I then provide some detail on each, together with the specific examples of consent-based approaches.

There are three main approaches to drafting new criminal offences covering downblousing and upskirting:

- (a) Current position of 'motive-based' law and proposals:** Northern Irish current law (on non-consensual distribution of sexual images) and proposals (on downblousing and upskirting) require proof of specific motives which means the laws are not comprehensive and exclude many cases where offenders motivated by humour, banter, pranks and boosting their status among friends.
- (b) Alternative including reckless intention:** If a consent-based approach is not followed, the next best alternative is to include reckless intention. This would mean only having to prove an offender was aware of the risk of causing distress, even if that was not their main aim or purpose. Scots and Irish law include recklessness.
- (c) Alternative 'consent-based' laws:** The most appropriate approach is to base the law on consent and reasonable belief in consent, as is the case for most sexual offences. Many of the state laws in Australia and the US follow this approach.

(a) Current law and proposals – 'motive-based' offences

Northern Irish and English law on non-consensual distribution of private sexual images ('revenge porn') provide that the offence is committed *only* if it can be proven that the perpetrator acted with the intention to cause distress to the victim.

Similarly, voyeurism laws also require proof of specific motives, in this case of sexual gratification.

English and Scots laws on upskirting require proof of motives of either sexual gratification, or intention to cause distress, harm or humiliation.

Therefore, each of the offences is limited to only certain circumstances and the laws are not comprehensive.

In particular, the laws do not cover upskirting, voyeurism or distribution of intimate images where the offender acted for humour, a prank, to boost their status amongst friends and similar.

(b) Reckless as to causing distress

An alternative to requiring proof of a direct intention to cause distress, or of sexual gratification, is to allow reckless intention. This means that where an offender is aware of the risk of causing harm, but goes on to take that risk anyway, they would commit the offence. Therefore, even where causing distress was not the main aim or purpose, if it can be shown they were aware of the risk, then they could be found responsible for the offence.

In relation to the purpose of sexual gratification, this could be reframed to include the purpose of gaining sexual gratification *and* being reckless as to causing distress, alarm or humiliation.

[Scots law](#) on non-consensual distribution of intimate images includes a recklessness standard.¹ The inclusion of reckless intention in the legislative drafting of the Scots provision is more straightforward as there is only the one intention included, namely causing distress to the victim.

[Irish law](#) on intimate image abuse with intent to cause distress also includes recklessness and applies to taking or sharing intimate images.²

NI upskirting/downblousing proposal including recklessness

The current draft proposal includes two purposes – sexual gratification or causing distress, alarm or humiliation to the victim. The intention/purpose element is drafted in a slightly different way to the Scots and Irish provisions referred to above, and includes the purpose of gaining sexual gratification. The draft could be revised, drawing on Scots and Irish law, to include:

the intention to gain sexual gratification and being reckless as to whether the victim is caused distress, alarm or humiliation; or

the intention to cause distress, alarm or humiliation, or being reckless as to whether the victim is caused distress, alarm or humiliation.

(c) Consent-based laws

The most appropriate alternative is to focus on non-consent, rather than proof of specific motives. This focuses on the core wrong of the behaviour – lack of consent. This is the basis for most sexual offence laws.

The current draft proposals for upskirting and downblousing could be revised to remove the requirement to prove specific purposes. A proposed revision is included in the evidence submission of the [NASUWT](#).

New South Wales, Australia:

There are other jurisdictions which take a consent-based approach. For example, the laws on non-consensual taking or sharing of intimate images in [New South Wales](#), Australia, are as follows.³ An offence is made out where:

‘A person who intentionally records an intimate image of another person (a) without the consent of the person and (b) knowing the person did not consent to the recording or being reckless as to whether the person consented to the recording, is guilty of an offence.’

3. Canadian laws on child sexual exploitation and positions of trust

- The Committee asked for further information regarding Canadian provisions on sexual exploitation and breach of trust. It will be recalled that [section 153 of the Canadian Criminal Code](#) provides for an offence of sexual exploitation where the adult is ‘in a position of trust or authority towards a young

person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person’

- The advantage of this approach is that it ensures that any exploitative sexual activity is included, rather than the ‘list-based’ approach in current legislation (and reform proposals in England and Wales) which necessarily exclude many exploitative adult-young person relationships.
- **Canadian legislation:** The legislation in Canada was first introduced in 1988. It was amended in 2005 to include exploitative relationships, in addition to relations of trust and dependency, following cases where prosecutions were unsuccessful.
- **Data:** There is little data available on prosecutions because publicly available is not sufficiently detailed to cover specific offences, though there is some [data](#) from 2012 which confirms a number of prosecutions under this offence. In general, Canada collects statistics (as in England & Wales) based on the most serious charge. Therefore, cases involving sexual assault/rape will be recorded as such, even if originally charged together with section 153. Colleagues in Canada are of the view that few charges are brought under these provisions since the age of consent was increased to 16, due to lack of police/prosecutorial prioritization of such cases as well as the general reluctance of young people to recognize and report exploitative relationships.
- **On-going legal debates:** There also remains considerable legal debate in Canada over the interpretation of what constitutes both a ‘position of trust’ and ‘exploitation’ (with some cases going to the Supreme Court). It is rarely clear whether there is such a relationship. Further, cases suggest that terms such as ‘coach’ or sport are not as obvious as might be assumed. For example, a conviction for breach of trust was quashed in a case where a horse trainer aged 40 had a sexual relationship with a 15 year old girl who was a keen rider (*R v Poncelet* 2008). He was not her coach, or teacher, but over many months showed her various horse-keeping and riding skills from his experience and work as a horse trainer. It was held that this did not constitute a position of trust.
- **In summary,** there are few easily accessible statistics on rates of prosecution from Canada (the NIA may be able to source info from the Canadian government directly). There also remains considerable debate regarding what constitutes a ‘position of trust’ and an exploitative relationship. I would suggest that the lesson from this is that while a flexible law (including terms such as exploitation rather than listing specific professions or roles) may still be subject to debate regarding its boundaries, it does at least provide opportunities for prosecutions and is flexible to adapt to changing understandings of appropriate and exploitative sexual relationships.

¹ Section 2(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016: Disclosing, or threatening to disclose, an intimate photograph or film

(1) A person (“A”) commits an offence if—

(a) A discloses, or threatens to disclose, a photograph or film which shows, or appears to show, another person (“B”) in an intimate situation, (b) by doing so, A intends to cause B fear, alarm or distress **or A is reckless as to whether B will be caused fear, alarm or distress, and** (c) the photograph or film has not previously been disclosed to the public at large, or any section of the public, by B or with B’s consent.

² Harassment, Harmful Communications [2020.] and Related Offences Act 2020, section 2 (1) A person who distributes, publishes or threatens to distribute or publish an intimate image of another person— (a) without that other person’s consent, and (b) with intent to cause harm to, **or being reckless as to whether or not harm is caused to**, the other person, is guilty of an offence.

³ See also [Illinois](#) in the US.