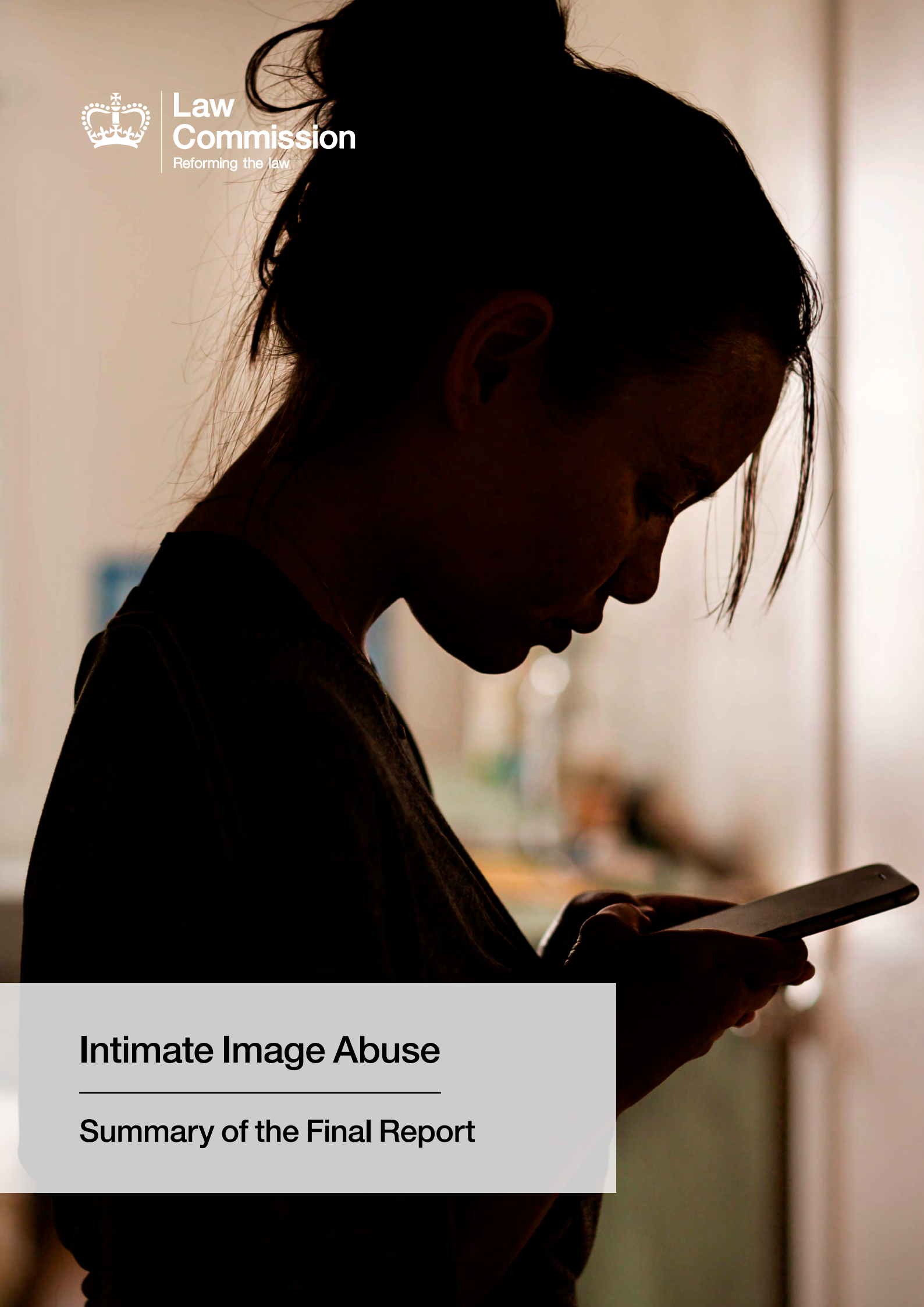


Law Commission
Reforming the law

# Intimate Image Abuse

## Summary of the Final Report

# Introduction

## Intimate image abuse

It has never been easier to take and share images. Items we interact with every day - smartphones, laptops, tablets, even smart TVs - can record images. With just a click of a button, a photo or film can be sent instantly to a friend two hundred miles away, or shared with a million people at once on social media. This also means it has never been easier to take or share images of others without their consent. This is particularly worrying when those images are intimate; for example nude photos, videos of sexual acts or photos taken secretly underneath clothing.

The non-consensual taking and sharing of intimate images can have a significant and long-lasting impact on victims. We refer to this as intimate image abuse. It **violates the sexual autonomy, bodily privacy and dignity** of the person depicted. Victims of intimate image abuse can experience **serious and significant harm** such as psychological harm, worsening physical health, and financial loss. The law recognises that intimate image abuse is **harmful and wrongful**. Over time, a patchwork of offences has been developed to try to address the evolving nature of intimate image abuse.

**28,201**

At least **28,201** reports of disclosing private sexual images without consent were recorded by police between April 2015 and December 2021.[1]

**1 in 14**

**1 in 14** adults in England and Wales have experienced a threat to share intimate images.[2]

**38 million**

A website that virtually strips photos of women naked received **38 million** hits in the first 8 months of 2021.[3]

1 https://www.independent.co.uk/news/uk/england-wales-police-data-refuge-b2080235.html

2 https://www.refuge.org.uk/wp-content/uploads/2020/07/The-Naked-Threat-Report.pdf

3 https://www.huffingtonpost.co.uk/entry/deepfake-tool-nudify-women_n_6112d765e4b005ed49053822

## Law Commission project

The Law Commission of England and Wales is an independent body established by statute to make recommendations to Government to reform the law in England and Wales. In 2019, the Law Commission was asked by the Ministry of Justice to conduct a project assessing the adequacy of the criminal law in relation to the non-consensual taking, making and sharing of intimate images.

We undertook a thorough review of the law resulting in our consultation paper published on 26 February 2021. We identified a number of gaps and limitations in the current patchwork of offences and proposed a more structured legal framework that would better protect victims.

### Consultation

We ran a three-month public consultation, which closed on 27 May 2021. We received 354 written responses from members of the public, professionals and organisations including legal professionals, the judiciary, parliamentarians, police, academics, medical professionals, and victim support groups. We also held a number of consultation events. This consultation process has informed our final recommendations, and we are very grateful to those who met with us or responded to our consultation.

There was significant support for reform to the way intimate image abuse is addressed in the criminal law. The consultation process demonstrated a need for a clearer, more comprehensive framework of criminal offences and better, more consistent, protection for victims of intimate image abuse.

### Report

We have now published our report with final recommendations. This summary provides an overview of our key recommendations. Full details of all our recommendations, the responses from consultees, and discussion of the relevant policy issues, are contained in the report, available at our website: **https://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/**

# Current law and need for reform

Currently, there is no single criminal offence in England and Wales that governs the taking, making and sharing of intimate images without consent. Instead, we have a patchwork of offences that have developed over time. There are four offences that specifically address some forms of intimate image abuse.

### Voyeurism

- Section 67 of the Sexual Offences Act 2003.
- Criminalises recording an image of a person doing a private act without consent if done with the intent that someone would look at the image for the purpose of obtaining sexual gratification.
- Limited to images where the person depicted is in a place which, in the circumstances, would reasonably be expected to provide privacy.

### Sharing of private sexual images ("the disclosure offence") and threats

- Section 33 of the Criminal Justice and Courts Act 2015.
- Criminalises the sharing of a private sexual image of another person, without that person's consent if done with the intent of causing that person distress.
- Recently amended to criminalise threatening to share a private sexual image.
- Images that are altered to become private and sexual are excluded.

### Upskirting

- Section 67A of the Sexual Offences Act 2003.
- Criminalises recording an image, without consent, of another person's genitals or buttocks underneath their clothing when they wouldn't otherwise be visible, if done with the intent that someone will look at the image either for the purpose of humiliating, alarming or distressing the person depicted, or obtaining sexual gratification.
- Introduced to address a specific behaviour known as "upskirting" which is excluded from the voyeurism offence as victims are often upskirted in public not "doing a private act".
- Doesn't include images of breasts.

### Breastfeeding voyeurism

- Introduced by section 48 of the Police, Crime, Sentencing and Courts Act 2022 which amends section 67A of the Sexual Offences Act 2003.
- Criminalises recording, without consent, an image of someone breastfeeding with the intent that someone will look at the image either for the purpose of humiliating, alarming or distressing the person depicted, or obtaining sexual gratification.
- Includes taking images of someone while breastfeeding or adjusting their clothing after breastfeeding, regardless of what is captured in the image.

## Other offences

There are a range of other offences, not specifically aimed at intimate image abuse, that are sometimes used where specific facts permit. This includes communications offences, blackmail, controlling or coercive behaviour, harassment and stalking, outraging public decency, and possession of extreme pornography.

## Gaps and limitations in the current law

### Motivations

Current offences are limited to two motivations. Taking or sharing without consent if done for a laugh, for financial gain, or where there is no specific motivation is not currently covered.

### Nature of the image

Some images taken in public (such as taking an image of a sexual assault in public) and downblousing images are not currently covered.

### Sharing of images

Sharing a sexual deepfake, or sharing with the person depicted, is not currently covered, even if there was an intent to cause the victim distress.

### Anonymity and other ancillary orders

Not all victims of intimate image abuse are automatically eligible for anonymity or special measures. The availability of ancillary orders can also depend on which offence is charged.

The differences between the offences in scope, definition, and available orders cause difficulties in understanding and applying the law, and lead to inconsistent protection for victims. The gaps identified mean that harmful, culpable behaviour is not appropriately criminalised and victims are left without effective recourse.

To address this, we recommend a new framework of offences which uses one consistent definition of an intimate image, covers the full range of perpetrator motivations, and applies protective measures for victims consistently.

# The recommended offences

We recommend a tiered structure of offences starting with a "base" offence and then three offences that are more serious, reflecting the higher culpability of the offender. A fifth offence of installing equipment can apply to an offence of taking an intimate image without consent at either tier.

## Base offence

**It should be an offence for a person D intentionally to take or share an intimate image of V if:**

(a) V does not consent to the taking or sharing; and

(b) D does not reasonably believe that V consents.

It should be a defence if D had a reasonable excuse.

| Sexual gratification offence | Humiliation, alarm, or distress offence | Threat offence |
|---|---|---|
| It should be an offence for a person D intentionally to take or share an intimate image of V if:<br>(a) V does not consent;<br>(b) D does not reasonably believe that V consents; and<br>(c) D does so with the intention that D or a third person will, for the purpose of obtaining sexual gratification, look at the image of V. | It should be an offence for a person D intentionally to take or share an intimate image of V if:<br>(a) V does not consent; and<br>(b) D does so with the intention of causing V humiliation, alarm or distress or with the intention that D or another person will look at the image for the purpose of causing V humiliation, alarm or distress. | It should be an offence for a person D to threaten to share an intimate image of V where:<br>(a) D intends to cause V to fear that the threat will be carried out; or<br>(b) D is reckless as to whether V will fear that the threat will be carried out. |

## Installing offence

It should be an offence for a person D to install equipment with the intent of enabling D or another to commit the offence of taking an intimate image without consent.

# Base offence

All the current intimate image offences require the perpetrator to have acted with a specific intent: either to obtain sexual gratification or to cause humiliation, alarm or distress to the victim. We have heard consistently that this makes the current offences too limiting.

First, it means that anyone who takes or shares an intimate image without consent for any other reason or motivation can avoid criminal liability. Intimate image abuse is perpetuated for many reasons, and sometimes for no clear reason at all. Intimate images may be taken for a joke, shared in exchange for different images in return, for financial gain, to gain social status, or simply because someone felt like it. The conduct causes harm to the victim, regardless of the motivation, or lack of it.

Secondly, it means that prosecutions may fail, or not even be started, if it is difficult to provide evidence of a specific intent. Even if a perpetrator admits to the act of non-consensual taking or sharing, if it cannot be proved that they did so to cause distress or obtain sexual gratification, they will not be prosecuted.

This is unsatisfactory. The fact an image was taken or shared without consent is sufficiently wrongful and harmful to warrant criminalisation. Over 300 consultees supported the introduction of an offence which would criminalise the taking or sharing of an intimate image without consent, regardless of the motivation.

We therefore recommend that it should be an offence intentionally to take or share an intimate image without consent, and without reasonable belief in consent, regardless of motive.

To commit this offence, the intimate image must have been taken or shared intentionally. This means, for example, that if someone shares an intimate image by accident, or takes a photo without realising there is someone nude in the background, it is not an offence.

The base offence should be a summary only offence (meaning that it can only be tried in a magistrates' court), with a maximum sentence of six months' imprisonment.

### Circumstances where taking or sharing an intimate image without consent does not amount to "abuse" and is therefore justified

There will be instances where, even in the absence of consent, the taking or sharing of an intimate image without consent of the person depicted will not warrant criminalisation. This is where the circumstances and nature of the conduct mean it is not morally wrongful or harmful, or the harm caused is minimal.

Proud family members and friends will often take and share nude or partially-nude images of young children such as a photo of a new-born baby uploaded to a social media page announcing the birth. This is a normal behaviour not understood to be harmful. Although it is without the consent of the young child depicted, taking or sharing of this kind is not criminal conduct. We recommend that this type of taking or sharing is specifically excluded from the base offence. We also recommend excluding intimate images of a child taken or shared in connection with the medical care or treatment of the child, where there is parental consent.

In other contexts, taking or sharing without consent may be justifiable because it is done for a legitimate purpose, or in the public interest. For example; where an image of a sexual assault needs to be shared as evidence within court proceedings but the victim is not able to be contacted for consent, or where an image of a breast injury needs to be taken to enable swift medical treatment for an unconscious patient.

While unlikely, we do think that there will be rare occasions where taking or sharing an intimate image without consent is in the public interest and is therefore justified. This may be, for example, where an image of a sexual encounter is the only way to prove a news story of substantial national interest. This does not mean that sharing an image that may simply be of interest to the public will be in the public interest.

**A person D should not be convicted of the base offence where there is a reasonable excuse for their conduct. The defence of reasonable excuse should include:**

(a) taking or sharing D reasonably believed was necessary for the purposes of preventing, detecting, investigating or prosecuting crime;

(b) taking or sharing D reasonably believed was necessary for the purposes of legal or regulatory proceedings;

(c) sharing D reasonably believed was necessary for the administration of justice;

(d) taking or sharing D reasonably believed was necessary for a genuine medical, scientific or educational purpose; and

(e) taking or sharing that was in the public interest.

D should bear the legal burden of proof to establish the defence on the balance of probabilities.

## More serious offences that reflect more culpable behaviour

It is important to have a base offence that enables a wide range of abusive conduct to be appropriately criminalised. We also think it is necessary to have more serious offences, with higher sentences available, for cases where a perpetrator has acted with a particular intent that makes their behaviour more culpable. During consultation we considered a range of motivations and asked which were appropriate to criminalise more seriously. We concluded that where someone acts with a specific intent to obtain sexual gratification, to cause the victim humiliation, alarm or distress, or to threaten the victim, that is more serious behaviour which should be reflected in a more serious offence and potentially higher sentence. There was support from the majority of consultees for recognising more culpable behaviour in this way.

This approach is not intended to reflect the harm caused to the victim of different conduct. We know that the level and type of harm caused is not directly related to the motivation behind the act. It is also not intended to reflect the most common or prevalent types of intimate image abuse. Instead, this approach is intended only to reflect the higher level of culpability where a perpetrator acts with a specific intent. This is similar to the approach in other areas of criminal law including assault, and murder and manslaughter.

The three offences below should be “either way” offences. This means that they can be heard in either a magistrates’ court, or at the Crown Court with a jury. There should be a maximum sentence of two or three years’ imprisonment on indictment (in the Crown Court), or on summary conviction (in a magistrates’ court) to a term not exceeding the general limit in a magistrates’ court.

### Humiliation, alarm, or distress offence

Consultees agreed that taking or sharing an intimate image without consent intending to cause someone humiliation, alarm or distress is a particularly malicious behaviour. It is appropriate to criminalise this conduct separately as it can warrant a higher sentence than would be available for a base offence. We recommend that it should be a more serious offence to take or share an intimate image without consent with the intent of causing humiliation, alarm or distress to the person depicted.

## Sexual gratification offence

Where a person has pursued sexual gratification by violating another's sexual autonomy or bodily privacy, it is appropriate to criminalise their conduct more seriously. As above, this conduct can justify a higher sentence than the base offence.

Currently it is only an offence to take an intimate image with an intent to obtain sexual gratification; it is not an offence to share it for sexual gratification. We think that this specific intent can be present in both taking and sharing, and it can be equally culpable. We recommend that it should be a more serious offence to take or share an intimate image with the intention that someone will look at the image for the purpose of obtaining sexual gratification.

## Threat offence

Following a successful public campaign to amend the law,[4] it is now an offence to threaten to disclose a private sexual image if it is done with the intent to cause distress. Consultation responses also demonstrated significant support for criminalising threats to share intimate images. We therefore recommend a new framework of offences should include a threatening to share offence.

We understand that threats are often made in the context of abusive relationships, to exert power or control. They are also made to extort money or more images. They may also be made for a "laugh", or to try and prevent someone reporting abuse. Making a threat is sufficiently culpable behaviour to warrant a more serious offence. It should be an offence where someone makes a threat to share an intimate image, intending to cause the victim to fear that the threat will be carried out, or being reckless as to whether they will fear that. We do not think it is necessary to require evidence that the threat was made with any other intent, such as to cause distress.

The threatening to share offence should include implicit and conditional threats. It should also include threatening to share an intimate image that does not exist and other circumstances where it is impossible for the defendant to carry out the threat.

It should be an offence whether the threat to share an image was made to the person depicted in the image, or a third party.

4 Refuge, Naked Threats, 2020, **https://www.refuge.org.uk/wp-content/uploads/2020/07/The-Naked-Threat-Report.pdf**

## Installing offence

In section 67 of the Sexual Offences Act 2003 it is a separate offence to install equipment in order to commit an offence of observing someone doing a private act. It is not currently an offence to install equipment in order to commit an offence of recording someone doing a private act. We do not think this gap is justified.

We heard from consultees about hidden cameras being installed in places such as Airbnb properties or toilet cubicles in order to take intimate images secretly. It is not always possible to determine whether an image was actually taken, but the act of installing equipment in order to do so is violating.

It should be an offence for a person to install equipment with the intent of enabling themselves or another to commit an offence of taking an intimate image without consent. This can apply to the base offence, or the specific intent offences if there is evidence that the equipment was installed to take an image with the relevant intent. This installing offence would be summary only where it applies to the base offence, and an either way offence where it applies to the specific intent offences.

# Anonymity and special measures

## Anonymity

All complainants of the new intimate image offences should have automatic lifetime anonymity. Currently this only applies to victims of the voyeurism and upskirting offences, but not victims of the disclosure offence. There is no justifiable reason for this and all victims should be afforded the same protections. This will help empower victims to report and support prosecutions.

## Special measures

Complainants of the new intimate image offences should automatically be eligible for special measures to support them giving evidence at trial. This may include, for example, enabling them to give evidence from behind a screen, via a videolink, or by pre-recording their evidence.

Restrictions on the cross-examination of complainants of sexual offences should extend to all complainants of the new intimate image offences. Such restrictions include the prohibition on anyone charged with a sexual offence from personally cross-examining the complainant, and restrictions on introducing evidence of, or questioning the complainant about, their sexual behaviour.

# Ancillary orders

## Notification Requirements

We recommend that notification requirements (often called "being put on the sex offenders' register") should be automatically applied for the sexual gratification offence, when an appropriate seriousness threshold is met. The seriousness threshold would be met when an adult offender is convicted and sentenced to a term of imprisonment. This reflects the current threshold for the voyeurism offence. Notification requirements are a public protection measure that enable the police to monitor and locate offenders, and deter re-offending. They are one of the most intrusive orders that can be applied so it is important their use is limited to cases of a serious sexual nature.

## Sexual Harm Prevention Orders

We recommend that Sexual Harm Prevention Orders should be available for a court to apply when appropriate for all the intimate image offences. Such orders can be used to impose prohibitions on an offender in order to prevent sexual harm, for example by restricting foreign travel or internet access. They can only be made where the court considers it necessary to protect the public from sexual harm.

# Definition of intimate image

An "**image**" is a video or photograph.

An "**intimate**" image is an image that is either sexual, nude or partially nude, or of toileting.

### Sexual

Shows something that a reasonable person would consider to be sexual because of its nature; or taken as a whole, is such that a reasonable person would consider it to be sexual.

### Nude or partially nude

Means images of all or part of a person's genitals, buttocks or breasts, whether exposed, covered with underwear or anything being worn as underwear, or where the victim is similarly or more exposed than if they were wearing only underwear. This includes images that have been altered to appear similarly or more exposed.

### Toileting

Means images of someone in the act of defecation or urination, and images of personal care associated with genital or anal discharge, defecation or urination.

These definitions reflect those images that would violate someone's sexual autonomy or bodily privacy when taken or shared without their consent. These images show something that is inherently personal, private and intimate.

The definitions focus on what the image itself shows, rather than the status, dress or circumstances of the person when the image was taken. This means that upskirting and downblousing images are included; for example if an image shows someone's breast covered by underwear, it will be an intimate image even if the person was wearing a top at the time it was taken.

These definitions should apply to all intimate image offences to ensure consistency.

### Not ordinarily seen on a public street

There will be some images that will fall into the definitions above, but are less inherently private or intimate. Images of kissing may be "sexual". An image of a young child, or male adult's chest area may be "partially nude". However, they are commonly understood to be less intimate than an image showing someone engaging in sexual intercourse, or of a female adult's breasts. This is because kissing, child and male adult chests are commonly seen on public streets. They do not need the protection of the criminal law in the same way as more intimate images.

The definition of intimate should exclude images that only show something that is ordinarily seen on a public street, except for images of breastfeeding.

## Altered intimate images

It should be an offence to share an intimate image without consent, whether that image is an original, altered or created in any way. This includes deepfakes and images that have been "nudified" where an app digitally removes clothing from a non-intimate image making the person appear nude. As long as it appears to be an intimate image of the victim, it will be included in the sharing offence.

## Limitations – images not covered by intimate image offences

The intimate image offences focus on images that show the victim in an objectively intimate way. There are many other troubling behaviours involving images that would not be caught by our definition of intimate. Some are wrongful, but not sufficiently so that they necessitate a criminal response. Others are so harmful they should be criminalised, but are better criminalised by other offences; we explain how and when other offences may apply in the report.

### Creepshots

Images taken, usually in public places of people who are clothed, "zoomed in" on an area of the body such as the buttocks, breasts, or pubic area. This is unpleasant behaviour, often rooted in misogyny that can make victims feel less safe just existing in public. However, the images are not themselves so intimate that they alone justify a criminal law response.

### Outing images

Images used to convey a message about the person depicted, usually their sexuality or trans identity. This can lead to a range of harms; from minimal to exposing the victim to a risk of serious harm including physical violence. Where an image is only private because of the message it aims to convey, it is not the same conduct as intimate image abuse.

### Semen images

Images that show semen on top of a non-intimate image to suggest the image was used for masturbation. These images speak to the perpetrator's sexuality, not the intimacy of the person depicted. Semen images are violating and can be harmful, but are distinct from images that depict the victim intimately.

**Other offences that could apply:**

- Communications offences
- Harassment
- Outraging public decency

## Images that are considered intimate within particular religious groups

The current intimate image offences do not include images that are only deemed intimate within certain religious groups, but not by "Western" standards of private and sexual. We have heard evidence that people from some religious or cultural groups may be seriously harmed by the disclosure of images which would not be covered by our definition of intimate, for example images of an individual not wearing attire that they would usually wear in public for the purpose of modesty (based on religious beliefs), and exposing body parts that they would not usually expose in public.

We asked consultees for their views on this issue and received thoughtful, well-considered responses that recognised the serious harm the taking or sharing of such images can cause. We also heard how difficult it would be to try to define the types of images that could be included. It would require introducing a level of subjectivity as to what "intimate" means. This risks the offences becoming too broad and uncertain. It is really important that the boundaries of these offences are as clear as possible. Introducing subjectivity only on the basis of religious beliefs also risks inconsistency. There may be reasons other than religious beliefs why one person has a different definition of intimate than another. It would be difficult in practice to establish if the person taking or sharing the image knew that it was considered intimate. But without this, their conduct is not sufficiently culpable. For these reasons we do not think it is appropriate to include any other images in the offence that are not sexual, nude, partially nude or toileting.

The responses to this question also raised related issues. First, responses highlighted additional barriers faced by victims of intimate image abuse from marginalised groups when trying to access the criminal justice system. It is right that these barriers are removed, but reform of specific offences can only achieve so much in this regard. Education, training, and resourcing of community support groups and the by-and-for sector is also crucial to improve the experiences of marginalised groups.

Secondly, we were particularly concerned to hear how intimate images are used in the context of so-called honour-based abuse. We heard that images that depict someone behaving outside what is considered the community norm (such as an image showing a kiss between people from different communities, or of people drinking alcohol) can be shared to expose the person depicted to a risk of serious harm for their perceived transgression. This harmful and culpable conduct is not exclusive to intimate images, or even images at all. Sharing contents of an online dating profile or informing someone of the physical location of the victim can also have the same effect. We ask the Government to consider whether more is needed to address this harmful conduct.

# Public element tests

Intimate image abuse involves the violation of victims' privacy. Privacy is violated, and harm arises, when an image is taken without consent in a private setting, or an image that was shared in private is then shared outside that private space. Where there is a significant public element to the intimate image, taking or sharing may not violate privacy in the same way.

We recommend two public element tests that would carve out from the offences conduct where the taking or sharing is not sufficiently criminal because it is less wrongful, harmful and culpable.

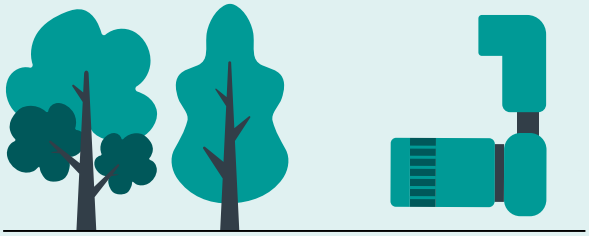
### Test 1: Images taken in public

Sometimes people are willingly nude, toileting, or engaging in sexual acts in public. A streaker at a football match or a naked protestor knows members of the public will see them, and that they will attract attention because of their nudity. They do not have a reasonable expectation of privacy in relation to someone taking their image. It is not appropriate to criminalise someone for taking or sharing an image of such an event.

If someone is nude in public against their will, or is sexually assaulted in public, taking or sharing an image of that would be extremely violating and can cause significant harm. It is appropriate to criminalise someone who knowingly takes or shares an image in such circumstances, unless the person has a reasonable excuse for doing so, such as providing evidence to the police.

There are some circumstances in which someone may be voluntarily nude or partially nude in public but they could still reasonably expect privacy in relation to an image being taken of them. People should always be able to change in a public changing room, or breastfeed in public without someone taking an image of them.

We recommend this test to carve out from the offences images that are taken in public where the person depicted does not have a reasonable expectation of privacy in relation to an image being taken of them.



**Where a person D takes or shares an intimate image of V without V's consent, if:**

(1) the intimate image was taken in a place to which members of the public had access (whether or not by payment of a fee); and

(2) V was, or D reasonably believed V was, voluntarily engaging in a sexual act, toileting, or was voluntarily nude or partially nude,

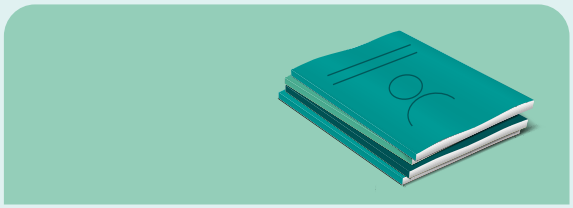
the prosecution must prove that V had a reasonable expectation of privacy in relation to the taking of the image. V will have a reasonable expectation of privacy in relation to the taking of an intimate image when breastfeeding in public or when nude or partially nude in a public or semi-public changing room.

### Test 2: Images previously shared in public

People share their own intimate images in public or consent to others doing so. Nude photos are displayed as artwork, sexual videos are shared as consensual pornography, underwear images are posted on social media. Images that are available in public are often shared onwards; they may be sent to friends, printed off and displayed, lent and borrowed amongst colleagues. Even where the person depicted has not consented to such onward sharing, it does not warrant criminalisation.

It is less culpable and harmful because the image was previously shared in public, with the consent of the person depicted. If, instead, an image was uploaded to a porn site without the consent of the person depicted, resharing that can cause serious harm. If the person sharing onwards is aware there was no consent to the original uploading, it is highly culpable behaviour.

We recommend this test to carve out from the sharing offences the less culpable and less harmful conduct where an image was previously shared in public with consent.



**It should not be an offence for a person D to share an intimate image without the consent of the person depicted where:**

(1) the intimate image has, or D reasonably believed that the intimate image has, previously been shared in a place (whether offline or online) to which members of the public had access (whether or not by payment of a fee), and

(2) either the person depicted in the image consented to that previous sharing, or D reasonably believed that the person depicted in the image consented to that previous sharing,

(3) unless the person depicted subsequently withdrew their consent to the image being publicly available and D knew that they had withdrawn that consent.

The legal burden of proof for this test should be on the prosecution.


## Consent

The key feature of intimate image abuse is the lack of consent. Consent, for the purposes of sexual offences, is defined under sections 74 to 76 of the Sexual Offences Act 2003, which includes several rebuttable and irrebuttable presumptions in relation to the victim's consent. Consultees generally considered these to be well understood and familiar within the criminal justice system. We therefore recommend these provisions should apply to the intimate image offences.

It is important to clarify that consent relates only to the particular act of taking or sharing in question, not to any additional or subsequent acts of sharing.

## Proof of harm

Intimate image abuse causes a range of harms. Victims may experience one, some, or all types of harm to varying degrees. The way those harms may present may be different for every individual. We do not think it is appropriate to require proof of harm as part of the intimate image offences. Doing so would present significant evidential issues, have a negative impact on victims, and ultimately act as a barrier to successful prosecutions.

Harm can be considered throughout proceedings, including at sentencing. There are opportunities for victims to share with the court the harm they suffered and the impact the offending had on their lives, for example in a Victim Personal Statement.

# What acts should be criminal?

Currently, taking and sharing intimate images without consent are the only acts that are criminalised by intimate image offences. It is not an offence to make or possess an intimate image without consent.[5] We believe this is appropriate and recommend that the new intimate image offences criminalise the non-consensual taking and sharing of intimate images only.[6]

## Taking

Current criminal offences use the terms "take" and "record" to cover behaviour where an image is captured by any means. They are not specifically defined and we have not heard evidence that this has caused any issues. We asked whether there were any kinds of taking that should be criminalised that were not caught by these terms. We concluded that all appropriate forms of taking an image are covered.

"Taking" should be understood using the ordinary meaning of the term. It should include any means by which a relevant image is produced, including taking a photo or video with a camera whether digital or analogue and using a device to capture a photograph or video, whether using the camera or an app. "Taking" an intimate image which is instantaneously modified by software – such as through a filter – should also be included in a "taking" offence.

## Copying as a form of taking

Technology has enabled easy reproduction of images. One can take a screenshot of an image that appears on a device, save a copy of a downloaded image, or produce a duplicate using a photocopier. This is copying an image, rather than taking an original image.

Sometimes, images are copied in order to keep a permanent version of an image after access to the original would otherwise be lost; for example, screenshotting a Snapchat image that is automatically deleted in seconds. While the boundaries are tricky, we conclude that this is distinct copying behaviour that we refer to as "retention" and not "taking".

Taking a screenshot of a videocall that is being shown in real time should fall within the definition of taking, because this conduct creates a "still" image that does not otherwise exist. It is more like taking an image "in real life". The person depicted has no control over what the image shows.

The definition of "taking" an image should only include such behaviour where, but for the acts or omissions of the defendant, the image would not otherwise exist.

5 Of adults. It is an offence to make or possess an indecent image of a child under section 1 of the Protection of Children Act 1978 and section 160 of the Criminal Justice Act 1988.

6 We consider the act of making a threat separately (see page 10).

## Sharing

Currently, there is one offence that criminalises the "disclosure" of private sexual photos. This covers an appropriately wide range of behaviour that makes an image available to another. Consultees supported a comprehensive understanding of sharing to avoid perpetrators exploiting loopholes, and to allow for technological developments in how images can be shared.

The definition of sharing should include all behaviours that have directly made the intimate image available to another. This should include physical posting, showing or displaying, sharing on social media, peer to peer messaging, making the image available digitally by transferring a file, sending an encrypted file, saving the image at a specific location and enabling someone to access it, and sending a link or other instructions on how to access the file from a place where the sender has stored it.

The definition of sharing should include sharing with the person depicted.

The scope of a sharing offence should not extend to "secondary sharing"; that is, sharing information as to the location of an intimate image that has already been made available by a third party. For example, sharing a link to a website where a sexual video has been posted online, or giving someone directions to a billboard that displays a partially-nude photo.

While we recognise that there can be wrongdoing in this "secondary" form of sharing, we do not consider it to be as serious as the act of making the image available in the first place, which should be the focus of the criminal law. Including this conduct in a sharing offence would widen the reach of the criminal law to an extent so as to make it far more difficult to enforce. It would still be an offence to share the actual image, rather than information as to its location.

The definition of sharing should not include "secondary sharing" in cases where a person D has informed a third person E where to find an image (for example, by sending a link to a website), that another person F has made available there, D has not shared the image itself or otherwise made the image available, and the image was already available to E.

## Making

Making involves altering or creating an image to make it appear as though the depicted individual is nude, partially nude, or engaged in a sexual or private act. It can include sexual photoshopping, creating deepfake pornography and digitally removing someone's clothes from a photo using "nudification" apps or sites. It is not currently an offence to make an intimate image of an adult.

Consultees told us that making intimate images may be a prevalent behaviour and can give rise to similar harms as other forms of intimate image abuse. However, from the evidence we have heard, most of the harm arises when a "made" image is shared, or where there is a threat to share it. It should be an offence to share or threaten to share a "made" intimate image. We do not think that it should be an offence simply to make an intimate image.

We do not recommend an offence of making an intimate image without consent. It should be an offence to share intimate images that are made, created or altered.

## Possession and retention

Possessing or retaining an intimate image of an adult without consent is not currently a criminal offence. It is a crime to possess indecent images of children,[7] or extreme pornography.[8]

There are various forms of possession or retention that could cause harm. We categorised these as:

1. Never consent to possession (for example images that were acquired by hacking a device or downloading from a revenge porn website)
2. Consent to a defined possession (for example the receipt of a time-limited image over Snapchat)
3. Consent to indeterminate possession (for example images shared in the context of a relationship)

Retaining an image after consent has expired, or where there was never consent, can be deplorable behaviour. Possession of intimate images without consent can be a cause of significant harm and distress to victims. However, we do not believe that it should be criminal. Criminalising possession or retention would create a very broad offence that covers significantly less culpable behaviour. Forgetting all the places in which an image is digitally stored could put someone at risk of committing a criminal offence. This is not appropriate.

There are so many instances where someone is in possession of an image without consent it is not practical to expect the police to be able to act on all reports. This means, even if it was a criminal offence, victims would not get the outcome they want.

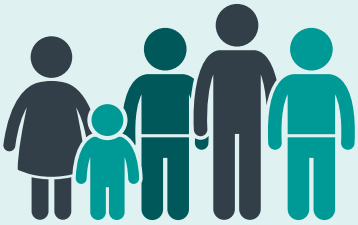
Many instances of possession will be significantly less harmful than other types of intimate image abuse. The most harmful behaviour is when those retained images are shared, or the person who has retained them threatens to share them. These behaviours would be covered by our recommended offences of sharing an intimate image without consent and threatening to share an intimate image. We also think there can be real harm caused by sending a retained image to the person depicted, who thought it had been deleted or had asked for it to be deleted. This should be a sharing offence.

7 Criminal Justice Act 1988, s 160.

8 Criminal Justice and Immigration Act 2008, s 63.

# Children and young people

The criminal justice system recognises that children and young people sometimes need different treatment to adults, as victims, witnesses and perpetrators. There are measures throughout the criminal law to reflect this. For example, there is guidance for prosecutors on charging decisions involving child defendants, special rules for sentencing children, and a special youth court for child defendants. Currently, the intimate image offences apply to perpetrators and victims of all ages.



a child is anyone **under the age of 18**

During consultation we heard concerns that our proposed offences risk over-criminalising children. Consultees suggested that behaviour that would be considered intimate image abuse from an adult is not necessarily abusive from children. Children may be too young to understand the conduct is inappropriate or has sexual connotations. They may think the behaviour is funny or may be trying to fit in. There was also support for keeping children out of the criminal justice system where possible because of the long-term and disproportionate impact it can have.

We also heard about the significant harms caused to child victims, and victims of child perpetrators. For example, we heard that teachers are at particular risk of being upskirted by students, or having sexualised deepfakes of them created and shared amongst classes. While consultees had differing views on how prevalent intimate image abuse is amongst children, we have heard evidence that nude or partially-nude images of children are routinely shared among peer groups without consent. There is also research that suggests children and young people are more likely to be victims of intimate image abuse than other age groups.[9]

**"The harmful norms which enable intimate image abuse must be challenged to create safe environments for children who are at risk of victimisation. This will require a combination of education and culture change, which must address the culture of silence about sexualised pressure among young people and promote healthy expectations about sex and consent."**

**The Howard League for Penal Reform**

9 Elena Sharratt, "Intimate image abuse in adults and under 18s" (2019) at p 9 **https://swgfl.org.uk/assets/documents/intimate-image-abuse-in-adults-and-under-18s.pdf**.

We have carefully considered the arguments and conclude that it is appropriate for the intimate image offences to continue to apply to perpetrators and victims of all ages. The criminal justice system, in particular the youth justice system, is designed to respond to the risks associated with children being criminalised. The most effective way of addressing the risks associated with criminalising children for intimate image abuse is to ensure that:

- the offences are clear and well-defined;
- cases involving children are only prosecuted where there is a public interest in doing so (suitably robust prosecutorial guidance would help ensure this);
- provisions designed to support child perpetrators and victims, and offer alternatives to a formal criminal justice response, operate effectively; and
- children, young people and adults are trained and educated to enable good understanding of intimate image abuse, and intimate image offences.

# Contact Details

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