Intimate Image Abuse

A consultation paper
THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Law Commissioners are: The Rt Hon Lord Justice Green, Chair, Professor Sarah Green, Professor Nicholas Hopkins, Professor Penney Lewis, and Nicholas Paines QC. The Chief Executive is Phillip Golding.

Topic of this consultation: We are conducting a review of the existing criminal law as it relates to taking, making and sharing intimate images without consent. In particular we look at the current range of offences which apply in this area and identify the gaps in the scope of protection currently offered, making provisional proposals in an effort to ensure that the criminal law provides consistent and effective protection against the creation and sharing of intimate images without consent.

Geographical scope: This consultation applies to the law of England and Wales.

Duration of the consultation: We invite responses from 26 February 2021 to 27 May 2021.

Responses to the consultation may be submitted using an online form at: https://consult.justice.gov.uk/law-commission/intimate_image_abuse/. Where possible, it would be helpful if this form was used.

Alternatively, comments may be sent:
By email to imageabuse@lawcommission.gov.uk
OR
By post to Intimate Image Abuse Team, Law Commission, 1st Floor, Tower, 52 Queen Anne’s Gate, London, SW1H 9AG.

If you send your comments by post, it would be helpful if, whenever possible, you could also send them by email.

Availability of materials: The consultation paper is available on our website at https://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/.

We are committed to providing accessible publications. If you require this consultation paper to be made available in a different format please email imageabuse@lawcommission.gov.uk or call 020 3334 0200.

After the consultation: We will analyse the responses to the consultation, which will inform our final recommendations for reform to Government, which we will publish in a report.
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Glossary

This is not an exhaustive comprehensive glossary of terms relating to intimate image abuse. It defines only the terms related to intimate image abuse that are used in this consultation paper.

4chan

4chan is a website to which images and discussion can be posted anonymously by internet users. The website contains a number of sub-categories – or “boards” – such as, notably, the “Politically Incorrect” board and the “Random” board. The website has proved controversial, and has at times been temporarily banned by various internet service providers.

Actus reus

The external elements of an offence, that is, the elements of an offence other than those relating to the defendant’s state of mind or fault. They divide into conduct elements, consequence elements and circumstance elements.

App

Short for “application”, this is software that can be installed on a mobile device, such as a tablet or mobile phone, or a desktop computer.

AirDrop

This is an Apple service that allows users to transfer files (including photographs) between Apple devices using a peer-to-peer wireless connection (ie they are not sent over the internet or mobile network).

Blog

An online journal, or “web log”, usually maintained by an individual or business and with regular entries of content on a specific topic, descriptions of events, or other resources such as graphics or videos. To “blog” something is also a verb, meaning to add content to a blog, and a person responsible for writing blog entries is called a “blogger”. Microblogging refers to blogging where the content is typically restricted in file size; microbloggers share short messages such as sentences, video links or other forms of content. Twitter is an example of a microblog.

Catfishing

Luring someone into a relationship by adopting a fictional online persona.
Chatroom

A feature of a website where individuals can come together to communicate with one another. Chatrooms can often be dedicated to users with an interest in a particular topic. Chatrooms can have restricted access or be open to all.

Charge

The crime that the defendant is formally accused of committing.

Chemsex

The use of drugs to enhance the experience of sexual activity. This often involves stimulant type drugs such as methamphetamine, gamma-hydroxybutyrate (GHB) and mephedrone. The term and practice is mostly understood to have originated amongst gay and bisexual men.

Cisgender or Cis

Someone whose gender identity is the same as the sex they were assigned at birth (See further, Stonewall, Glossary of terms, “Cisgender”, available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.)

Comment

A response to another person’s message – such as a blog post, or tweet – often over a social media platform.

Count

A statement, on the indictment, of the crime the defendant is formally accused of committing (see also the definition of indictment).

Cyberbullying

The use of the internet enabled forms of communication to bully a person, typically by sending messages of an intimidating or threatening nature.

Cyberflashing

The term “cyberflashing” is used to refer to a range of behaviours, but mostly commonly involves a man sending an unsolicited picture of his genitals to a woman.

Cyberstalking

A form of stalking that takes place over the internet.

Deepweb and Darkweb

The Deepweb refers to any parts of the World Wide Web that cannot be found using conventional search engines like Google. This could be because the content is restricted by the website creators. The Darkweb refers to the small portion of the Deepweb that can only
be accessed through the use of specific software, such as the TOR browser. It has both legitimate and illegitimate uses, and is commonly used for facilitating the distribution of controlled drugs and indecent photographs of people aged under 18 years.

**Deepfake**

The term is a blend of the words “deep learning” and “fake” and describes the hyper-realistic digital falsification of images, video, and audio.¹

**Deepfake pornography**

The use of deepfake techniques to create pornographic photos or videos, often using the facial features of someone represented in non sexual images to add on to the body of someone appearing in a pornographic photo or video.

**Defendant**

A person accused of committing an offence

**Disclosure**

In this consultation paper we refer to the offence under section 33 of the Criminal Justice and Courts Act 2015 as the disclosure offence. This term is used to describe the act of sharing or making available an intimate image to another. It is not used in this paper to refer to criminal disclosure evidence rules.

**Downblousing**

The taking of images, usually from above, down a female’s top in order to capture their bra, cleavage and/or breasts

**Doxing**

Searching for and publishing private or identifying information about a particular individual on the web, typically with malicious intent.

**Either-way offence**

An offence that can be tried either in the Crown Court or in a magistrates’ court.

**Emoji**

A digital pictorial icon used most often in written online communications that usually displays an emotion or sentiment.

**Extortion**

The act of obtaining a gain from another, usually financial, by using threats or force.

Facebook
A social media platform which connects users from all over the world and enables them to post, share, and engage with a variety of content such as photos and status updates.

Facebook messenger
A private messaging service provided by Facebook, whereby a Facebook user can contact one or more of their Facebook friends either in one-to-one or group communication. Messages sent will only be visible to those involved in the messages or group chats.

Fake news
False, often sensational, information disseminated under the guise of news reporting.

Fault element
Also known as the mental element or mens rea – the state of mind necessary for a defendant to be guilty of an offence, for example intention, recklessness, knowledge or belief (or the lack of it). In some cases, fault is not about the state of mind of the defendant as the standard is one of negligence.

Filter
A photo editing feature of social media sites such as Instagram and Snapchat that allows the user to alter the look of their photos.

Friend
The term used on social media services such as Facebook to refer to an individual who is added to a user’s social network on the platform. A person may allow this “friend” to view their profile, or particular parts of it (for example, certain posts or messages). It is also used as a verb, for example, to “friend” a person, means to add them to your social network. Facebook “friends” may not actually be “friends” in the conventional understanding of the term. Someone could “friend” a complete stranger.

Follow
“Following” another user of certain social media platforms (for example, Twitter or Instagram) means that you will receive updates from that user, which will appear in your newsfeed.

GIF
A GIF (“graphics interchange format”) is a moving or “animated” digital image that plays back (or “loops”) continuously. They are mostly soundless, and can include short clips of video or film as well as cartoons.

Group chat
A chat feature that allows participants to send and receive messages, images, voice notes, memes and GIFs to multiple recipients simultaneously.
Handle

The term used to describe someone’s username on Twitter. For example, the Law Commission’s Twitter handle is @Law_Commission.

Hacking

The unauthorised accessing of data or material, including images, stored either on internet servers or a device such as a mobile phone or computer.

Hashtag

A hashtag is a tag usually used on social networks such as Twitter or Facebook. Social networks use hashtags to categorise information and make it easily searchable for users. It is presented as a word or phrase preceded by a #. For example, a current well-known hashtag is MeToo.

Hate Crime

There is no statutory definition of “hate crime”. When used as a legal term in England and Wales, “hate crime” refers to two distinct sets of provisions: Aggravated offences under the Crime and Disorder Act 1998 (“CDA 1998”), which are offences where the defendant demonstrated, or the offence was motivated by racial or religious hostility; Enhanced sentencing provisions under the Criminal Justice Act 2003 (“CJA 2003”), which apply to offences where the defendant demonstrated, or the offence was motivated by hostility on the grounds of race, religion, sexual orientation, disability or transgender identity. A different definition is used by the police, Crown Prosecution Service and National Offender Manager Service for the purposes of identifying and flagging hate crime. The focus of this definition is on victim perception: Any criminal offence which is perceived by the victim or any other person, to be motivated by a hostility or prejudice based on a person’s race or perceived race; religion or perceived religion; sexual orientation or perceived sexual orientation; disability or perceived disability and any crime motivated by a hostility or prejudice against a person who is transgender or perceived to be transgender. The term hate crime is sometimes also used to describe “hate speech” offences, such as offences of stirring up hatred under the Public Order Act 1986, and the offence of “indecent or racialist chanting” under the Football (Offences) Act 1991.

Image hashing

Image hashing refers to the process of examining the contents of an image, and constructing a digital hash value that uniquely identifies an input image based on the contents of an image. The hash value can then be used to search for other instances of the image.

Indictable offence

An offence triable in the Crown Court (whether or not it can also be tried in a magistrates’ court); contrasted with a summary offence.

Indictment

The document containing the charges against the defendant for trial in the Crown Court.
Instagram

A photo sharing app that allows users to take photos, apply filters to their images, and share the photos instantly on the Instagram network and other social networks such as Facebook or Twitter.

Instant messaging (IM)

A form of real-time, direct text-based communication between two or more people. More advanced instant messaging software also allows enhanced modes of communication, such as live voice or video calling.

Internet Access Provider

A company that provides subscribers with access to the internet.

Internet Service Provider

A broader term than Internet Access Provider referring to anything from a hosting provider to an app creator.

IP address

An "internet protocol" address is a numerical label which identifies each device on the internet, including personal computers, tablets and smartphones.

Jurisdiction

The right of a court to try a case (especially in relation to cases where some of the events took place outside England and Wales).

LGB

An abbreviation for lesbian, gay and bisexual.

LGBT

An abbreviation for lesbian, gay, bisexual and transgender.

LGBTQ/+ 

An abbreviation for lesbian, gay, bisexual, transgender and questioning (or queer for some users of this term). The + stands for other sexual identities including asexual or pansexual.

Liking

Showing approval of a message posted on social media by another user, such as his or her Facebook post, by clicking on a particular icon.

Live streaming

The act of delivering video content over the internet in real-time. This term was popularised in social media by apps such as Periscope.
Meme
A thought, idea, joke or concept that has been widely shared online, often humorous in nature – typically an image with text above and below it, but sometimes in video and link form.

Naturism
The practice of going without clothes.

Non-binary
An umbrella term for people whose gender identity doesn’t sit comfortably with “man” or “woman”. It can include people who identify with some aspects of binary gender identities, and others who completely reject binary gender identities. Non-binary people may also identify under the transgender umbrella.

Notification
An alert received usually on a mobile phone to notify the user of a new message or social media post connected to them.

Offline communication
Communication that does not use the internet (for example, having a face-to-face conversation or sending a letter).

Online abuse
For the purposes of this Consultation Paper, we adopt the following working definition of “online abuse”. Online abuse includes but is not limited to: online harassment and stalking; harmful one-off communications, including threats; discriminatory or hateful communications, including misogynistic communications ("online hate"); doxing and outing; impersonation.

Online communication
Communication via the internet between individuals and/or computers with other individuals and/or computers.

OnlyFans
A subscription-based content sharing website launched in 2016.

Outing
Disclosing a person’s sexual orientation, gender identity or HIV status without their consent, but can be used to describe revealing other intimate information including sex work, without consent.
**Periscope**
A social video app that allows users to broadcast live video from wherever they are and to engage with others’ videos, browse live or recent broadcasts, and follows users to receive notifications.

**Photoshop**
A software application for editing or retouching photographs and images.

**PornHub**
A pornography website launched in 2007.

**Post or posting (on social media)**
A comment, image or video that is sent so as to be visible on a user’s social media page or timeline (whether the poster’s own or another’s).

**Private message**
A private communication between two people on a given platform which is not visible or accessible to others.

**Profile page**
A display of personal information and posts associated with a person on a social media service.

**Replying**
An action on, for example, Twitter that allows a user to respond to a Tweet through a separate Tweet that begins with the other user’s @username.

**Retweeting**
The re-sharing (forwarding) on Twitter by a person (B) of a message received from another person (A), using the re-tweet button and attributing the message to A.

**Revenge porn**
The practice of posting intimate images online without the consent of the person depicted usually as a way of humiliating the victim after a perceived wrong (such as the end of a relationship or refusing advances). The term is sometimes used to describe the hacking of celebrity’s phones and posting intimate images stored on them online to humiliate the victim.

**Screenshot**
Capturing in a photo form the contents of a screen, usually a mobile phone, tablet or laptop. Most technology items have a unique button or combination of buttons that enable the user to capture a photo of the current screen of that item and store it to the device’s memory.
**Sex worker**

There is no legal definition of “sex worker” in England and Wales. When we use this term in the consultation paper, we refer to a person who exchanges sexual acts for payment or other benefit or need. We also acknowledge that the definition of sex worker might vary depending on context and the preferences of individual sex workers.

**Sextortion**

The practice of using intimate images, or the threat to share or take intimate images to extort the victim usually for financial gain or more pictures.

**Sexting**

The practice of using digital technology to create, send, and receive sexually explicit texts, images or videos, usually taking place between two people in a relationship.

**Sexualised photoshopping**

Superimposing a victim’s head or other body parts onto the body of someone engaging in a sexual act so that it looks like the victim is engaging in the sexual act.

**Sexual Harm Prevention Order or SHPO**

An order that can be imposed by the court that prohibits someone from doing, or not doing specific acts where such prohibition is necessary for the protection of the public. An order may be imposed on someone if they have been convicted of an offence listed is either Schedule 3 or Schedule 5 of the Sexual Offences Act 2003.

**Sharing**

The broadcasting by users of social media of web content on a social network to their own social media page, or to the page of a third party.

**Skype**

A free program that allows for text, audio and video chats between users; it also allows users to place phone calls through their Skype account.

**Snapchat**

A social app that allows users to send and receive time-sensitive photos and videos known as “snaps” to other users chosen by them. Once the snap is opened by the receiver, there is a time limit before the snap is closed and cannot be opened again (typically 10 seconds). Users can add text and drawings to their snaps and control the list of recipients to whom they send them.

**Social media**

Websites and apps that enable users to create and share content or to participate in social networking.
Social media platform

Refers to the underlying technology which facilitates the creation of social media websites and applications. From a user’s perspective, it enables blogging and microblogging (such as Twitter), photo and video sharing (such as Instagram and YouTube), and the ability to maintain social networks of friends and contacts. Some platforms enable all of these in one service (through a website and/or an application for a desktop computer or mobile phone) as well as the ability for third-party applications to integrate with the service.

Social Networking

The use of internet-based services and platforms to build social networks or social relations with other people, through the sharing of information. Each networking service may differ and target different uses and users. For example, facilitating connections between business contacts only, or only particular types of content, such as photos.

Summary or summary-only offence

An offence triable only in a magistrates’ court; in contrast to an indictable or either-way offence.

TikTok

TikTok is a free social media application that allows users to watch, create and share short videos.

Transgender or Trans

An umbrella term to describe people whose gender is not the same as, or does not sit comfortably with, the sex they were assigned at birth. (See further, Stonewall, Glossary of terms, “Trans”, available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.)

Transgender man

Someone who was assigned female at birth but identifies and lives as a man (See further, Stonewall, Glossary of terms, “Transgender man”, available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.)

Transgender woman

Someone who was assigned male at birth but identifies and lives as a woman (See further, Stonewall, Glossary of terms, “Transgender woman”, available at https://www.stonewall.org.uk/help-advice/faqs-and-glossary/glossary-terms.)

Trolling

Where a person or group creates controversy in an online setting (typically on a social networking website, forum, comment section, or chatroom), disrupting conversation as to a piece of content by providing commentary that aims to provoke an adverse reaction.
Tweet
A post on the social networking service Twitter. Tweets can contain plain text messages (not more than 280 characters in the English version of the service), or images, videos, or polls. Users can Tweet to another person (@mention tweets) so as to ensure they will be notified of the Tweet, or can also message them directly. Other users can retweet the Tweets of others amongst their connections on the platform.

Twitter
A social network that allows users to send “Tweets” to their followers and/or the public at large.

Upload
The act of adding content to an internet site or platform.

Upskirting
The act of taking a photograph or video underneath a person's skirt without consent, typically in a public place. Section 67A of the Sexual Offences Act criminalises this behaviour.

VAWG
An acronym for violence against women and girls.

Victim
The person against whom an offence is said to have been committed. Also, until conviction, formally called the complainant.

Viral
The phenomenon whereby a piece of content, such as a video, photo, blog article or social media post, is sent and shared frequently online, resulting in it being seen widely across many web users.

Voyeurism
The behaviour of observing or recording private acts of others without their consent usually for the sexual gratification of the perpetrator. Section 67 and section 67A of the Sexual Offences Act 2003 criminalises certain types of voyeurism.

Webcam
A video camera connected to a computer, which can be used through a variety of different social media services for video calls between users or video conferencing.

WhatsApp
An encrypted instant messaging service for one-to-one or group chat on mobile devices.
YouTube

A video-sharing website that allows registered users to upload and share videos, and for any users to watch videos posted by others.

Zoom

An app that enables users to webchat, voice call or video call each other. Zoom uses a cloud-based software programme and has a free and paid-for version.
Chapter 1: Introduction

INTIMATE IMAGES

1.1 Photographs and videos are an important means of communication. We take and share photos and videos spontaneously on a daily basis to mark the significant and the ordinary. These images document our lives, conveying information, ideas, experiences and emotions in a compressed form with immediate impact upon the recipient. They are an essential part of understanding the world that we live in. In 2014 alone, one trillion photographs were estimated to have been taken.1

1.2 The rapid growth of technology and the expansion of internet access has created limitless opportunities to share images of our lives with others which are at our fingertips day and night. Widespread ownership of smartphones and other camera-enabled devices allows individuals to take pictures immediately and share them almost instantaneously. The internet facilitates this exchange of ideas, information and experiences through the taking and sharing of images in public spaces. Now the internet is accessible to the overwhelming majority of citizens, for many through personal devices that can be operated in the palm of a hand. The Office for National Statistics Internet Access Survey recorded that in January to February 2020, 96% of households in Great Britain had internet access, up from 93% in 2019 and 57% in 2006.2 The sharing of images is an important feature of our daily lives and a means of connecting with our families, our friends and our wider community. In 2016, it was estimated that 3.5 million photos were shared every minute.3

1.3 These developments have also facilitated taking and sharing sexual, nude, semi-nude and private (also referred to collectively as “intimate”) images.4 These are most often shared in the expectation that these will remain private moments of connection between sender and recipient. These images may be shared as a way of forming or developing an intimate relationship, or simply as an expression of one’s sexuality. These sensitive images may be taken and shared with consent in situations where the person depicted in the image is able to exercise their own sexual autonomy. For example, sexting is broadly defined as the practice of using digital technology to create, send and receive sexually explicit texts, images or videos, usually taking place


4 These terms are explained at para 1.57 below.
between two people in a relationship. Equally the practice of sending private and sexual images can be part of the dating experience in an increasingly online and currently locked down world.

1.4 However, the potential for harm still exists when an image is taken or shared consensually. Many do so within the boundaries of an intimate relationship based on the trust and confidence reposed in the recipient of the image. Fragile bonds of trust and confidence may not survive the ending of a relationship and private, sexual images may be shared many months or years later without the consent of the person in the picture, motivated by revenge. This attempt to humiliate and shame is a growing phenomenon. It acts as an online version of the pillory; a device used to hold an individual on display to the passing public with a sign indicating their transgressions thereby subjecting them to humiliation. The practice of posting sensitive and explicit images (commonly referred to as “revenge pornography”) in public spaces online without consent carries with it grave and irrevocable consequences for the victim. Recent research published by the domestic violence charity Refuge found that one in seven young women has received threats that intimate photos will be shared without their consent.

1.5 There is also compelling evidence of the misuse of intimate photographs and recordings in abusive relationships as a means of ensuring compliance. The taking of images may result from physical or emotional abuse or coercion by a dominant and abusive partner. This gives power to the abuser to reassert control over the victim at any point by threatening to share personal and explicit images with the victim’s friends, family, employer or a public online space. This pattern of behaviour serves to prolong coercive and controlling relationships and prevent victims from leaving to seek refuge.

1.6 Rapid technological advances also mean that images may be taken without consent using inconspicuous devices that can be operated in an unobtrusive manner. This makes it much more challenging for people to detect the use of photographic or recording equipment in private and semi-private spaces. Likewise, cameras may be positioned to take images underneath clothing in public spaces.

1.7 These are just a handful of examples of the way in which intimate images may be misused. There are many more types of behaviours and motivations which we go on to consider in this paper. What is clear is that technological progress has outpaced attempts by successive Governments to protect the public from harm resulting from those who take, make and/or share intimate images without consent. Legislation has attempted to tackle the challenges which have emerged over the last two decades on a piecemeal basis but no comprehensive and holistic review of the law has been undertaken until now.

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THIS PROJECT

1.8 The origins of this project are rooted in our Abusive and Offensive Online Communications Scoping Report which was published in November 2018. The purpose of that Report was to assess the extent to which the current law achieved parity of treatment between online and offline offending. We noted that there was considerable scope for reform and identified compelling arguments for a review of three branches of the law: the non-consensual taking and sharing of intimate images; hate crime; and communications offences.

Terms of reference

1.9 On 26 June 2019, the Law Commission agreed to conduct a project assessing the adequacy of the criminal law in relation to the non-consensual taking, making and sharing of intimate images. Our terms of reference were agreed as follows:

- to review the current range of offences which apply in this area, identifying gaps in the scope of the protection currently offered, and making recommendations to ensure that the criminal law provides consistent and effective protection against the creation and sharing of intimate images without consent.

In particular:

- to consider the existing criminal law in respect of the non-consensual taking of intimate images, and the non-consensual sharing of intimate images, and to assess whether it is capable of dealing adequately with these behaviours.

- to consider the meaning of terms such as “private” and “sexual” in the context of the taking and sharing of images without consent, with reference to existing legislation, including (but not limited to) section 33 of the Criminal Justice and Courts Act 2015 and section 67 of the Sexual Offences Act 2003.

- to consider the potential impact of emerging technology which allows realistic intimate or sexual images to be created or combined with existing images and how the creation and dissemination of such images is dealt with under existing criminal law.

- to ensure that any recommendations comply with, and are conceptually informed by, human rights obligations, including under Article 10 (freedom of expression) of the European Convention on Human Rights.

1.10 The following issues remain outside the scope of our review:

- The review will not make recommendations about the existing law on the creation and dissemination of indecent images of children.
• Government is conducting active policy work on “platform liability”7 this
review will therefore remain focused on the liability of individual offenders.

• The Commission is undertaking a separate but related project reviewing the
application of and potential reform to the communications offences under
section 1 of the Malicious Communications Act 1988 and section 127 of the
Communications Act 2003, which will run concurrently to this project. Matters
relating to this review remain out of scope.

1.11 Additionally, despite the images being in some sense intimate, this review does not
consider the issue of “cyberflashing”, the most well-known form of which is the
sending of a picture of the sender’s penis via Bluetooth to a stranger’s mobile phone.
We are conducting a second project on reform of the communications offences in
parallel to this review. Our Harmful Online Communications consultation paper follows
the Scoping Report published in November 2018. In that consultation paper, we have
considered and made provisional proposals regarding the issue of cyberflashing. We
have provisionally proposed that section 66 of the Sexual Offences Act 2003 should
be amended to include explicitly the sending of images or video recordings of one’s
genitals.8

Terminology

1.12 There is an emerging and significant body of opinion that all of these behaviours fall
within a broad continuum of sexual offending classified as “image-based sexual
abuse”. “Image-based sexual abuse” is a term constructed by academics working in
this field to describe a spectrum of harmful behaviour which, at its core, violates an
individual’s personal integrity by the creation, distribution and misuse of intimate
images.9 It encompasses the specific offences we describe in Chapter 3 of this paper
and other practices which are not, at present, specifically targeted under the current
law.

1.13 The terminology used to describe this behaviour is a critical issue and not merely of
academic interest. The eye-catching, headline grabbing terms used to label and
describe this behaviour have been criticised by academics, policy makers and those
who work in this field. Several commentators have argued that the label of
“upskirting”, popularised by the media, downplays the serious nature of the
behaviour.10 Although we accept the criticisms of this term, we use it pragmatically in

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7 Platform liability refers to the responsibilities of companies that host websites or social media sites where
harmful or illegal content may be shared.


9 L Kelly, Surviving sexual violence (1988). See also Clare McGlynn, Erika Rackley and Ruth Houghton,

10 See, for instance, Clare McGlynn, Erika Rackley and Ruth Houghton, “Beyond ‘Revenge Porn’: The
Continuum of Image-Based Sexual Abuse” (2017) 25 Feminist Legal Studies 25, 32 and N Henry, A Powell
and A Flynn, Not Just ‘Revenge Pornography’: Australians’ Experiences of Image-Based Abuse: A
social-context/schools/global-urban-and-social-studies/revenge_porn_report_2017.pdf (last visited 24
February 2021).
this paper in relation to the offence under section 67A of the Sexual Offences Act 2003 in order to distinguish it from the voyeurism offence in section 67 of the Sexual Offences Act 2003. Likewise, the term “downblousing” can be criticised for diminishing the seriousness of the conduct to which it refers but we adopt it for the same reasons.

1.14 As with “upskirting”, commentators have argued that the term “revenge porn” minimises the gravity of this conduct. Additionally, it does not accurately describe the images themselves, which are not, in fact, pornographic, nor does it capture the full range of perpetrator motivations which are discussed in Chapter 4. Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn observe that these images are to be distinguished from legal commercially generated pornography and may not be generated or distributed for sexual gratification.11 Lilian Edwards argues that these images are not problematic by virtue of being “porn”. Often, they are “very vanilla”, for instance a woman in her underwear posing provocatively. The core mischief of this behaviour is that they have been non-consensually shared.12 There is broad consensus amongst experts and academics that we should refer to “revenge pornography” for what it is – image-based abuse as part of a spectrum of domestic abuse, sexual exploitation, coercion and harassment.13 We are persuaded that the term “revenge porn” does mislabel the harmful conduct in issue. Therefore, we have chosen to refer to the current sharing offence as “the disclosure offence” and to any new offence we propose as a “sharing offence”.

1.15 We recognise the importance of academic research on the issue of terminology and acknowledge the arguments in favour of using “image-based sexual abuse” as an umbrella term to describe this type of conduct. However, we have chosen to refer to “intimate image abuse”. We believe that this is an inclusive term which encompasses first, the nature of the images we consider in this paper and secondly, the range of harmful behaviours demonstrated by perpetrators. It also acknowledges and reflects the lack of consensus on whether all examples of this behaviour should be identified and punished as sexual offending. We classify the conduct of perpetrators into three separate categories of taking, making and sharing an intimate image,14 the common thread being that the conduct takes place without the consent of the person in the image and violates their sexual privacy, autonomy and freedom, their bodily privacy and their dignity.

Other jurisdictions

1.16 To help us with our understanding and analysis of this area of law we have considered a number of other countries and states which have implemented intimate image abuse laws. These include the approach taken in Scotland and the recommendations made

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13 A Phippen and M Brennan, Sexting and Revenge Pornography – Legislative and Social Dimensions of Image-Based Abuse (forthcoming).

14 We also consider the issue of threats to take or share intimate images in Chapter 12.
by the Irish Law Commission in 2016 which resulted in the Harassment, Harmful Communications and Related Offences Act 2020. In addition, we consider the law in the Australian states of Western Australia and New South Wales as well as Queensland, Victoria and Tasmania. We also look at the approaches in New Zealand and Canada.

1.17 The reasons for choosing these jurisdictions are first, they have similar legal systems to ours and second, the range of offences captured by these provisions is broader than the offences currently available in England and Wales (for example, including threats to distribute and the sharing of altered images). Australia and New Zealand in particular have carried out extensive research and analysis into the range of behaviours and harms caused by intimate image abuse and the Scottish provisions were implemented following a public consultation.

Impact of COVID-19

1.18 At the time of writing, the world is in the midst of a pandemic resulting from the coronavirus disease (COVID-19), an infectious illness caused by a newly discovered coronavirus. Tragically, in the UK alone, over a hundred thousand people have lost their lives to the virus. Restrictions on individual freedoms have driven people to spend greater amounts of time at home and online.

1.19 The impact of lockdown has been severe for those living with a domestic abuser. The UK’s largest domestic abuse charity, Refuge, reported a 700% increase in calls to its helpline in a single day. An open letter to the Prime Minister from 22 organisations working to address violence against women and girls, sought to impress upon the Government the increased risk to women and girls during lockdown:

It is highly foreseeable that the COVID-19 pandemic, and the emergency measures that must be taken to control it, will lead to an increase in violence against women and girls in the UK . . . . The mass experience of isolation measures, the diversion and repurposing of public services to respond to COVID-19, and the existing vulnerability of many women and girls at a time of less protection is a potential crisis.


More women and girls will be abused and are at risk in this period. Every pandemic and major disaster has found this.\(^{18}\)

1.20 In April 2020, the Home Affairs Committee published its Second Report of Session 2019–21 which confirmed this view, reporting a global surge in domestic violence during the coronavirus pandemic with the UK mirroring this pattern.\(^{19}\)

1.21 Lockdown has provided no sanctuary from sexual exploitation. There has been a flood of reports to the Revenge Porn Helpline, the Government-funded service for adults experiencing intimate image abuse. As early as April 2020, an immediate surge in cases could be identified. The Revenge Porn Helpline opened more than 200 cases in the four weeks from 23 March 2020. Sophie Mortimer, manager of the Revenge Porn Helpline, reported that over half of the cases since the beginning of the first lockdown clearly originated in “an abusive or controlling relationship”.\(^{20}\) The Revenge Porn Helpline recorded 3,146 cases in 2020, an 87% increase from 2019. It has more troublingly been described as “the new normal”.\(^{21}\)

1.22 There is compelling evidence that image-based abuse is prevalent, unexceptional and increasing. Most victims of image-based abuse are ordinary people whose lives are upturned by publication in online spaces. While celebrity scandal may attract the immediate attention of the media, this is a problem that has the potential to impact everyone.

1.23 During the COVID-19 pandemic, people have been forced to find new ways to work and socialise. Use of video calling apps like FaceTime and WhatsApp has increased.\(^{22}\) The video conferencing app Zoom, in particular, has seen usage boom, with the firm reporting more than 300 million daily users at the height of the pandemic.\(^{23}\) They way that people date has also changed. Use of dating apps has risen sharply, and people are increasingly using video calling apps to stay connected to partners they do not live with and to meet new people.\(^{24}\)

1.24 With this has come a rise in “sexting” (sharing intimate pictures as part of a sexual conversation) and individuals appearing nude or engaging in sexual acts during video

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\(^{21}\) David Wright, Director of the UK Safer Internet Centre. See Cristina Criddle, “'Revenge porn new normal' after cases surge in lockdown” (16 September 2020), [https://www.bbc.co.uk/news/technology-54149682](https://www.bbc.co.uk/news/technology-54149682) (last visited 24 February 2021).


calls. For instance, virtual group sex parties are being held on apps like Houseparty and Zoom. (This despite nudity and sexually explicit material being prohibited under Zoom’s “acceptable use” policy, and a spokesperson for the firm stating that they use “a mix of tools, including machine learning” to detect people not adhering to the policy.)

1.25 This rise in nudity and sexual activity taking place via a webcam or phone camera has increased the risk of intimate images being taken and shared without consent. Some video conferencing apps allow users to record and save calls. Usually where this feature is used, the other people in the call will be alerted that the call is being recorded, so any intimate images that are captured will usually be taken with consent. However, they could be later shared without consent. For instance, The Washington Post discovered that thousands of videos that had been recorded using Zoom’s recording feature had been made viewable on the internet. Some of these videos contained intimate images, including an aesthetician teaching students how to give a Brazilian wax.

1.26 It is also possible to capture a still image from, or record, a video call without the other participant(s) in the call knowing or consenting. Someone could take a “screenshot” of another person, who is nude or engaging in a sexual act on camera. Alternatively, someone could use third party software to record their screen, so that others on the call are not notified that the call is being recorded. The number of articles and videos online explaining how to use third party software to record a video call, with titles like “How to record Skype calls without the other person knowing”, suggests that this is not uncommon.

1.27 In addition to increased opportunity for offending, the reliance on technology to communicate during periods of social restrictions has negatively impacted victims of intimate image abuse. We have heard how some victims who experienced intimate image abuse pre-COVID had withdrawn from social media or communications technology as part of their coping mechanism. This coping mechanism has been severely impacted by the sudden reliance on cameras and communication technology for social and work engagement. Victims either have to disclose to their employers or friends why they are not able to use such technology, or they have to engage with it and risk undermining their mental health or recovery progress.

1.28 As restrictions on socialising in person continue and people look set to incorporate greater use of video calling apps into their work and social lives for the foreseeable

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future, this increase in opportunities for committing intimate image abuse is likely to continue.

THE CURRENT LEGAL FRAMEWORK

1.29 Attempts to tackle the harm caused by the taking and sharing of intimate images without consent bear the hallmarks of incremental, piecemeal reform. Understandably, successive Governments have attempted to tackle different types of behaviour as they have become prevalent or entered into public consciousness. Therefore, offences have been created as a reaction to evidence of emerging harmful behaviours. There have been two important consequences. First, it has been challenging for policy makers to agree on how to classify this type of offending due to the myriad of differing behaviours by offenders and their motivations without a holistic review. Such behaviour can fall within a broad spectrum of sexual offending. It may act as a precursor to other sexual offending or may precede or run in parallel to intimidatory or violent offences. Secondly, it creates a patchwork of protection with inconsistent outcomes for victims and offenders depending on whether a specific offence exists to target the behaviour, and whether the offence is classified as sexual, triggering ancillary order making powers to protect and support the victim and, in some cases, the wider public. This means that victims of different types of intimate image abuse offences are not treated equally under the law. We provide a more detailed analysis of these offences in Chapter 3.

1.30 In the next section we explain how the three current intimate image abuse offences (voyeurism, disclosing of private sexual images and “upskirting”) have sought to tackle the taking and sharing of intimate images without consent. We briefly identify the limitations of each provision and the gaps in the law. We also address the broader operational issues that have been described to us by victims and other stakeholders. In particular we outline victims’ experiences of reporting intimate image abuse to the police and their perceptions of how the police and the Crown Prosecution Service (“CPS”) have responded to those reports.

Voyeurism

1.31 The Sexual Offences Act 2003 rewrote the law on sexual offences following a review of the existing law under the Sexual Offences Act 1956 and the Sex Offenders Act 1997. It also tackled voyeuristic behaviour which at the time, in many instances, was not criminal “… but causes deep concern, such as observing others when they thought they were in private”. The Home Office recommended the creation of a new criminal offence to tackle this behaviour as it formed a continuum of behaviour with other sex offences which violated a victim’s privacy and personal integrity.

1.32 Following publication of a Government White Paper, Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences, the Act introduced a number of new sexual offences; one of these new

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29 Home Office, Setting the Boundaries: Reforming the Law on Sex Offences (July 2000) and Home Office and Scottish Executive, Review of Part 1 of the Sex Offenders Act 1997 (July 2001).

30 Home Office, Setting the Boundaries: Reforming the Law on Sex Offences (July 2000) para 8.1.2.

31 Home Office, Setting the Boundaries: Reforming the Law on Sex Offences (July 2000) paras 8.3.2 and 8.3.7.
offences, found in section 67 of the 2003 Act, criminalised specific types of voyeuristic behaviour for the first time.

1.33 The policy behind the introduction of the criminal offence of voyeurism was a desire to strengthen the protection of the public from this and related behaviours. While historically “peeping” was regarded as a nuisance, rather than criminal, the Government was persuaded by evidence presented in the review that this behaviour warranted criminalisation due to its links with a range of non-consensual sexual behaviour including serious sexual offending.

1.34 However, the offence suffers from a number of limitations which make it less effective in protecting victims of intimate image abuse. First, the offence fails to take into account offenders who act otherwise than for the purpose of obtaining sexual gratification. Therefore, where an intimate image is taken or recorded solely for the purpose of causing humiliation, alarm or distress, such conduct would not be caught by the voyeurism offence. We have heard from stakeholders that intimate images which are recorded or taken without consent have serious harmful consequences for the victim, regardless of the offender’s purpose. Secondly, the sharing of images obtained through a criminal act of voyeurism cannot be prosecuted under the voyeurism offence. Thirdly, the nature of the image is limited to images of private acts and images obtained in places where the victim has a reasonable expectation of privacy, a concept which has taxed the courts and has resulted in inconsistent outcomes for those who have suffered harm.

Disclosure of private sexual images without consent

1.35 In 2015, the Criminal Justice and Courts Act criminalised the practice of sharing private sexual images without consent. Section 33 of the Criminal Justice and Courts Act 2015 (“the disclosure offence”) creates an offence of disclosing private sexual photographs or films without the consent of an individual who appears in them and with intent to cause that individual distress.

1.36 The criticisms of this offence are well-documented. Academics, law enforcement authorities and victim stakeholder groups collectively agreed that there were significant limitations to the disclosure offence. First, the offence does not cover sharing of the image with the person depicted in the image. Secondly, the sharing of an altered image which appears sexual or nude, for example a “deepfake” image, is not prohibited. We have heard from a range of stakeholders that both these forms of sharing can be equally harmful and certain marginalised groups are at a greater risk of this form of abuse. Thirdly, the prosecution must prove that the defendant intended to cause distress. We heard from various stakeholders that a requirement to prove an intent to cause distress is an impediment to prosecuting these offences. Further, an image may be shared as a joke or a prank, but the harm caused to the victim is nonetheless serious. Images may go on to be re-shared or re-tweeted without consent, reaching a large number of people. Fourthly, threats to share private, sexual images are not criminalised under the disclosure offence. Recent attempts to amend

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32 We discuss these limitations in detail in Chapter 3.

33 A survey commissioned by Refuge in June 2020 found that 1 in 14 adults in England and Wales have experienced threats to share intimate images or videos – equivalent to 4.4 million people. Refuge, ‘The Naked Threat’ (July 2020), p.4 available at https://www.refuge.org.uk/wp-content/uploads/2020/07/The-
the Domestic Abuse Bill 2019-21 to include threats to share would only criminalise this behaviour where the victim is personally connected to the perpetrator.34

“Upskirting”

1.37 In 2017, a public campaign, run by Gina Martin, advocated and lobbied for the criminalisation of “upskirting”. This term refers to the practice of operating equipment to record an image, beneath another person’s clothing, with the intention of viewing their genitals or buttocks, with or without underwear. This campaign received significant media attention and public support. In 2018, Parliament criminalised “upskirting” as an additional voyeurism offence within the Sexual Offences Act 2003. However, its focus on genitals or buttocks does not protect women from the recording and sharing of images of their breasts, a practice known as “downblousing”.

1.38 Similarly to the voyeurism offence, the upskirting offence only focuses on the taking of upskirting images. Therefore, while taking an upskirting image is specifically criminalised, the sharing of that image is not. The distribution of upskirting images is permissible unless the case falls under another offence such as the disclosure offence or a communications offence.

A patchwork of offences

1.39 A patchwork of poorly fitting offences has resulted. We conclude in this paper that, without a holistic approach to intimate abuse offences, the individual offences do not fit together seamlessly, creating gaps in protection. This results in a legal framework which is unclear, unnecessarily complicated and inconsistent in application. The problem of gaps in protection was highlighted during the second reading of the ‘upskirting’ Bill, when Maria Miller MP, Chair of the House of Commons Women and Equalities Committee, enquired presciently how issues such as “deepfake” pornography should be dealt with under the law:

I am afraid, however, that we shall be back here again shortly to debate the fact that the law does not cover other ways in which people can be abused online. One issue is deepfake technology. Readily available software packages can be used to swap other faces for those of the actors in pornographic films. At the moment it is being done with the faces of other well-known actors, but what is to stop it happening with the faces of well-known politicians, or a person’s ex, or someone they know, or someone they saw in the street and happened to take a picture of? Today we are dealing with upskirting, but the Government need to take a long, hard look at image-based abuse, because more problems are coming down the line.35

1.40 This observation has proven to be correct. In addition to the limitations we identify in relation to existing offences designed to tackle intimate image abuse, we have observed that a number of harmful behaviours are not covered adequately, or at all, by existing criminal laws. Deepfake imagery, downblousing images, and threats to share private, sexual images are three harmful behaviours which are not specifically

34 Hansard (HL), 5 January 2021, vol 809, col 20
criminalised under the current law. We also note that images taken (recordings) of rapes and sexual assaults is on the rise and question whether it is adequately covered by existing criminal offences.

1.41 Stakeholders reported that police responses varied significantly from force to force. A recurring theme was that it was difficult to understand which criminal offences might be applicable. In a study conducted by Professor Clare McGlynn (QC Hon), Professor Erika Rackley and Dr Kelly Johnson,36 victims reported that they believed that the police did not fully understand the relevant legislation or how to investigate the offence.37 Some had been advised by police officers that their allegations would be too difficult to investigate. Victims reported feeling dismissed and blamed for their abuse.38

1.42 As we highlight in this paper, the perception held by a significant number of stakeholders that effective action by the police is lacking may be attributed in part to a miscellany of offences which may apply to intimate image abuse. They are not contained in a single statute but are spread across numerous Acts of Parliament and the common law. Some specifically target intimate image abuse, and others are criminal laws never designed to deal with this type of conduct which are stretched and shaped to fit this conduct with inconsistent and unintended consequences.

**Ancillary orders**

1.43 Ancillary orders can be triggered automatically or made by a judge to provide additional protection for the complainant during criminal proceedings and/or the wider public post-conviction.

1.44 We consider three types of order in this paper that may be relevant to intimate image abuse: automatic anonymity for a complainant; Sexual Harm Prevention Orders; and notification requirements for sexual offenders (colloquially known as the “sex offenders’ register”). We also consider special measures allowing victims to receive additional support in giving their evidence at trial.

1.45 The Sexual Offences (Amendment) Act 1992 provides for automatic lifetime anonymity for the victim of a sexual offence. In simple terms, this prohibits any person publishing details that would identify the victim. It only applies to sexual offences such as voyeurism and upskirting but does not apply to the disclosure offence.

1.46 Victim support groups told us that, without automatic anonymity, the risk of identification creates an invisible barrier to victims reporting the matter to the police.

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37 See also, Emma Bond and Katie Tyrell, “Understanding Revenge Pornography: A National Survey of Police Officers and Staff in England and Wales” (2018) Journal of Interpersonal Violence (online only) (783 police officers and staff across England and Wales completed a survey on the sharing of intimate images without consent. 78.2% of respondents reported having an average or patchy understanding of the disclosure offence, and 5.9% reported having no knowledge at all.).

and may lead victims to withdraw a complaint or their cooperation with a prosecution once commenced. On average, 62% of victims who call the Revenge Porn Helpline after their intimate images have been shared non-consensually do not then go on to report the matter to the police (or do not state that they had reported the matter to the police). This is often through fear of being judged. In a survey of over one thousand sextortion victims (where a threat to share an intimate image is made), the authors found that only 16% of victims reported the matter to the police.

1.47 Sexual Harm Prevention Orders are available to a sentencing judge on conviction for certain offences where the judge considers it necessary to protect the public from sexual harm. A Sexual Harm Prevention Order consists of proportionate restrictions on the offender’s behaviour backed by criminal sanction. These restrictions are at the discretion of the judge but can involve regulation or monitoring of their computer or internet use. Non-compliance by the offender can result in the commission of a separate criminal offence. There is currently no power to impose a Sexual Harm Prevention Order where a disclosure offence has been committed.

1.48 Notification results when an offender is convicted of certain sexual offences listed in a schedule to the Sexual Offences Act 2003. The conviction of the offender triggers an automatic requirement to provide specific information to the police in order to assist with the offender’s long-term monitoring. The aims of the notification requirements are to protect the public and provide the police with an effective tool for the management of sex offenders in the community. A conviction for the disclosure offence does not trigger notification requirements.

1.49 Special measures at trial are currently available automatically to victims of the upskirting and voyeurism offences, but not to victims of the disclosure offence.

1.50 These gaps in the application of ancillary orders to intimate image abuse offences produce inconsistent outcomes for victims.

Conclusion

1.51 We conclude in this paper that there is a critical need for reform in this area for three compelling reasons. First, the existence of gaps and lacunae in the law due to the evolution of technology. Secondly, the patchwork of different offences, many of which


41 Sentencing Code 2020, s 345.

42 The criteria for making a Sexual Harm Prevention Order are contained in sections 343 to 358 of the Sentencing Code 2020. The disclosure offence is not listed in either schedule 3 or 5 to the Sexual Offences Act 2003.

43 See for example the policy objectives outlined in Home Office and Scottish Executive, Review of Part 1 of the Sex Offenders Act 1997 (July 2001) and Home Office, Protecting the public, strengthening protection against sex offenders and reforming the law on sexual offences (November 2002).

44 Section 80 of the Sexual Offences Act 2003 applies the notification requirements to individuals convicted (or otherwise dealt with as specified) of an offence contained in schedule 3 to that Act.
overlap but use different language and terminology. Thirdly, the lack of coherence in the law which makes prosecutorial decisions and training for enforcement agencies difficult, and in turn fails to safeguard victims from this abuse.

1.52 In the next section, we set out the structure of this paper and the roadmap to our provisional proposals.

THIS CONSULTATION PAPER

Part 1: The case for a new model

1.53 In Part 1 of this paper we begin with an examination of types of intimate image offending behaviour and the experience of victims in Chapter 2. Having considered the types of offending behaviour, we outline the current law in England and Wales as it relates to the taking, making and sharing of intimate images without consent in Chapter 3. In addition to a more detailed analysis of the three offences which specifically target intimate image abuse discussed at paragraphs 1.31 to 1.38 above, we also consider other criminal offences which may apply. We conclude that there are a number of gaps in the law and significant limitations with those offences designed to target intimate image abuse which we have outlined above. We conclude that the current law is a “patchwork” of offences and the protection offered is piecemeal and conceptually inconsistent.

1.54 Having identified the gaps and limitations of the current law, we go on to consider what motivates a perpetrator to commit the various forms of intimate image abuse in Chapter 4. We conclude that requiring the prosecution to prove an additional intent over and above an intention to commit the conduct element of the offence would limit its application and may capture only a subset of offenders who take and share intimate images without consent.

1.55 We move on to consider why intimate image abuse warrants criminalisation and what types of harm are caused to victims of intimate image abuse in Chapter 5. We conclude that intimate image abuse is both wrongful and harmful. It is wrongful because it violates the victim’s sexual privacy, autonomy and freedom, their bodily privacy and their dignity, and a consequence of the wrongs of intimate image abuse is that it can cause victims to suffer serious and lasting harm. Because the harm caused by intimate image abuse can be severe, there are compelling arguments for criminalising this behaviour more expansively than under the current law.

Part 2: The new model

1.56 In Part 2, we examine the potential elements of new offences targeting intimate image abuse. We make provisional proposals for a suite of four new intimate image abuse offences of taking and/or sharing intimate images without consent:

(a) a ‘base’ offence of taking or sharing an intimate image without consent which does not require proof of additional intent;

(b) an offence of taking or sharing an intimate image without consent, with an intention to humiliate, alarm or distress the depicted person;
(c) an offence of taking or sharing an intimate image without consent, for the purpose of obtaining sexual gratification, for oneself or another; and

(d) an offence of threatening to share an intimate image.

1.57 We commence Part 2 of the paper in Chapter 6 by exploring what constitutes an intimate image under the current law. We review how an image is defined in the three intimate image offences in England and Wales. We focus on the nature of the image, and the categories of image that should be included within an intimate image offence. We set out provisional proposals for the types of images that ought to be included in any new offence or offences based on our proposed classifications of “sexual”, “nude or semi-nude” and “private” under the umbrella term of “intimate”.

(a) Sexual images include images that are either sexual by nature or sexual when taken as a whole.

(b) Images that are “nude” or “semi-nude” would also come under the scope of “intimate”. These would include a person’s genitals, buttocks or breasts, whether exposed or covered with underwear (or with any garment that is worn as underwear), or images of a person’s partially exposed breasts, taken down their top. This would therefore include images of “upskirting”, “downblousing”, and images taken of a person breastfeeding.

(c) Where a nude or semi-nude image has been altered so that the depicted individual’s breasts, genitals and/or buttocks are not exposed, we propose that this should still be caught under the category of “nude or semi-nude” provided that the depicted individual is exposed to a similar degree as they would be if they were wearing underwear.

(d) Images that are “private” include images of people using the toilet. We have asked for consultees’ views on whether “private” should also include images of people undressing, showering or bathing where their genitals, buttocks and breasts are not exposed or are covered only with underwear.

1.58 Images that are altered to appear intimate would also be covered under our proposed definition of intimate. We discuss this in Chapter 7 in relation to the sharing offence and Chapter 12 in relation to the threats offence.

1.59 We also ask for consultees’ views on whether and to what extent images which are considered intimate within particular religious groups should be included in intimate image offences, when the perpetrator is aware that the image is considered intimate by the person depicted. The inclusion of such images would be limited to the offences with an additional intent element and the threatening to share offence, to ensure that an offence is only committed when the defendant is aware that the image is intimate or is aware of the harm that their actions could cause. If someone takes or shares such an image without consent in order to obtain sexual gratification, they clearly understand that the image is intimate. If their intention is to cause the victim distress, alarm or humiliation, they clearly appreciate the harm that taking or sharing such images can cause. Equally, someone who intends to cause the victim to fear that a
threat to share such an image will be carried out or is reckless as to whether the victim will fear that the threat will be carried out must appreciate the harm that sharing such an image could cause.

1.60 We review which forms of conduct should be criminalised in Chapter 7. We consider whether offences of taking and sharing should be expanded to cover a wider range of behaviours than those criminalised under the current law. We examine what “taking” or “sharing” an image means and what should be included under these terms. In addition, we consider whether making an intimate image without consent (without sharing or threatening to share the image) and possessing or retaining an intimate image without consent should be criminalised. We set out our provisional proposals for the conduct elements of new intimate image abuse offences.

1.61 We consider “taking” as the act by which a relevant image is produced. Therefore, taking an image should include any means by which such an image could be captured and produced. This would include taking a photo or video with a camera whether digital or analogue and using a mobile phone or computer to capture a photograph or video whether using the camera function or an app. We consider instances of copying an image and propose that “taking” should be limited to situations where, but for the acts of the perpetrator, the image would not otherwise exist.

1.62 We provisionally propose that “sharing” an intimate image should capture:

(a) the act of sharing online, including on websites, via email, live streaming and through private messaging services;

(b) sharing offline, including through the post or distribution by hand; and

(c) showing to someone else, including images stored on a device and printed copies.

1.63 We also discuss in this chapter images that have been altered to appear intimate. We provisionally propose that a sharing offence should include images which have been altered to appear intimate.

1.64 We do not make any provisional proposals for a simple “making” offence. We invite consultees to submit evidence of simple making behaviours, and the harms they might cause. Likewise, we do not provisionally propose a possession offence and we set out our reasoning, inviting consultees' views on our provisional conclusion.

1.65 We analyse the keystone of intimate image abuse offences; the requirement to prove that the act of taking and/or sharing was done without consent. In Chapter 8, we consider what it means for an act of taking and/or sharing to be done without consent for both adult and child victims. We acknowledge some of the criticisms of the existing consent provisions in the Sexual Offences Act 2003 (“SOA 2003”) but conclude that sections 74 to 76 of the SOA 2003 should apply to our provisionally proposed offences, a view endorsed by many stakeholders during our pre-consultation discussions.

1.66 We consider whether the criminal law should require proof of actual harm to the victim in Chapter 9. We conclude that requiring proof of actual harm is undesirable and
should not form part of intimate image abuse offences as it would act as an unnecessary barrier to prosecution.

1.67 We examine how the fault requirements of new offences should be formulated in Chapter 10. In addition to the requirement that the taking or sharing of the intimate image be intentional, we consider fault requirements relating to the defendant’s awareness that the victim did not consent to the taking or sharing, and the defendant’s motivation. In relation to the defendant’s awareness of lack of consent, we propose adopting a form of fault requirement consistent with existing sexual offences in England and Wales by requiring proof that the defendant did not reasonably believe the victim consented. We conclude that an offence without a motivation or additional intent requirement would more appropriately capture the wide range of wrongful and harmful behaviours that constitute intimate image abuse. However, we identify a need for a more serious offence where a perpetrator acts maliciously and warrants a more severe penalty on the grounds of their enhanced culpability and the harm caused. We also provisionally conclude that a more serious offence which requires proof that the defendant’s purpose was obtaining sexual gratification is necessary to reflect the increased culpability of this behaviour and empower a court to impose appropriate ancillary orders and trigger notification requirements.

1.68 We consider whether there are circumstances in which taking and/or sharing an intimate image of someone without their consent should not be criminalised in Chapter 11. In particular, we discuss whether images that are taken in public, and images that have been previously shared in public, always require the protection of the criminal law. We conclude that some acts of taking (and subsequently sharing) intimate images in public without consent should not be criminalised (such as where someone is streaking or protesting naked), while others should be (such as where someone is being sexually assaulted in a public place). We conclude when the victim was voluntarily engaging in a sexual or private act in public, or was voluntarily nude or semi-nude in public, the taking or sharing of such an image should only be criminalised where the victim had a reasonable expectation of privacy in relation to the taking of the image. In relation to intimate images previously shared in public (such as an image posted on a publicly accessible website), we conclude that onward sharing of such images should only be criminalised where the victim did not consent to the previous sharing and the defendant did not reasonably believe that the victim had consented to the previous sharing (such as an image posted on a publicly accessible “revenge pornography” website).

1.69 Separately, we argue that specific provision must be made for threats. In Chapter 12 we analyse the behaviours that can be categorised as threats to take, make or share intimate images. We provisionally propose that it should be an offence to threaten to share an intimate image where the defendant intends to cause the victim to fear that the threat will be carried out, or the defendant is reckless as to whether the victim will fear that the threat will be carried out.

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45 Or the defendant reasonably believed this to be the case.

46 Or intimate images the defendant reasonably believed have been previously shared in public.
1.70 Finally, we identify specific types of behaviour that ought not to be criminalised under our proposed offences in **Chapter 13**. We identify the following categories of behaviour which may amount to a reasonable excuse:

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

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

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

(d) taking or sharing for a genuine medical, scientific or educational purpose; and

(e) taking or sharing in the public interest.

1.71 In conclusion, we draw together the threads of our analysis in Part 1 and Part 2 and summarise our proposals for four new offences in **Chapter 14**, setting out the ancillary orders that we conclude should be available. First, we provisionally propose that automatic lifetime anonymity should be available for all victims of the new intimate image abuse offences. Secondly, notification requirements should be automatically triggered (where the appropriate sentencing threshold has been met) for the offence of taking or sharing an intimate image without consent for the purpose of obtaining sexual gratification. Thirdly, Sexual Harm Prevention Orders should be available for all four offences where an offender presents a risk of sexual harm and a court is satisfied such an order is necessary to protect the victim and/or the public.

1.72 These four new offences would capture the range of behaviours that we have identified as constituting intimate image abuse, empower a court to reflect the severity of the crime and make appropriate ancillary orders, and make the law simple, clear and consistent.

**CHILDREN AND YOUNG PEOPLE**

1.73 In this consultation paper we make references to children and young people. While these terms are defined in criminal law, we use them in a non-technical sense. For the purposes of our consultation, we use the term "children" to refer to those under 18, and "young people" to refer to those between the age of 18 and 24.\(^{47}\)

1.74 As we demonstrate in the paper, intimate image abuse involves children and young people as both perpetrators and as victims. We heard from stakeholders that whilst reform measures ought to take into account the impact of overcriminalisation of children and young people, children do have the potential to perpetrate serious and significant harms which have a long-lasting effect. It would therefore be arbitrary for

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\(^{47}\) The upper limit of 24 years is consistent with the United Nations definition of a young person and also reflects the age bracket given to us by stakeholders when referring to "young people". UN Resolution 36/28 of 1981.
the law only to apply to those above the age of 18. In these circumstances we do not think it appropriate to exempt children and young people from liability.

1.75 However, we also acknowledge that because children are still developing and are underdeveloped in terms of their ability to comprehend the consequences, a more nuanced approach is required by the criminal justice system. This is reflected both in the public interest test applied by prosecutors before proceeding with a prosecution and also in specialist guidance developed by the CPS in relation to charging decisions. See, for example, Crown Prosecution Service, Indecent and Prohibited Images of Children (20 December 2018, updated 30 June 2020), https://www.cps.gov.uk/legal-guidance/indecent-and-prohibited-images-children (last visited 24 February 2021);


We observe that any guidance is likely to be extended to take into account any new intimate image abuse offences.

1.76 In relation to child victims of intimate image abuse, the indecent images of children offences fall outside of our terms of reference. As we discuss in Chapter 8, we nonetheless consider that our provisionally proposed offences should include cases involving child victims who do not consent. In the existing intimate image abuse offences – the disclosure offence, voyeurism and upskirting – Parliament has chosen not to differentiate between victims on the basis of age. We agree. To do so would fail to protect child victims in some cases of intimate image abuse which do not fall within the indecent images of children provisions.

FREEDOM OF EXPRESSION AND HUMAN RIGHTS COMPATIBILITY

1.77 Laws passed in England and Wales must be compatible with the rights under the European Convention on Human Rights (“ECHR”), incorporated into domestic law under the Human Rights Act 1998. Therefore, consideration is needed as to whether our provisionally proposed offences are compatible with these convention rights, in particular Article 8, the right to respect for private life and Article 10, the right to freedom of expression.

1.78 Articles 8 and 10 are qualified rights. This means that neither provides absolute protection for an individual who asserts their right to privacy or expression. Interference in either right by law is permitted where it is in pursuit of a legitimate aim, such as the protection of the rights of others and is necessary in a democratic society.


49 Protection of Children Act 1978, s 1 (taking, making or sharing an indecent photograph of a child); Criminal Justice Act 1988, s 160 (possessing an indecent photograph of a child).

50 See para 1.10 above.
1.79 One of the most important aspects of the offences that we are proposing is the protection they afford to the right to private life under Article 8 of the ECHR: people’s images – especially intimate images – constitute a fundamental aspect of their personality and so the taking or sharing of their image without their consent clearly intrudes on their right to private life. The question that falls to be considered is therefore whether there are any circumstances in which an interference in someone’s Article 8 right (by taking or sharing their intimate image without consent) can be justified on the basis of another’s Article 10 right to freedom of expression.

1.80 In most cases, arguments concerning the right to freedom of expression by a person making a non-consensual disclosure of an intimate image will be specious, for instance in cases involving the non-consensual disclosure of intimate images on a “revenge porn” website or the recording of a sexual assault. We are not aware of such arguments being made in these contexts.

1.81 Further, given the nature of the images and the absence of consent, there are unlikely to be instances where any claimed public interest in disclosure will outweigh a clear interference in an individual’s Article 8 right. Consideration of freedom of expression necessarily must include the victim’s freedom of expression along with their Article 8 rights. For example, victims of intimate image abuse might be forced to delete their social media accounts, stay offline or change their name all of which would interfere with their Article 10 rights. For all of these reasons, we limit detailed discussion in relation to Article 10 to those topics where there is a compelling and competing argument to be considered.

1.82 We consider in Chapter 13 whether there are situations in which an interference in someone’s Article 8 right (by taking or sharing their intimate image without consent) can be justified on the basis of another’s Article 10 right to freedom of expression. We conclude that, although likely to be rare, there may be circumstances in which there is a public interest in disclosing an intimate image without consent and an individual should not be criminalised for doing so.

1.83 Therefore, we provisionally propose that acting in the public interest should constitute a reasonable excuse for conduct that would be otherwise be criminal under our base offence. This would ensure compliance with Article 10 of the European Convention on Human Rights.

ACKNOWLEDGMENTS

1.84 We acknowledge the contribution of and thank Professor David Ormerod QC who was Commissioner of Criminal Law prior to the appointment of Professor Penney Lewis. The provisional proposals should not be taken to represent Professor Ormerod’s views.

51 See for example von Hannover v Germany (2012) 55 EHRR 15 (App Nos 40660/08 and 60641/08) (Grand Chamber decision) at [96] and [103]; Mosley v United Kingdom (App No 48009/08) (2011) 53 EHRR 30 at [131]; Soderman v Sweden (2014) 58 EHRR 36 (App No 5786/08); Z v United Kingdom (2002) 34 EHRR 3 (App No 29392/95) (Grand Chamber decision), at [73]; MPv Bulgaria App No 22457/08 (unreported) at [108].
1.85 We have held a number of meetings with individuals and organisations representing key stakeholder groups while we have been preparing this paper: academics, individuals working in the criminal justice system, victim support groups and victims. We are extremely grateful to them all for giving us their time and expertise so generously. We would like to make particular note of the contributions of Professor Clare McGlynn QC (Hon) and Dr Kelly Johnson of Durham University, Professor Erika Rackley of the University of Kent, Elena Sharratt of the University of Exeter, Professor Alisdair Gillespie of Lancaster University, Dr Adrian Scott of Goldsmiths, University of London, Dr Charlotte Bishop of Exeter University, Dr Thomas Crofts of the University of Sydney and Professor Danielle Keats Citron of Boston University for their invaluable time, providing us with feedback and insight during the pre-consultation stage. We would like to thank Sophie Mortimer and colleagues at the Revenge Porn Helpline for sharing their specialised knowledge and data. We would also like to thank the Justices’ Clerks’ Society of England and Wales and Patrick Down from the Criminal Justice Division in the Scottish Government for providing us with data and feedback on the current law. We also thank Raymond Byrne, Commissioner at the Irish Law Reform Commission for his advice and assistance. Finally, we would like to thank Emily Hunt, Gina Martin, Folami Prehaye and David Canham for generously sharing with us their time, their experiences as victim-survivors and greatly valued insights.

1.86 The following members of the Law Commission worked on this consultation paper: David Connolly (Team Manager), Nadia Manzoor (Lawyer), Dr Laura Lisle (Research Assistant), Samantha Magor (Research Assistant), Roseanna Peck (Research Assistant), Lucy Corrin (Lawyer).
Part 1: The case for a new model

Chapter 2: Experiences and behaviours
Chapter 3: The current law and its limitations
Chapter 4: Motivations
Chapter 5: The wrongs and harms of intimate image abuse
Chapter 2: Experiences and behaviours

INTRODUCTION

2.1 In recent years, disclosing an intimate image without consent and taking an image up someone’s clothing without consent (“upskirting”) have attracted a great deal of attention and, as we discuss in Chapter 3, have been specifically criminalised. However, these are not the only forms of what we have termed “intimate image abuse”.

2.2 This chapter will set out the range of behaviours which fall within the category “intimate image abuse”: taking, making, sharing or possessing an intimate image without consent, or threatening to take, make or share an intimate image. In the following chapter, we examine the current law as it applies to intimate image abuse. We identify which behaviours are criminalised and which currently fall outside the scope of the criminal law in England and Wales and discuss the limitations of the current law in the context of intimate image abuse.

2.3 While none of these behaviours is new, the combined effect of technological advances, the growth of the internet and increased smartphone ownership has made them more common and easier to commit. Relatedly, these behaviours used to be limited to the offline world, for instance images being taken on a camera and perhaps shown to others physically. Now, much of this behaviour happens online, where the potential for images to spread exponentially, causing greater harm to the victim, is much higher.

TAKING

2.4 Some perpetrators will take intimate images of their victims without consent. This can happen in a public place (like a public park), a private place (like the victim’s home) or a place which is neither public nor private (like a school or an office).

2.5 There is some evidence that this is the form of intimate image abuse that happens most frequently. In a survey of 4274 Australians, 20% reported having had sexual or nude images of them taken without their consent. This was higher than the percentage who reported that images of them had been distributed without their consent, or to whom threats were made that they would be distributed.

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1 Disclosing an intimate image without consent in the Criminal Justice and Courts Act 2015, s 33 and “upskirting” in the Sexual Offences Act 2003, s 67A (as amended by the Voyeurism (Offences) Act 2019).


2.6 This section will describe the four types of non-consensual taking of which we have learned: voyeurism, “upskirting”, “downblousing”, and the recording of sexual assaults.5

Voyeurism

2.7 Voyeurism is an offence that can be committed in a number of ways under section 67 of the Sexual Offences Act 2003 (“SOA 2003”). Broadly speaking, it involves surreptitiously viewing, photographing or videoing someone engaged in a private or sexual act for the purposes of sexual gratification, where the perpetrator knows (or ought to know) that the other person does not consent. The perpetrators are sometimes described as “Peeping Toms”.6

2.8 According to the Crown Prosecution Service (“CPS”) Violence Against Women and Girls report, in 2018-19 there were 539 offences of voyeurism prosecuted.7

2.9 The typical case of recording under section 67(3) of the SOA 2003 is a man photographing or videoing a woman through a window in her bedroom or bathroom. However, voyeurism happens in a variety of other ways and contexts.

2.10 We learned of cases where perpetrators had installed cameras in female changing rooms. For instance, Christopher Richardson-Blake installed a camera in the female changing room at Abingdon police station in Oxfordshire,8 and Darren Johnson installed cameras in the changing rooms and toilets of leisure centres he ran in Putney and Earlsfield.9

2.11 We also learned of cases where internal CCTV was used to capture images of people without their consent, for instance in their home or while staying in a hotel or an Airbnb. Some groups were found to be at particular risk, most notably women and domestic workers.10

2.12 Relatedly, “smart home” devices have been used to record victims in their homes without their consent, as a mechanism for perpetrating domestic abuse. In one case, a couple had installed password-protected cameras around their shared home. When the relationship ended, the victim changed the passwords, but her ex-partner hacked

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5 Our project is concerned with intimate images, which means that taking, making and sharing, and threats to share, audio recordings without consent is outside of the scope of our review. We briefly touch on this issue in the making section at paragraph 2.52 and in the threatening to share section at paragraph 2.114.


10 Prof Victoria Nash and Julia Slupska (Oxford Internet Institute).
into the cameras in order to capture images of her. By doing this, he sought to maintain power and control over her.\textsuperscript{11}

2.13 We also learned of cases where the perpetrator and the victim are in the same room, and the victim has allowed the perpetrator to see them in a particular state of undress or has consented to have sex with them. Then, the perpetrator has taken a picture or video of the victim without their consent. In one case, Tony Richards had consensual sex with two sex workers, but filmed the encounter without their consent.\textsuperscript{12}

2.14 In a related case, Emily Hunt alleges that she was drugged and raped in a hotel room by a stranger, Christopher Killick, in May 2015. Killick was not charged with rape because of a lack of evidence. However, it later surfaced that he had filmed her, while she was naked and unconscious, without her consent.

2.15 The CPS refused to charge Killick with voyeurism, arguing that Hunt did not have a “reasonable expectation of privacy” when Killick filmed her.\textsuperscript{13} Hunt intervened when the Court of Appeal heard Tony Richards’ appeal against his convictions for voyeurism. The relevant matter for both was whether the act being filmed had to be private from the defendant for the voyeurism offence to apply. (This is discussed further in Chapter 10). The CPS faced criticism for their seemingly contradictory positions in the Richards and Hunt cases. When Richards’ conviction was upheld, and following mounting pressure,\textsuperscript{14} the CPS charged Killick with voyeurism and he plead guilty in August 2020.\textsuperscript{15}

2.16 Additionally, in recent years, drones have increasingly been used to commit crimes. An investigation by The Independent newspaper, conducted in 2016, found that incidents involving drones reported to the police increased by 352% in one year. A few police forces reported drones being used to commit voyeurism offences. For instance, a force in Wales reported that a drone had been used to record a woman undressing in her apartment.\textsuperscript{16} In another example, a couple in the US state of Utah were charged

\textsuperscript{11} Julia Slupska (DPhil Candidate, Oxford Internet Institute).

\textsuperscript{12} In January 2020 the Court of Appeal ruled that Richards’ conduct fell within the offence of voyeurism. See \textit{R v Richards (Tony)} [2020] EWCA Crim 95, [2020] 1 WLR 3344.

\textsuperscript{13} As we explain in Chapter 3, for an image to be caught by the voyeurism offence the victim must have been engaging in a “private act”, which means they must have been “in a place which, in the circumstances, would reasonably be expected to provide privacy”. Sexual Offences Act 2003, s 68(1).

\textsuperscript{14} See, for instance, Maya Oppenheim, “Woman who was told man that filmed her naked without consent could not face charges wins fight for justice” (29 January 2020) \textit{The Independent}, \url{https://www.independent.co.uk/news/uk/home-news/naked-filming-no-consent-emily-hunt-cps-a9306921.html} (last visited 22 February 2021).


with voyeurism in 2017 after their drone was intercepted and footage of several people filmed in their bedrooms and bathrooms was found on the photo card.17

2.17 “Chemsex” parties are attended by individuals who meet initially on “hook up” apps, before taking drugs (like methamphetamine, gamma-hydroxybutyrate (GHB) and mephedrone) and engaging in sexual activity. People hosting or attending these parties often take pictures of or record other attendees naked or having sex without their knowledge or consent.18 Additionally, because these parties are largely organised through “hook up” apps, the victim often knows nothing about the person or people they are meeting, except for what appears on their profile. For instance, they may not know the perpetrator’s real name, age, profession, or even whether the address they are visiting is really where that person lives. There have been cases where the venue has been made up to look like someone’s flat or house when it was not, and cases where a flat was filled with hidden cameras.19 Our pre-consultation research highlighted that chemsex parties are most common in the gay community and this type of intimate image abuse disproportionately affects gay men.20

2.18 Experiences of “chemsex” vary. In some cases, victims take drugs such as GHB voluntarily, then engage in consensual sexual activity but are being filmed or live-streamed without their knowledge or consent. Some victims may take drugs voluntarily but are then sexually assaulted if they become incapacitated, or are given sedative drugs without their knowledge by a perpetrator who intends to sexually assault them. In these instances, the sexual activity is non-consensual as the victim lacks the capacity to consent and the perpetrator is recording the commission of a sexual offence on the victim. The practice of recording someone who is being sexually assaulted is discussed further at paragraph 2.31 below.

Upskirting

2.19 “Upskirting” refers to the non-consensual taking of pictures or videos of someone’s genitalia or buttocks underneath their outer clothing in public.21

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18 Catherine Bewley (Galop); and Ronnie Meechan-Rogers (PhD student, University of Birmingham).
19 Catherine Bewley (Galop).
2.20 It has been an offence under section 67A of the SOA 2003 since April 2019. The change in the law was in large part the result of a campaign by Gina Martin, a woman who was upskirted at a concert in July 2017, but the perpetrator was not charged because their behaviour did not fall within the existing voyeurism offence.

2.21 Figures obtained from 35 police forces by the Press Association found that 153 incidents were reported in the 182 days after the law was passed – almost one report every day. CPS data on violence against women and girls shows that in 2019-20, 14 people were charged with recording up someone’s clothing without consent, and an additional 33 people were charged with “operating equipment” under someone’s clothing without consent. According to Yin Jones, Senior Policy Advisor at the CPS, the “operating equipment” offence is sometimes charged when there is not sufficient evidence to charge under the recording offence. Additionally, there is evidence that “upskirting” accounts for a small but not insignificant proportion of intimate image abuse cases. In an Australian study conducted by Nicola Henry, Asher Flynn and Anastasia Powell, 5% of female participants (total sample 2406) said that someone had taken an image up their clothing without their consent.

2.22 Figures obtained by the Press Association confirm that the vast majority of “upskirting” victims are women. Additionally, perpetrators are almost always men. CPS figures show that in 2019 10 men were convicted of 16 “upskirting” offences, and three of those men received prison sentences. The majority of these offences were committed in shops, while four were on public transport and one outside a festival.

2.23 Before “upskirting” became a specific offence, perpetrators were often caught by other offences, such as outraging public decency. Paul Appleby took 9,000 upskirt pictures over the course of five weeks in late 2014. He targeted women in shops and other public places. He was convicted of two counts of outraging public decency and given a three-year community order. Simon Hamilton used a camera hidden in his bag to film up the clothing of around 80 women as they queued at supermarket checkouts.

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22 As amended by the Voyeurism (Offences) (No 2) Act 2019.
26 Data yet to be published.
He was jailed for three years and nine months.31 Guy Richard Knight took more than 200 images of women under tables on trains in 2007. He was fined £500.32

2.24 “Upskirting” has also been carried out in more unusual ways. For instance, in 2020 a man was jailed in Singapore for 44 weeks for taking upskirt videos of several women using his mobile phone hidden in his shoe.33

2.25 The images are often posted on websites set up to house “upskirting” pictures and videos. In 2015, one such website claimed to have 70 million page views every day and be worth £130 million.34

Downblousing

2.26 “Downblousing” refers to the taking of images, usually from above, down a woman’s top in order to capture their bra, cleavage and/or breasts.35 This behaviour has not been specifically criminalised, something which has attracted criticism from commentators.36

2.27 This behaviour seems to be extremely common. A study by the Australian eSafety Commission found that the most common form of intimate image abuse for women aged 18 and over was images of their cleavage (20%). Among all participants the figure was 14%, compared with 3% for “upskirting”.37

2.28 In another Australian study conducted by Nicola Henry, Asher Flynn and Anastasia Powell, 10% of female respondents (total sample 2406) said that an image had been taken of their cleavage without their consent.38

2.29 The extent of downblousing is particularly evident on online forums. One such website “OneClickChick” categorises sexual and nude images uploaded and shared by users in threads. One thread called “Upskirt & Downblouse” has over 3,000 sub-threads.


The thread tagline refers to “girls showing more than they intended”, indicating that women pictured are unaware of what is being photographed. Another website, “The Candid Board”, came to the attention of the press when hackers gained access to the subscription-based members-site and leaked details of over 180,000 members. Those members were charged $19.99 to view and share “downblousing” and “upskirting” images.

2.30 Additionally, in 2017 “downblousing” images were found on the phone of Dr Richard George following allegations he took a photo up a woman’s skirt on the tube. It was found that he would regularly take photos of women while on the tube, either upskirt images or of women’s breasts while standing over them. Dr George was found guilty of two counts of outraging public decency.

Images of sexual assault and rape

2.31 One particularly horrific form of intimate image abuse is the taking of pictures or videos of someone being sexually assaulted or raped. While the offence of possession of extreme pornographic images covers some of this abuse, it is a complex and under-utilised offence. This form of intimate image abuse appears to happen less in the UK than it does in other countries, like the US. However, there have been some cases in the UK and there is some evidence that filming sexual assaults and uploading the videos to pornography websites is on the rise. One high-profile example is the case of Chrissy Chambers, whose then boyfriend filmed them having sex when she was too intoxicated to consent. He then shared the video on a porn website without Chrissy’s knowledge or consent. The video was re-shared widely and received tens of thousands of views.

2.32 Additionally, at “chemsex” parties attendees often take GHB, which is a mild anaesthetic and is sometimes used to incapacitate a victim to have sex with them.

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43 Tanith Carey, “I was drugged in a bar, sexually assaulted and left frothing at the mouth, says singer spiked on night out” (16 September 2020) The Sun, [https://www.thesun.co.uk/fabulous/12679345/rise-of-filmed-drug-rapes/](https://www.thesun.co.uk/fabulous/12679345/rise-of-filmed-drug-rapes/) (last visited 22 February 2021).


45 To give a recent and particularly shocking example, Reynhard Sinaga was jailed for life in January 2020 for committing 159 sexual offences, including 136 rapes. Sinaga would target men outside nightclubs in
When the victim is incapacitated, multiple men may sexually assault or rape them, and film the abuse. In these instances both the sexual activity and the filming/taking of the image is non-consensual. This behaviour is not only occurring at chemsex parties. A recent investigation by The Sun newspaper reported a rise in incidents in other circumstances where the victim is drugged then sexually assaulted while incapacitated. The report also found that the filming of such incidents is on the rise, with over six million videos that show, or appear to show, such attacks being uploaded to main pornography sites in one year. It is not always clear which videos are of real incidents and which are consensually made by pornography actors. Experts commenting on the investigation note that even staged videos legitimise the behaviour to viewers.

**MAKING**

2.33 Other behaviours can be broadly categorised as “making” intimate images without consent. These include photoshopping images to make them appear sexual and making deepfake pornography. As we observe in Chapter 3, the making of intimate images without consent is not specifically criminalised under the current law.

**Sexualised photoshopping**

2.34 Sexualised photoshopping involves the victim’s head, and sometimes other body parts, being superimposed onto the body of someone engaging in a sexual act (usually a porn actress) so that it looks like the victim is engaging in the sexual act. As a result of technological advancements, many of these images look highly realistic. It can be impossible to tell that the image has been photoshopped.

2.35 This behaviour appears to be reasonably common. In a survey conducted by the Australian eSafety Commission, 5% of images which were non-consensually sent, or where the victim was threatened that they would be sent, were photoshopped or altered to make them appear sexual. In addition, an informal survey, conducted in the US in 2013, found that 12% of pictures and videos posted on Hunter Moore’s infamous “revenge porn” website “IsAnyoneUp?” were of the victim’s head and

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Manchester, bring his victims back to his flat, spike their drinks with GHB to incapacitate them, then film himself assaulting them. See "Reynhard Sinaga: 'Evil sexual predator' jailed for life for 136 rapes" (6 January 2020) BBC News, https://www.bbc.co.uk/news/uk-50987823 (last visited 22 February 2021).

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46 Catherine Bewley (Galop).
47 Tanith Carey, “So ashamed I was drugged in a bar, sexually assaulted and left frothing at the mouth, says singer spiked on night out” (16 September 2020) The Sun, https://www.thesun.co.uk/fabulous/12679345/rise-of-filmed-drug-rapes/ (last visited 22 February 2021)
48 Criminal Justice and Immigration Act 2008, s 63 may apply if a person is in possession of an extreme pornographic image which meets the statutory definition.
someone else’s body. Finally, requests for an image (often of the poster’s partner, friend or family member) to be photoshopped are posted very regularly on image boards like 4chan.

2.36 The victims are almost always women, and very often celebrities. For instance, in 2016 Indian actress Jyothi Krishna’s face was photoshopped onto images of porn actresses, and the photoshopped image went “viral” on several social media sites. Another Indian actress, Asha Sarath, had a similar experience. However, non-celebrities are also targeted. Helen Mort discovered that non-sexual images of her had been uploaded to a porn website. Users of the site were invited to edit the photos, to merge her face with explicit and violent sexual images. One woman, identified as “Anna”, was photoshopped into pornographic videos by groups on image boards like Reddit, 4chan and 8chan. They also subjected Anna to rape and death threats and made crude remarks about her sexuality and gender identity, highlighting that this form of intimate image abuse is often tied up with misogyny.

Deepfakes

What is a deepfake?

2.37 Deepfakes do not work in the same way as older faceswapping technology, where an individual’s face is swapped onto someone else’s head, but the individual whose face it is still controls their facial expressions. Deepfakes take the facial features alone and animate those facial features with the expressions of someone else. Deepfakes are created by feeding a piece of software called an “autoencoder” with hundreds of images of an individual’s face, which then studies these images to learn what they all have in common. The result is called a “face data set”.

2.38 As Bobby Chesney and Danielle Citron explain:

This technology often involves the use of a “neural network” for machine learning. The neural network begins as a kind of tabula rasa featuring a nodal network controlled by a set of numerical standards set at random. Much as experience refines the brain’s neural nodes, examples train the neural network system. If the network processes a broad array of training examples, it should be able to create

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54 Anastasia Powell and Nicola Henry, Sexual Violence in a Digital Age (1st ed 2017) p 166.


56 Henry Ajder, Head of Communications and Research Analysis at Sensity (formerly known as DeeTrace).
increasingly accurate models. It is through this process that neural networks categorize audio, video, or images and generate realistic impersonations or alterations.  

2.39 The process of recognising and swapping faces in pictures and videos employs an artificial intelligence (“AI”) method called “deep learning”. By analysing a large number of photos or a video of someone’s face, the artificial intelligence algorithm can learn to manipulate that face, and then map it onto another person in a video.

2.40 The term “deepfake” was coined by the Reddit user u/deepfakes, who created the Reddit forum r/Deepfakes on 2 November 2017. The forum was dedicated to “faceswapping” female celebrities into pornographic videos. The forum was removed from Reddit on 7 February 2018, but the creation of deepfakes has since exploded.

2.41 Deepfakes are created using code: a set of words and numbers which tell a computer what you want it to do. When r/Deepfakes was removed, the faceswapping code was donated to the open source community, to be developed further by users, and uploaded on GitHub, a website which stores and manages code (alongside other things). Sensity (formerly known as “Deeptrace”) found that deepfakes are becoming more accessible and the technology is becoming more advanced because of deepfake creation community websites and forums, of which they identified 20. These communities enable people who are new to creating deepfakes to develop their skills and experienced creators to collaborate. Through this collaboration, a number of faceswap projects have emerged, which are driving the creation of increasingly advanced and realistic deepfakes.

2.42 Sensity also found that deepfakes are being made in three ways. The first is using computer apps with faceswapping capabilities built in. These are mostly used by experienced creators, because they often require the user to have knowledge of programming and a powerful graphics processor. However, tutorials on how to use the most popular apps have been created, and some of these videos have hundreds of millions of views. Further, The New York Times reported that one of the most

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62 Henry Ajder (Sensity).
2.43 The second way is using a self-service portal, which involves an individual uploading pictures and videos of the victim, then the portal generating the deepfake and sending it back to the individual. The price for this service varies, but Sensity found that it can cost as little as $2.99. The third way is experienced deepfake creators advertising their services on forums and online marketplaces. A bespoke faceswap video was found to cost around $30.64

2.44 The spread of and advances in deepfake technology come at a time when individuals are increasingly able to make their content reach large audiences and go “viral”, mainly through websites, blogs and social media platforms.65

2.45 Other forms of deepfake involve altering some other aspect of the image. For example, a picture of Emma González, a student who survived the shooting at Marjory Stoneman Douglas High School in Parkland, Florida, was altered so that it appeared as though she was ripping up the United States Constitution, rather than a bullseye.66

2.46 To capture this wider range of deepfake images, we adopt Bobby Chesney and Danielle Citron’s much broader definition of deepfakes: the “hyper-realistic digital falsification of images, video, and audio”.67

Deepfake pornography

2.47 Not all deepfakes are pornographic, but the vast majority are. In 2019 Sensity reported that of the 14,678 deepfakes they identified online, 96% were pornographic and 100% of the pornographic deepfakes were of women. Of those women, 99% had a public profile, as actresses or musicians. The vast majority of these videos are uploaded to dedicated deepfake pornography websites (94%), the remainder to mainstream pornography websites. They also found that the four largest deepfake porn websites had attracted 134,364,438 video views.68


It should also be acknowledged that a small, but growing, minority of those requesting pornographic deepfakes are doing so to fulfil a private fantasy, rather than to share it online.69

In 2018 Reddit, PornHub and Twitter banned deepfakes,70 and in January 2020 Facebook did the same.71 However, online discussion boards like 4chan, 8chan and Voat allow people to request and share deepfake porn, and a number of stand-alone sites have been created. One such site receives around 20,000 unique visitors every day.72

As Sensity’s research indicates, deepfakes have been “weaponized disproportionately against women, representing a new and degrading means of humiliation, harassment and abuse”. Deepfake porn has been argued to stem from men’s feelings of entitlement to women’s bodies, and is used to silence, shame and degrade women, reducing them to sex objects.73 Indeed, although most creators and requestors are anonymous, judging by their usernames and what we know about the people who use sites where deepfakes are posted, it is highly likely that the majority of perpetrators are male.74

Additionally, while it is true that the vast majority of pornographic deepfakes target female celebrities, deepfakes are increasingly being made of women who are not famous. This shift can perhaps be explained by the growth in users on discussion boards offering to make videos by request for a small fee – around $20 (£16) per video.75

Some of the videos are poorly made and obviously fake, but fakes are becoming harder to detect. Making deepfakes is becoming easier:

Recent breakthroughs in machine-learning technology, employed by creators racing to refine and perfect their fakes, have made fake-video creation more accessible than ever. All that’s needed to make a persuasive mimicry within a matter of hours is

69 Henry Ajder (Sensity).
74 Henry Ajder (Sensity).
a computer and a robust collection of photos, such as those posted by the millions onto social media every day.\textsuperscript{76}

And those who are skilled at making deepfakes are compiling large numbers of facial images of female celebrities (“facesets”) and sex-scenes of porn actresses (“donor bodies”) so that making videos is easier. Some skilled deepfake creators are also experimenting with voice-cloning software to create convincing audio.\textsuperscript{77} However, our project is concerned with the creation of altered \textit{images}, and therefore altered audio recordings are outside of the scope of our review.\textsuperscript{78}

2.53 As well as deepfakes which swap the victim’s face onto a porn performer’s body, there are deepfakes where the victim’s clothing can be removed to make the victim appear nude. This type of deepfake pornography has attracted significant media attention recently, after Sensity (formerly known as Deeptrace) produced a report uncovering an AI bot, operating on the messaging service Telegram, which makes women appear nude “by synthetically generating a realistic approximation of their body parts”.\textsuperscript{79} Altered images of over 100,000 women have been published on a Telegram channel with almost 25,000 subscribers, and it is likely that more women have been targeted by images created for private use.\textsuperscript{80}

2.54 The app “DeepNude” launched in June 2019. It was free to download, but users had to pay US$50 to remove the watermark which covered images once they had been generated. The app quickly attracted media criticism, which caused users to skyrocket: the website received 545,162 visits and 95,464 active users the month it launched. The creators responded by taking the website offline and selling the app for $300,000 to an anonymous buyer.\textsuperscript{81} It continues to operate under the name “DeepNude.to”.

\section*{SHARING}

2.55 Sharing intimate images without consent (commonly referred to as “revenge porn”)\textsuperscript{82} has been defined in a variety of ways. Some definitions are expansive, such as

\begin{itemize}
\item \textsuperscript{78} See paragraph 2.114 for further discussion.
\item \textsuperscript{79} Henry Ajder, Giorgio Patrini and Francesco Cavalli, “Automating Image Abuse: Deepfake Bots on Telegram” (October 2020) \textit{Sensity}, available at: https://sensity.ai/reports/ (last visited 22 February 2021) 3.
\item \textsuperscript{80} Matt Burgess, “A deepfake porn bot is being used to abuse thousands of women” (20 October 2020) \textit{Wired}, https://www.wired.co.uk/article/telegram-deepfakes-deepnude-ai (last visited 22 February 2021).
\item \textsuperscript{81} Henry Ajder, Giorgio Patrini, Francesco Cavalli and another, “The State of Deepfakes: Landscape, Threats, and Impact” (September 2019) \textit{Sensity} (formerly known as Deeptrace), available at https://sensity.ai/reports/ (last visited 22 February 2021).
\item \textsuperscript{82} As we explain in the introduction, we will be referring to this behaviour as sharing or disclosing an intimate image without consent.
\end{itemize}
“...someone shows, sends, or posts nude or nearly nude photos or videos of someone else without the consent of the person pictured”. Others limit the definition to digital distribution, for instance “…the non-consensual distribution of nude or sexual images online or via mobile phones”. Others go further still, limiting it to online distribution. For instance, “…the posting of individuals' nude photographs without their consent” and “…the act of sharing intimate, sexually graphic images and/or videos of another person onto public online platforms (e.g. Facebook) without their consent”.

**Behaviours**

2.56 Disclosing private sexual images without consent is criminalised under section 33 of the Criminal Justice and Courts Act 2015 (the disclosure offence) where there is an intention to cause distress. The “classical” case of sharing an intimate image without consent is a man posting online sexual or nude pictures or videos of a woman, which he took or were shared with him consensually, without her consent after the breakdown of their relationship, for revenge. While this does happen, it is far from the only example of this behaviour and as we discuss in Chapter 3, not all instances of this behaviour are prohibited by the disclosure offence which has a number of limitations.

**Intimate relationship contexts**

2.57 In the context of intimate relationships, images may be taken by or shared with the perpetrator consensually, but then shared (further) without consent. However, in the context of an abusive relationship, it is not uncommon for images to have been taken without consent or for the victim to have been coerced or pressured into sending images. In some cases, perpetrators have hacked into or stolen images from victims’ devices. The perpetrator will then share the images without consent. Sophie Mortimer from Revenge Porn Helpline told us that where a perpetrator had been identified, 68% of clients had reported the incident as having been committed by a previous or current partner. 70% of their clients are female and their latest figures show that 84% of perpetrators (where a perpetrator and gender had been identified) are male.

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89 A Phippen and M Brennan, *Sexting and Revenge Pornography – Legislative and Social Dimensions of Image-Based Abuse* (forthcoming).
2.58 Relatedly, some perpetrators will maintain control over the victim by conducting a “campaign of abuse” against them. This will involve sharing the images on multiple occasions with different people or groups of people. For instance, the Revenge Porn Helpline received multiple calls from a victim whose images were shared with every new employer she had. Alternatively, the perpetrator may share the image(s) with the victim herself, perhaps as a reminder that they have the image(s) and could share them with others, in order to blackmail or control her. As we explain in Chapter 3, sharing an intimate image with the person in the image is explicitly excluded from the current disclosure offence.

2.59 Another behaviour we learned is prevalent among gay men is images of one man naked, or engaging in a sexual act, with another man being shared on the latter’s dating profile or in chats with other men on these apps. They are intending to flirt or “sext” and put little thought into the fact that they are sharing a sexual image of someone else.

Celebrity “leaks”

2.60 The term “revenge porn” is also used to describe the hacking and sharing online of private and sexual pictures of celebrities. This is often perpetrated against victims specifically because of their celebrity status. Hackers gain access to celebrities’ cloud-based storage, steal intimate images and release them on the internet, often multiple images at a time. This attracts mass public attention, and the fact that nude images of certain celebrities have been “leaked” online becomes known by millions of people. A good example is the incident in 2014, which became known as “The Fappening”, when almost 500 nude or partially nude images of female celebrities were hacked and shared on the image board 4chan.

2.61 One police officer told us that celebrities face particular barriers to reporting the leaking of their images to the police. He referred to the “Barbra Streisand effect”, the phenomenon where celebrities report or speak out against their intimate images or private information being shared, but this draws more attention to the leaked material and results in more people seeing it.

Hacking devices and taking content from victims’ private accounts

2.62 We have also heard about cases where non-celebrities’ devices have been hacked, and images downloaded and shared, by strangers. For instance, a particularly disturbing example we learned of is mobile phone repair shops finding victims’
intimate images on their phones, downloading them and posting them online along with their personal data.\textsuperscript{96}

2.63 Similarly, a behaviour which came to light very recently is the downloading and non-consensual sharing of "OnlyFans" content. OnlyFans is a social media platform which allows creators to charge a subscription fee for those wishing to view their content. It has gained notoriety for the large number of young female account holders making sometimes substantial amounts of money from posting nude and/or sexual images of themselves.\textsuperscript{97} In early 2020, 1.6 terabytes of OnlyFans videos were found to be circulating on commercial pornography sites, after subscribers had downloaded the videos from OnlyFans, without the consent of account holders, and re-uploaded them.\textsuperscript{98}

How images are shared

2.64 Images are not always shared online. They may be shared via a private messaging service, via email or shown to others on the perpetrator’s device. Sometimes, physical photos are shared.\textsuperscript{99} Having said this, online sharing is often more devastating to the victim than offline, considering images can be distributed widely and quickly, shared onwards, and can remain online permanently. Callers to the Revenge Porn Helpline whose images had been uploaded to commercial pornography sites, dedicated "revenge porn" sites or image boards often only found out images of them had been uploaded some time later through friends or people who had visited the site. By that time, the images had often been re-shared widely.\textsuperscript{100}

2.65 In a survey conducted by the Australian eSafety Commission, Facebook was the most common channel by which images were shared (53\% of cases), but this varies by age and gender: teenage girls often reported images shared via Snapchat (47\%) and people aged 25-55 reported images being shared via email more frequently than younger people. The study also noted that websites established for people to share and view images non-consensually may host a greater proportion of this content than the figures suggested, because victims may be unaware their images have been uploaded onto these sites.\textsuperscript{101} In another survey conducted by the National Centre for Cyberstalking Research, images were shared on social media platforms in 37\% of

\textsuperscript{96} Dr Emma Short.


\textsuperscript{99} Prof Erika Rackley and Dr Kelly Johnson.


cases, they were sent in a text message in 27% of cases and posted on websites like YouTube in 25% of cases.\textsuperscript{102}

2.66 By contrast, the Revenge Porn Helpline has indicated that social media sites are not a popular choice for sharing images because most now have clear and pro-active take-down policies. Instead, images are often shared on commercial pornography sites, especially smaller and less well-regulated sites hosted in countries without stringent copyright laws. Younger victims, especially victims who look younger than 18, are often posted on poorly regulated image boards like 4chan and Anon.IB.\textsuperscript{103} (Anon.IB was shut down in 2018 by Dutch police but has recently resurfaced).

2.67 There are also cases where people were having consensual sex, but one of the parties was livestreaming it without the other party’s or parties’ consent.\textsuperscript{104} This is particularly prevalent amongst participants in “chemsex”. Images taken at chemsex parties (either consensually or not) are sometimes non-consensually shared or livestreamed. Different groups from the chemsex community may use live video streaming services, like Zoom and FaceTime, to allow different groups to watch and take part. Alternatively, they may stream the content online for others to watch.\textsuperscript{105}

2.68 Another behaviour we learned of is large numbers of images being “dropped” (sent via AirDrop) on public transport to one or more recipients whose AirDrop settings are open. Some of the images may be commercial pornography, and some may be of the person “dropping” the images (“cyberflashing”), while others may have been non-consensually taken and/or shared.\textsuperscript{106}

2.69 A further behaviour, which amplifies the harm to victims considerably, is the secondary distribution of images. “Secondary distributors” are those who forward or re-share images which have already been shared. Often, this will be re-sharing images which have been uploaded onto social media, “revenge porn” websites or commercial porn websites. It is this secondary distribution which makes images “go viral”, making it extremely difficult to have them removed.\textsuperscript{107} Adding another layer of difficulty, people will often download images onto their phones or computers, and when the images are taken down from social media platforms or pornography sites, they will simply re-upload them.\textsuperscript{108}

2.70 In some cases, the images will be shared years after the perpetrator came into possession of them. For example, the Revenge Porn Helpline learned of a case where

\begin{itemize}
\item \textsuperscript{102} Emma Short, Antony Brown, Melanie Pitchford and another, “Revenge Porn: Findings from the Harassment and Revenge Porn (HARP) Survey – Preliminary Results” (2017) Annual Review of Cybertherapy and Telemedicine 163.
\item \textsuperscript{103} A Phippen and M Brennan, Sexting and Revenge Pornography – Legislative and Social Dimensions of Image-Based Abuse (forthcoming).
\item \textsuperscript{104} Prof Erika Rackley and Dr Kelly Johnson.
\item \textsuperscript{105} Catherine Bewley (Galop).
\item \textsuperscript{106} Maithreyi Rajeshkumar (Childnet International). We discuss “cyberflashing” in our Harmful Online Communications project.
\item \textsuperscript{107} Clare McGlynn and Erika Rackley, “Image-Based Sexual Abuse” (2017) 37 Oxford Journal of Legal Studies 358.
\item \textsuperscript{108} Sophie Gallagher (The Independent).
\end{itemize}
a girl had sent images to someone she met online when she was 14, and the images were not shared until she was 21. The number of images shared also varies significantly. In one survey, the average number of images shared was found to be 18, and in one case 331 images were shared. But the number can be far higher. In one case, the Revenge Porn Helpline removed 10,000 images of one victim.

2.71 Identifying information

It is common for naked or sexual images to be shared alongside private information about the victim, for instance her name, social media profile and home address. This is called “doxing”, and it can result in victims being sexually harassed, both online and offline, and stalked. In a survey conducted by the Cyber Civil Rights Initiative, 59% of victims had their full name shared, 26% their email address, 49% their social network profiles, 16% their home address, 20% their phone number and 14% their work address. In another survey conducted by the Australian eSafety Commission, 33% of victims said that their name had been shared alongside the image and 21% said their social media profile had been shared. Finally, in a study of 1244 people, 50% of victims reported that their full name and social media profile(s) had been shared alongside their image. On some “revenge porn” websites posters are encouraged to give “feedback” about the victim, and images are further sexualised by the inclusion of explicit text.

2.72 We also learned that some dedicated “revenge porn” sites organise content geographically. A good example is Anon.IB, which has a folder for the UK and threads for counties and major cities. In total, there are almost 300 UK threads. This means that when a victim discovers their images have been uploaded to these sites, they are also likely to come across images of other victims (predominantly women) that they know. It also means that people visiting these sites can look at the thread for the area they live in, to try and find images of women they know or have seen, and even request images of particular women. They may request images of a woman by name, or describe women they have seen in the area, for instance the “hot girls working at ASDA”. However, anyone requesting an image seems to be expected to post an

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109 Sophie Gallagher (The Independent).


111 Sophie Mortimer (Revenge Porn Helpline).

112 D K Citron, Hate Crimes in Cyberspace (1st ed 2014) p 45.


116 Georgina Calvert-Lee (McAllister Olivarius).
image in return. As one Anon.IB user said: “don’t be a leech, post what you’ve got and we’ll all contribute”.117

Non-intimate images

2.73 We also learned that the image itself is not always “intimate”. One particularly unpleasant phenomena is “tributing”. The perpetrator will find what is often a non-intimate image of the victim, masturbate onto it, take a picture and put it online, often on websites dedicated to these types of images.118 Often the victim will be told that her image has been “tributed”, because the aim is to make her aware of how her pictures are being used.119

Children and young people

2.74 A group that warrants special attention are older children120 and young people.121 There are conflicting opinions about how prevalent “sexting” (and by extension non-consensual intimate image sharing) is amongst this group.

2.75 Some of the stakeholders we spoke to indicated that this behaviour is very prevalent. Older children and young people feel pressured to take and send images of themselves, and those images are routinely non-consensually shared with the wider friendship group or year group.122 This group is said to be living in a “group chat culture”. It is not uncommon for there to be Facebook messenger or WhatsApp group chats where most of the year group is included. This can result in images being shared with hundreds of people, and then shared on.123 A good example is a recent case in Denmark, where over 1000 children were prosecuted because they shared in a large group chat videos of young girls having sex.124 In addition, a series of Freedom of Information (“FOI”) requests, submitted by the media literacy charity The Student View, revealed that 36 police forces in England and Wales collectively received reports relating to 541 child victims of the disclosure of private sexual images without consent. A further 360 children and young people were revealed to be suspects, suggesting that children are often being victimised by other children.125

2.76 However, the Professionals Online Safety Helpline (“POSH”) suggested that sexting is not normalised amongst this group, and a high proportion would be distressed and offended if an image of them was taken or shared without their consent. They also

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117 Sophie Mortimer (Revenge Porn Helpline).
118 Carmel Glassbrook (Professionals Online Safety Helpline (“POSH”)).
119 Sophie Mortimer (Revenge Porn Helpline).
120 Those between the age of 13 and 17.
121 Those between the age of 18 and 24.
122 Alexandra Whiston-Dew and Tim Thompson (Mishcon de Reya).
123 Carmel Glassbrook (Professionals Online Safety Helpline (POSH)).
suggested that, contrary to popular opinion, low numbers of children and young people are sending nude pictures.\textsuperscript{126}

2.77 To the extent that this behaviour is happening, calls to POSH suggest that the sharing of intimate images without consent by children and young people rarely happens in the context of a long-term relationship. It is often after a short fling or period of “sexting”, or after images have been sent to a group chat.\textsuperscript{127} Young people will often cover their genitalia or nipples with emojis, so the images are not strictly nude. This makes it harder to report the images.\textsuperscript{128}

**Nature of the image**

2.78 The majority of images being shared without consent seem to be nude, partially nude, private or sexual. For example, in a survey conducted by the Australian eSafety Commission, in 21% of cases the victim was partially clothed, in 4% they were completely nude, in 3% they were showering, bathing or toileting, in 3% engaging in a consensual sex act and in 1% engaging in a non-consensual sex act. For women, the proportion engaging in a non-consensual sex act rose to 11%. The remaining 35% of victims were unsure what kind of images were being shared. The eSafety Commission suggested this may be because they were told about the image by someone they knew and had not looked at them.\textsuperscript{129}

2.79 However, we were informed by multiple stakeholders about the sharing of images which are not nude or sexual by “Western” standards but are considered “intimate” to the people in them and to their community. The behaviour we were told about most frequently involves Muslim women who usually wear a hijab while in public being photographed without their hijab, while in an intimate pose or in bed with a man who is not their husband (for instance hugging or kissing, or with their shoulders and upper chest exposed)\textsuperscript{130} and those pictures being shared with their family, friends and community, or more widely on social media. As we expand upon in Chapter 5, this behaviour routinely results in victims being shamed, ostracised, harassed, and physically harmed.\textsuperscript{131}

2.80 In other examples of which we learned, parts of an individual’s body which they chose to cover in public were exposed, but the setting could not be described as “intimate”. First, the Revenge Porn Helpline received a call from a man from a Muslim background, reporting that images of his aunt and cousins had been posted on an

\textsuperscript{126} Carmel Glassbrook (Professionals Online Safety Helpline (“POSH”)).


\textsuperscript{128} Carmel Glassbrook (Professionals Online Safety Helpline (POSH)).


\textsuperscript{130} As Sophie Gallagher from The Independent pointed out to us, while these images cannot be classed as sexual by Western standards, to the women in the images, their families and their communities, these are often viewed as sexual images.

\textsuperscript{131} Carmel Glassbrook (Professionals Online Safety Helpline (POSH)); Zabaida Anwar (Victim Support); and Nazmin Akthar (Muslim Women’s Network Group).
anonymous Facebook group. In the images, the women were attending a celebration – they were dancing, eating, singing and had their abdomens exposed. It was reported that the women felt extremely violated and exposed.132 Similarly, for some women images being shared of them dancing and showing their ankles or lower legs can be used against them, causing extreme distress.133 We heard an example of a Hasidic Jewish woman who was being blackmailed with a picture of the lower half of her leg.134

2.81 Other images which may fall within the bracket “intimate” are images of trans people taken before they transitioned. The sharing of these images in order to “out” and invalidate trans people is “extremely common practice” online. Transphobic people have been known to scour the internet for pre-transition images of trans people. Often, images will be shared alongside personal information about the victim (“doxing”), often their name, social media profile(s) and address, to encourage others to harass the victim and even physically attack them.135

2.82 A further related example is images of LGB+ couples hugging, kissing or sharing an intimate moment. If either of the individuals are not “out” to their friends, family or community, because coming out puts them at risk of ostracisation or physical harm, then these images can cause substantial harm.136 Again, the harms caused are expanded upon in Chapter 5

2.83 A final example is images which do not quite meet the threshold for nude or sexual. For example, the victim may be wearing underwear and posing provocatively on a bed. The Revenge Porn Helpline received a report where 150 provocative images were shared 6 years ago, and they are still being re-shared now. There was very little the helpline could do.137

2.84 With “intimate” images of this kind, it is almost always clear when they are being shared maliciously, in order to harm the victim. Sometimes “intimate” images may be shared by the victim’s friend, usually on social media sites like Facebook, because they do not realise the impact it will have on the victim. For instance, someone may share a picture they took of their female friend and her girlfriend kissing, because they thought it was a lovely picture. However, their friend’s girlfriend is from a Catholic family, who have made clear they believe gay people are living in sin and they would never accept having a gay child. In this situation, when the victim asks the poster to take the image down they will usually do so immediately.138

2.85 We will consider these images in detail in Chapter 6, when we discuss what kinds of images should be captured by intimate image offences.

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132 Elena Sharratt (PhD Candidate, University of Exeter).
133 Sophie Francis-Cansfield (Women’s Aid).
134 Georgina Calvert-Lee (McAllister Olivarius).
135 Nick Antjoule and Drew Simms (Galop).
136 Elena Sharratt (PhD Candidate, University of Exeter).
137 Sophie Mortimer (Revenge Porn Helpline).
138 Nazmin Akthar (Muslim Women’s Network Group).
Prevalence

2.86 According to CPS data on violence against women and girls, 341 people were charged under the disclosure offence (section 33 of the Criminal Justice and Courts Act 2015) between 2019-20.\(^{139}\) This was down from 376 in 2018-19 and 464 in 2017-18.\(^{140}\) However, this is unlikely to give us a full picture. Many victims are unwilling or unable to report their abuse to the police for a range of reasons, and even when they do the police may not refer the case to the CPS, or the CPS may decide not to charge the perpetrator. Sophie Mortimer from Revenge Porn Helpline told us that in 2020 they dealt with 3146 cases, an 84% increase since 2019. The average number of images shared where the victim is a woman was 48.2 images per victim. For men the average number of images shared was 1.8 images per victim.

2.87 Studies on the prevalence of sharing intimate images without consent have been conducted in a range of jurisdictions. The findings differ quite significantly, perhaps because how prevalent the behaviour is found to be depends on how non-consensual sharing is defined. Where a more expansive definition was used, the behaviour was found to be more prevalent. With that caveat, the findings were as follows:

(1) Research conducted by the law firm Slater and Gordon found that 8% of people in the UK have had naked images of them shared without their consent.\(^ {141}\)

(2) In a survey conducted by the Australian eSafety Commission, 11% of adult Australian who use the internet had been victims.\(^ {142}\)

(3) In a survey conducted by Netsafe (New Zealand) 3% of respondents had been victims.\(^ {143}\)

(4) Research conducted by the Data & Society Research Institute found that 2% of Americans who use the internet have had a nude or nearly nude picture of them shared online without their permission.\(^ {144}\) However, respondents were asked whether images of them had been non-consensually shared to “harm or embarrass” them, so taking into account the much wider range of perpetrator

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\(^{139}\) Data yet to be published.


motivations of which we are aware (discussed in Chapter 4), the real figure is likely higher.

(5) In another survey with a more expansive definition of the behaviour, 8% of Americans reported having been victims.\textsuperscript{145}

2.88 Most studies do not differentiate between the different forms of sharing. An exception is an Australian study conducted by Thomas Crofts, Murray Lee, Alyce McGovern and Sanja Milivojevic. They found that, among the 422 participants aged over 19 years, 16% had shown a sexual image to another person without the consent of the person in the image, 4% had shared the image online, and 4% had forwarded the image in a message or email.\textsuperscript{146}

2.89 It is likely that the actual number of victims is higher than studies suggest, because victims are sometimes unaware that images of them have been shared. They may become aware after a significant period of time, by which point their images may have been viewed and downloaded by large numbers of people, and reposted on other websites or social media platforms. Some victims also choose not to come forward because of shame, humiliation and fear.\textsuperscript{147}

2.90 Another indication of the prevalence of this behaviour is the number of dedicated “revenge porn” sites operating. In 2014, Danielle Citron estimated that there were around 40 sites in the US dedicated to “revenge porn”, each containing images of hundreds of victims.\textsuperscript{148} In 2017, there were an estimated 2,000 “revenge porn” websites operating worldwide.\textsuperscript{149}

2.91 A final point should be made about the impact of the COVID-19 “lockdown”. In 2016 the Revenge Porn Helpline was dealing with between 60 and 70 cases a month. By the beginning of 2020, that number had increased to between 140 and 150 a month.\textsuperscript{150} Since the “lockdown” was implemented, this number has surged. They opened more than 200 cases in the four weeks from 23 March 2020, when the lockdown began, and over half of these cases took place in the context of an abusive or controlling relationship. The Helpline puts this down to an increase in internet usage, heightened emotions, and abusers having a greater degree of control over


\textsuperscript{146} T Crofts, M Lee, A McGovern and another, Sexting and Young People (1st ed 2015).


\textsuperscript{148} D K Citron, Hate Crimes in Cyberspace (1st ed 2014) p 51.


\textsuperscript{150} Sophie Mortimer (Revenge Porn Helpline). In 2020 the total number of reported cases to the Helpline were 2593 (not including sextortion cases).
their victims. More reports than normal were still being made in August, which has led the charity to worry that an increase in sharing without consent is the new post-lockdown “normal”. A total of 139,935 images were removed by the Helpline in 2020 (a takedown rate of 92%).

Victims and perpetrators

There is a great deal of evidence that sharing intimate images without consent “is predominantly perpetrated against, and severely negatively affects, women”. In a survey conducted by the Cyber Civil Rights Initiative, 90% of respondents who said an intimate image of them had been disclosed were women. A survey conducted by the National Centre for Cyberstalking Research also found that victims are predominantly women. Another survey conducted by the Australian eSafety Commission found that women were twice as likely as men to have been victims. A fourth survey found that women were one and a half times as likely to be victims. Finally, 75% of calls to the Revenge Porn Helpline are from women.

Other groups are also disproportionately victimised. One such group is young adults. For instance, while the Data & Society Research Institute found that 2% of Americans who use the internet have had a nude or nearly nude picture of them shared online without their permission, this rose to 5% among people aged 18-29. In the Australian eSafety Commission’s survey, women aged 18-24 were the targeted the


152 “Revenge porn helpline reveals surge in cases” (17 September 2020) ITV News, [link]


154 Cyber Civil Rights Initiative, End Revenge Porn: A Campaign of the Cyber Civil Rights Initiative, [link]


157 Dr Asia A Eaton, Dr Holly Jacobs and Yanet Ruvalcaba, “2017 Nationwide Online Survey of Nonconsensual Porn Victimization and Perpetration” (June 2017) Cyber Civil Rights Initiative, [link]

158 Government Equalities Office, Hundreds of victims of revenge porn seek support from helpline, (23 August 2015), [link]

159 Amanda Lenhart, Michelle Ybarra and Myeshia Price-Feeney, “Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of ‘Revenge Porn’” (13 December 2016) Data & Society Research Institute, [link]
most (24%). Expanding the age bracket slightly, the Cyber Civil Rights Initiative found that 68% of victims were 18-30 years old. Lastly, research by Netsafe (New Zealand) found that the targets of this behaviour are most commonly women under 30 (7%).

2.94 It also appears that LGBT+ people are disproportionately victimised. Of the male callers to the Revenge Porn Helpline, around 40% are gay. Additionally, around 25% of those contacting the Helpline were LGBT+, particularly those whose pictures had been shared (or threats were made that they would be shared) in order to “out” them. Research by Netsafe (New Zealand) indicated that LGBT+ people make up approximately 10% of victims. Finally, the Australian eSafety Commission found that 19% of LBGT+ respondents had been victimised, compared with 11% of cisgender heterosexual respondents.

2.95 There is also some evidence that people from other marginalised groups are at greater risk. For instance, 19% of participants in the Australian eSafety Commission’s study for whom English was not their mother tongue had been victims, compared to 11% of participants who spoke English as their first language. This is an under-explored area, and further research would be needed to present firmer conclusions about victimisation rates within other marginalised groups.

2.96 In terms of perpetrators, research indicates that a significant majority are men. Researchers from the Cyber Civil Rights Initiative found that men are significantly more likely to be perpetrators than women, and men between 18-25 are the most likely. The Australian eSafety Commission has also conducted detailed research on this. The study found that perpetrators are usually people the victim knows (29%...
friend, 13% ex-partner, 12% current partner, 10% family member), and that women are more likely than men to be victimised by an ex-partner, but less likely to be victimised by a family member. It also found that 27% of victims, and 39% of female victims aged 18-34, were stalked or threatened by the perpetrator after their image was shared. In 49% of cases the victim knew the perpetrator was male, in 35% of cases they knew they were female and in the remainder of cases they did not know. Where the perpetrator was male, they tended to be a partner or ex-partner, where they were female they tended to be a friend or family member.168

2.97 Lastly, in a survey conducted by the Cyber Civil Rights Initiative, 57% of victims said their material was posted by an ex-boyfriend, 6% said it was posted by an ex-girlfriend, 23% said it was posted by an ex-friend, 7% said it was posted by a friend, 7% said it was posted by a family member.169

THREATS

2.98 Instead of taking, making or sharing an intimate image without consent, a perpetrator may threaten to do any of the above. This section looks at each of these behaviours in turn.

2.99 As we highlight in Chapter 3, threats to take, make or share an intimate image are not covered by current intimate image offences in England and Wales. In Chapter 12, we provisionally propose that the criminal law should be broadened to include threats to share intimate images.

Threats to take intimate images

2.100 We were unable to find any examples of threats to take an intimate image without consent. However, it may be that this behaviour is happening, but it is not being reported to victim support groups or the police.

2.101 For instance, a perpetrator may threaten to take an image of their victim as part of a pattern of stalking, harassment or domestic abuse. They may threaten to take an image through a window into the victim’s bedroom or bathroom, or, if they are living with the victim, when they are undressing or getting out of the shower.

Threats to make intimate images

2.102 Threats to make an intimate image do not appear to be very common. However, the Revenge Porn Helpline alerted us to some cases which had been reported to them.170

2.103 In one case, the perpetrator threatened to photoshop the victim’s face onto a nude woman’s body and post the image on a commercial pornography site. In another case, the perpetrator said they were going to post images of the victim’s face on a


170 Sophie Mortimer (Revenge Porn Helpline).
pornography site, and the victim described being “terrified” that her face would be photoshopped onto a pornographic image. In both cases, the motivation of the perpetrator was unclear. However, in a third case, the perpetrator told the victim that if she did not send him nude images, he would photoshop her face onto a nude woman’s body. This case highlights that there is an overlap between threats to make intimate images and “sextortion” (discussed below).

Threats to share intimate images

2.104 Threats to share intimate images are by far the most common type of threat in this context. As with sharing without consent, the reported prevalence differs from survey to survey.

(1) One study conducted by McAfee found that 10% of respondents had received threats that their intimate images would be shared, and nearly 60% of those threats were carried out.171

(2) In a survey of 4274 Australians, 9% had been threatened with a sexual or nude image of them being shared.172

(3) In a survey conducted by Netsafe (New Zealand), 4% of respondents said they had been threatened with an intimate image of them being shared.173

(4) The Data & Society Research Institute report that 3% of Americans who use the internet have been the victim of a threat to share an intimate image.174

(5) In a survey with a broader definition of non-consensual sharing, 4.8% of Americans said they had been threatened with an image being shared.175

2.105 There is, however, widespread consensus that the victim of a threat to share is usually a woman, and the perpetrator usually a man.176 Research by the Cyber Civil Rights Initiative found that women were two and a half times more likely to be victims than


176 An exception to this is the practice of so-called “sextortion”, which is discussed below.
men,\textsuperscript{177} and the Data & Society Research Institute found that 10% of women under 30 have experienced a threat to disclose an intimate image.\textsuperscript{178}

2.106 The fact that women seem to be victimised more than men can be at least partially explained by the fact that threats to share intimate images are often made in the context of an abusive or controlling relationship, by partners or ex-partners attempting to exert control over their victims.\textsuperscript{179} One study found that the perpetrator was almost always a recent male ex-partner, who had also been abusive and controlling during his relationship with the victim.\textsuperscript{180}

2.107 Threats are made for a variety of reasons. It could be to “force the victim to engage in an unwanted sexual act, or prevent them from leaving the relationship or obtaining an intervention order, or to blackmail them for monetary payment, sexual favours or other related acts.”\textsuperscript{181}

2.108 Sometimes, when there is a threat it is not even clear that the images exist – the victim may not remember sending the images or allowing them to be taken.\textsuperscript{182} When images do exist, it is common for the perpetrator not to follow through with their threat, instead using the threat as a mechanism for controlling and harassing the victim.\textsuperscript{183}

2.109 In one case, the perpetrator had taken pictures of himself engaging in sexual acts with the victim while they were in a relationship. When the relationship ended, he threatened to share the pictures in order to coerce her into allowing him to see her and their children whenever he wanted to. The victim was afraid to stand up to him, or to report the abuse, in case he shared the images.\textsuperscript{184} A more high-profile example is the singer Mel B, who stayed in an abusive relationship with Stephen Belafonte for 10 years because he had threatened to share intimate videos of her.\textsuperscript{185}

\begin{enumerate}


\item \textsuperscript{179} Adam Dodge, “Threats of Revenge Porn: A New Way to Silence Survivors of Domestic Abuse” (7 November 2016) HuffPost, \url{https://www.huffpost.com/entry/threats-of-revenge-porn-a-new-way-to-silence-survivors_b_5798e8a8e4b0b3e2427d76b9} (last visited 23 February 2021).


\item \textsuperscript{181} Nicola Henry, Anastasia Powell and Asher Flynn, “Not Just ‘Revenge Pornography’: Australians’ Experiences of Image-Based Abuse: A Summary Report” (2017) RMIT University, 3.

\item \textsuperscript{182} Eleanor Butt (Refuge).


\item \textsuperscript{184} Zabaida Anwar (Victim Support).

\item \textsuperscript{185} Adam Dodge, “Threatened Revenge Porn: How it Imprisoned Mel B. for a Decade” (11 April 2017) HuffPost, \url{https://www.huffpost.com/entry/threatened-revenge-porn-how-it-imprisoned-mel-b-for_b_58ec13b3e4b081da6ad00714} (last visited 23 February 2021).
\end{enumerate}
2.110 Calls to the Revenge Porn Helpline suggest that threats are usually to share images with the victim’s family, friends or colleagues, rather than to put images onto commercial pornography sites, “revenge porn” sites or other websites.\textsuperscript{186} Sometimes, threats will be made to share the images on Facebook because the victim’s friends and family are likely to be on Facebook.\textsuperscript{187}

2.111 While threats are often made against partners and ex-partners, other vulnerable groups are also at risk, in particular migrants on temporary visas, victims of trafficking and sex workers.\textsuperscript{186}

2.112 Threats to share can overlap with impersonation. For example, the perpetrator may hack into the victim’s social media accounts or set up a fake account, then contact the victim threatening to share images through that account.\textsuperscript{189}

2.113 When images are taken (consensually or non-consensually) at “chemsex” parties, the perpetrator may threaten to livestream or share those images. Common motivations are stopping the perpetrator from reporting the sexual violence they experienced to the police, to manipulate the victim into continuing to take part or continuing to buy drugs, or to blackmail them. For gay people, these threats can have particularly severe consequences, especially if the victim is not able to be “out” with their family, friends or community.\textsuperscript{190}

2.114 Finally, the Muslim Women’s Network Group informed us that sometimes audio-only recordings of the victim engaging in an intimate or sexual act are made, and the victim is threatened with that recording being released unless she complies with demands to pay money or to engage in further sexual acts.\textsuperscript{191} Our project is concerned with sharing, and threats to share, intimate images without consent, which means that sharing, and threats to share, audio recordings without consent is outside of the scope of our review. However, we recognise the significant harm that sharing or threatening to share a sexual audio recording without consent can cause. We suggest that whether this behaviour is covered adequately by other criminal offences is reviewed. Depending on the circumstances, it is possible that this would be captured by a communications offence. We consider this possibility when we discuss the communications offences in Chapter 3.


\textsuperscript{187} Sophie Mortimer (Revenge Porn Helpline).


\textsuperscript{189} Elena Sharratt (PhD Candidate, University of Exeter).

\textsuperscript{190} Catherine Bewley (Galop).

\textsuperscript{191} Nazmin Akthar (Muslim Women’s Network Group).
Sextortion

2.115 “Sextortion”, or sexual extortion, can be defined broadly or narrowly.192 The broadest definition we found in relation to intimate image abuse was put forward by the Crimes Against Children Research Center based at the University of New Hampshire: “Sextortion is defined as threats to expose a sexual image in order to make a person do something or for other reasons, such as revenge or humiliation.”193

2.116 This definition aside, sextortion tends to be defined in one of two ways. Either, it is taken to mean using intimate images to extort money from the victim,194 or using intimate images to extort more images from the victim (or both).

2.117 Clare McGlynn, Erika Rackley and Ruth Houghton adopt an expansive definition. They see sextortion as involving the perpetrator coercing the victim into creating or sending intimate images or videos, or sending money, by threatening to share an intimate image or video that the victim sent previously.195 The Brookings Institute defines sextortion more narrowly, as: “old-fashioned extortion or blackmail, carried out over a computer network, involving some threat – generally but not always a threat to release sexually-explicit images of the victim – if the victim does not engage in some form of further sexual activity”. They explicitly exclude cases where perpetrators threaten to share images unless money is sent.196

2.118 How prevalent this behaviour is, and who the victims and perpetrators tend to be, seems to depend upon the definition adopted. Sophie Mortimer from Revenge Porn Helpline told us that the majority of sextortion cases reported to them involve overseas gang crime related activities. In 2020 they had 553 sextortion cases.

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194 The National Crime Agency (NCA) defines sextortion as webcam blackmail “where criminals might befriended victims online by using a fake identity and then persuade them to perform sexual acts in front of their webcam, often by using an attractive woman to entice the victim to participate. These webcam videos are recorded by the criminals who then threaten to share the images with the victims’ friends and family”. The NCA has reported that, “This can make the victims feel extremely ashamed and embarrassed and, tragically, here in the UK at least four young men have taken their own lives after being targeted in this way”. National Crime Agency, Sextortion (webcam blackmail), https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/kidnap-and-extortion/sextortion-webcam-blackmail (last visited 23 February 2021).


Sextortion for money

2.119 Research indicates that victims of sextortion for money tend to be men. Netsafe (New Zealand) has indicated that more men than women contact them after becoming victims of sextortion for money.197 In addition, the majority of male cases reported to the Revenge Porn Helpline involve sextortion for money,198 and around 70% of victims are men.199

2.120 The prevalence of sextortion for money seems to be increasing. In 2017, the National Crime Agency (“NCA”) received 1,304 reports of sextortion to its Anti-Kidnap and Extortion Unit (“AKEU”). This was three times the number of reports it received in 2015. Additionally, the NCA acknowledged that the true figure is likely to be far higher, because many victims feel too ashamed to report their abuse to the police, or are worried about the consequences.200 More recently, the prevalence of sextortion for money seems to have surged during the COVID-19 “lockdown”. Police received more than 9,000 reports of sextortion for money in the six weeks leading up to 1 May 2020. For some police forces, this was a six-fold increase in cases.201

2.121 When victims are extorted for money, they often receive a friend request on social media from the perpetrator using a fake profile, and the perpetrator will quickly initiate “sexting”. They will often pretend to be someone else, and send naked or sexual images of that person to encourage the victim to send images back. Or they may encourage the victim to pose naked or perform sexual acts over a live video-sharing platform.202

2.122 Alternatively, the perpetrator may hack the victim’s webcam or phone to take images, or hack their files to steal images which were consensually taken.203 Perpetrators who obtain images by hacking into victims’ webcams or devices have been found to use online forums to brag about how many webcams they are controlling, and swap tips

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199 Sophie Mortimer (Revenge Porn Helpline).


about how to hack devices. Sometimes, victims will be approached by a stranger who has tracked them down on a commercial pornography or “revenge porn” site.

2.123 The perpetrator will then threaten to share the images, often with the victim’s partner, family or work colleagues, unless the victim pays a sum of money. Sometimes they will create a fake YouTube video, to make it look like they have shared the images, to put pressure on the victim. Typically, they will extort from the victim anything from £500-£5,000. Generally, if payment is made they will demand more money.

2.124 Investigations conducted by the NCA have found that sextortion for money is often perpetrated by overseas criminal gangs.

**Sextortion for more images**

2.125 Unlike sextortion for money, research suggests that the victims of sextortion for more images are predominantly women and children. A study by the Crimes Against Children Research Center found that 83% of victims were women, and most were either children or young adults. Another study of 78 cases, conducted by the Brookings Institute, found that in 71% of cases all victims were under 18, in 14% of cases victims were a mix of children and adults and in 12% of cases all victims were adults. Nearly all adult victims were women (which led them to conclude that “adult sextortion therefore appears to be a species of violence against women”), but child victims were both boys and girls.

2.126 The Brookings Institute also found that all the perpetrators they identified were men. Sometimes, the perpetrator will be closely connected to the victim (they may be an ex-partner or family member, for instance) and they use the threat to share intimate images as a tool to sexually assault or sexually harass their victim. In 17% of cases, perpetrators sexually assaulted or threatened to sexually assault their victim in

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204 Julia Slupska (DPhil Candidate, Oxford Internet Institute).
205 A Phippen and M Brennan, *Sexting and Revenge Pornography – Legislative and Social Dimensions of Image-Based Abuse* (forthcoming).
207 A Phippen and M Brennan, *Sexting and Revenge Pornography – Legislative and Social Dimensions of Image-Based Abuse* (forthcoming).
212 A Phippen and M Brennan, *Sexting and Revenge Pornography – Legislative and Social Dimensions of Image-Based Abuse* (forthcoming).
person, and this was especially common when the victim and perpetrator knew each other. In this context, sextortion for more images is often part of wider pattern of abuse.  

2.127 Other times, the perpetrator is a stranger who targets multiple victims, often in a range of countries. The Brookings Institute found that in the majority of cases perpetrators had more than one target, and in 13 cases prosecutors estimated that there were more than 100 victims. Usually, perpetrators are motivated by their own sexual gratification, and have no intention to post the images online. This perhaps explains why, unlike with sextortion for money where perpetrators have been found to give up reasonably quickly, perpetrators of sextortion for more images will often persist for a long time – more than 6 months in 22% of cases.

2.128 The perpetrator may stalk a number of victims through online dating websites, with the aim of finding vulnerabilities they can use against the victim. For instance, they may target individuals from particular religious groups who have been pictured in an intimate setting with someone of the same sex, or holding an alcoholic drink. They will capture the images and threaten to share them, often to force the victim to perform sexual acts or send sexual images. In this way, sextortion can occur in relation to “intimate” (non-sexual) images (discussed above) as well as nude or sexual images.

2.129 Perpetrators targeting many victims may use several different email addresses, online profiles and screen names to avoid being caught. Particularly sophisticated perpetrators may trick victims into downloading malware onto their computers, which allows the perpetrator to access all of their files, control their webcams and track what they type. For example, Luis Mijangos was found to have 15,000 webcam-video captures, 900 audio recordings and 13,000 screen captures on his computer, associated with 129 computers and around 230 victims, 44 of whom were children.

2.130 The Brookings Institute found that social media manipulation, or “catfishing”, was by far the most common way for children to be targeted (91% of cases) and computer hacking was a lot more common when victims were adults (43% of cases). As with

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215 Julia Slupska (DPhil Candidate, Oxford Internet Institute).


sextortion for money, the perpetrator may hack the victim’s webcam or phone to non-
consensually take images, or their files to steal images which were consensually
taken.\textsuperscript{220} Also in the same way as sextortion for money, victims may be approached
by a stranger who has tracked them down on a commercial pornography or “revenge
porn” site.\textsuperscript{221}

\textbf{POSSESSION}

2.131 Another behaviour brought to our attention by a few stakeholders is the possession or
retention of intimate images without consent (but where there is no threat to disclose
the images).

2.132 Young people in particular report feeling extremely paranoid after relationships break
down. Even when no threat to disclose is made, they are often concerned about what
their ex-partner will do with their images.\textsuperscript{222}

2.133 Research suggests that it is common practice for individuals who have consensually
disclosed images to ask for them to be deleted when they no longer want the person
in possession of them to view them. According to one survey conducted by McAfee,
32\% of people who have sent an intimate picture to a partner have asked them to
delete it after breaking up.\textsuperscript{223}

2.134 While no research has been conducted into how frequently individuals refuse to delete
intimate images when asked to, we learned of several anecdotal examples.

2.135 We heard of cases where someone had shared images with someone else
consensually, or allowed that person to take images of them, but later decided they
did not want that person to retain the images. They asked the person in possession of
the images to delete them, but they refused. We also heard of cases where suspects
were being investigated for other crimes, and images were found on their phone from
a long time ago. It is likely that the person in the image did not realise they had
retained them, and would not consent to them having those images now.\textsuperscript{224}

2.136 Additionally, we heard an example of one individual who had consensual sex with
someone, which was recorded and stored on the other person’s cloud account. He did
not blackmail her or threaten to share the video, but she was very concerned that he
was holding on to it. She went to the police, but they told her there was nothing they
could do and she should try to stop thinking about it.\textsuperscript{225}

\textsuperscript{220} Clare McGlynn, Erika Rackley and Ruth Houghton, “Beyond ‘Revenge Porn’: The Continuum of Image-
Based Sexual Abuse” (2017) 25 Feminist Legal Studies, 25, 34.

\textsuperscript{221} A Phippen and M Brennan, Sexting and Revenge Pornography – Legislative and Social Dimensions of
Image-Based Abuse (forthcoming).

\textsuperscript{222} Carmel Glassbrook (Professionals Online Safety Helpline (POSH)).

\textsuperscript{223} Lianne Caetano, “Revenge Posts on Social Media Could Land You in Jail” (22 October 2013) McAfee,
(last visited 23 February 2021).

\textsuperscript{224} Matthew Hardcastle (Kingsley Napley).

\textsuperscript{225} Ksenia Bakina (Privacy International).
2.137 We will consider whether possessing an intimate image without consent should be a criminal offence in Chapter 7.

INTIMATE IMAGE ABUSE

2.138 The different forms of intimate image abuse are best seen as a “range of gendered sexualised forms of abuse which have common characteristics”. Clare McGlynn, Erika Rackley and Ruth Houghton term this the “continuum of image-based sexual abuse”. This section will consider how the different forms of intimate image abuse interrelate and how they are collectively experienced by victims.

2.139 One of the ways this plays out is that different types of intimate image abuse rarely happen in isolation. Rather, it is common for victims to experience more than one type of such abuse. For example, an intimate image may be taken of someone without their consent, and then shared without their consent, or threats may be made that it will be shared. In a survey of 4274 Australians, of those who had experienced a sexual or nude image of them being taken without their consent, 45% had also experienced a sexual or nude image of them being shared without their consent. Additionally, research conducted by the law firm Slater and Gordon found that of those whose images had been disclosed without their consent, half experienced this as a form of coercion and control and were first threatened that their images would be shared.

2.140 Alternatively, some behaviours encompass more than just taking, making or sharing (or threatening to take, make or share) an intimate image. A good example is images being livestreamed. For instance, in 2011 a female cadet from the Australian Defence Force Academy had consensual sex with a male cadet, Daniel McDonald. McDonald filmed them having sex without the female cadet’s consent, and livestreamed the recording to Dylan Deblaquiere, and four other cadets, who watched from another room. By doing so, McDonald was taking and sharing an intimate video without consent. In 2013 McDonald and Deblaquiere were found guilty of using the internet to send offensive material and McDonald was also found guilty of committing an indecent act. As discussed above at paragraph 2.67, livestreaming sex acts without consent also appears to be a significant issue at “chemsex” parties.

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232 Catherine Bewley (Galop).
2.141 Another reason to look at the different types of intimate image abuse together is to see how prevalent this behaviour is, who the victims are and who the perpetrators are, in the round. One Australian study examined three forms of intimate image abuse: images being taken without consent, images being shared without consent and threats that images would be shared.\(^{233}\) Contrary to studies examining single forms of image abuse, the study found that women and men reported being victims with almost exactly the same frequency (22% for women and 23% for men). However, men were more likely than women to be perpetrators (54% compared to 33% - with 13% unknown or mixed).

2.142 Additionally, women were more likely to be victimised by a partner or ex-partner (39% compared to 30% for men), particularly when the abuse was a threat to disclose an image (38% compared to 23%). Women were also more likely to fear for their safety as a result of the abuse, which can be explained by the fact that women are more likely to experience intimate image abuse in the context of stalking, harassment and domestic violence.

2.143 The same study found that people from certain marginalised groups are more likely to experience intimate image abuse. Of those who reported having a disability, an extremely high percentage had been victims of intimate image abuse – 56.1% (compared to 17.6% for people who did not report having a disability). Among indigenous Australians the figure was 50%, which fell to 22% among non-indigenous Australians. Finally, 36% of LGB people reported having suffered intimate image abuse, compared to 21% for cisgender heterosexual people. The rate of victimisation was higher among gay and bisexual men (39%) than among lesbians and bisexual women (33%), which is consistent with the fact that gay and bisexual men are the group most likely to report taking and sharing intimate images of themselves. Young people are also victimised more frequently. For example, 30.9% of 16 to 19-year olds reported being victims, compared 22.45% of 30 to 39-year olds.

2.144 As well as looking at intimate image abuse holistically, it is also important to frame it within a wider context of abuse. Many women experience intimate image abuse alongside other abusive behaviours, making image abuse one part of a broader pattern of abuse.\(^{234}\) For example, they may also have their movements monitored, or be stalked, harassed or sent abusive messages.\(^{235}\)

**CONCLUSION**

2.145 This chapter sought to highlight the wide range of behaviours that fall within the concept of “intimate image abuse”. These behaviours include, as a summary:

1. voyeurism;
2. “upskirting”;

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\(^{234}\) Sophie Francis-Cansfield (Women’s Aid).

\(^{235}\) Maithreyi Rajeshkumar (Childnet International).
(3) “downblousing”;
(4) recording sexual assaults;
(5) sexualised photoshopping;
(6) deepfake pornography;
(7) sharing intimate images without consent;
(8) threats to take, make and share intimate images;
(9) “sextortion” (both for money and for more images); and
(10) possessing or retaining intimate images without consent.

2.146 As this chapter has shown, these behaviours occur in a wide range of ways and circumstances.
Chapter 3: The current law and its limitations

INTRODUCTION

3.1 This chapter will outline the current criminal law in England and Wales first, as it applies specifically to taking, making and sharing intimate images without consent, and secondly, other offences which may apply to this conduct.\(^1\) It will demonstrate the application of these laws with reference to existing case law and identify any limitations or gaps in the current law that may form the basis for consultation questions and provisional proposals in later chapters. This chapter will not address the current law in England and Wales relating to indecent images of children or child sexual offences as this is not within the remit of this project.\(^2\)

3.2 There is currently no criminal offence which comprehensively covers the taking, making and sharing of intimate images without consent. There are three offences that may apply to some forms of these behaviours:

1. the “disclosure” offence under section 33 of the Criminal Justice and Courts Act 2015 (“CJCA 2015”);\(^3\)
2. voyeurism under section 67 of the Sexual Offences Act 2003 (“SOA 2003”) - namely, the offences found in sections 67(2), (3) and (4); and
3. the “upskirting” offence introduced by the Voyeurism (Offences) Act 2019, which added section 67A into the SOA 2003.

3.3 Each of these offences covers different circumstances of taking and disclosing (but not making) some form of intimate image.\(^4\) There are a number of other offences which may be used to prosecute intimate image abuse, including intimidatory offences (such as harassment or stalking), communications offences or indecency offences.

3.4 In this chapter we consider each of these offences in detail, the type of behaviour the offence targets, its scope and limitations. We then examine the other existing offences not specifically designed to target this form of abuse, and their limitations.

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\(^1\) At the end of this chapter we include a table that sets out all the current intimate image offences and a table that sets out the gaps in the current law.

\(^2\) Such as offences in the Protection of Children Act 1978 and the Criminal Justice Act 1988. The purpose of the offences in these Acts is to protect children from sexual harm and exploitation which is distinct in both nature and harm from intimate image abuse of adults.

\(^3\) See corresponding “revenge porn” offences in Northern Ireland (Justice Act (Northern Ireland) 2016, ss.51-53 and Scotland (Abusive Behaviour and Sexual Harm Act (Scotland) Act 2016, s.2).

\(^4\) Note that these concepts are further defined in Chapter 7.
SPECIFIC OFFENCES

The Disclosure Offence: section 33 of the Criminal Justice and Courts Act 2015

3.5 Section 33 of the CJCA 2015 provides for the offence of “disclosing private sexual photographs and films with intent to cause distress”, sometimes referred to as the “revenge porn” offence. Section 33(1) states that:

It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made—

(a) without the consent of an individual who appears in the photograph or film, and

(b) with the intention of causing that individual distress.

3.6 However, section 33(2) provides that “it is not an offence under this section for the person to disclose the photograph or film to the individual mentioned in subsection (1)(a) and (b)”. This means that disclosing a private, sexual photograph or film to the person who features in the photo or film being disclosed is not an offence under this provision, even if taken and disclosed to them without their consent. This is discussed further at paragraph 3.71 below. The offence could be committed if the image was sent to a person in the image with the intent to cause distress to another person who appeared in the image.

3.7 The offence is triable either way, with a maximum sentence of imprisonment for two years and/or a fine on indictment, or six months imprisonment and/or an unlimited fine on summary conviction.

3.8 As we noted in the previous chapter, data provided to us from the Crown Prosecution Service (“CPS”) show prosecutions under section 33 have been slowly reducing since 2018. Attrition rates are said to be high; for example, an investigation conducted by the BBC of figures released by 31 police forces indicated that just 11% of reported offences under section 33 of the CJCA 2015 were charged, 7% resulted in a caution.

5 Note that it is possible this may be an offence under the Communications Act 2003, s 127 or Malicious Communications Act 1988, s 1. These provisions are discussed at para 3.174 below.

6 D Ormerod and D Perry (eds), Blackstone’s Criminal Practice 2019, para B18.33 p1001.

7 Criminal Justice and Courts Act 2015, s 33(11) states that the reference to 12 months’ imprisonment as the maximum sentence is to be read as six months until section 154 of the Criminal Justice Act 2003 comes into force. At the time of writing, the Criminal Justice Act 2003, s 154 is not in force and therefore the maximum sentence stands at six months’ imprisonment.

8 Criminal Justice and Courts Act 2015, s 9. It should also be noted that Schedule 8 of the CJCA 2015 provides for the liability of service providers, however, platform liability is out of scope of the terms of reference for this project.


and 5% in a community resolution. No action was taken in 64% of reported offences, the main reasons given being a “lack of evidence” and “the victim withdrawing support”.11

Meaning of “photograph or film”

3.9 Section 34(4) defines “photograph or film” as a “still or moving image in any form” that either appears to or in fact consists of “one or more photographed or film images” including, as stated in section 34(5), those that have been “altered in any way”.

3.10 The explanatory notes to this section provide an example: if an image was digitally altered to look like a drawing – even if it was derived from an original photograph – its disclosure would not come under this offence. However, if a photograph or part of a photograph was transposed onto a drawing, this would come within the definition of “photograph”.12 If an image has been entirely computer-generated, even if it is made to look like a photograph, it does not fall within the definition of “photograph” for this offence. There may be various forms of altered imagery that fall foul of the disclosure offence. This is discussed further below.

3.11 A “photograph or filmed image” is taken to mean “a still or moving image that a) was originally captured by photography or filming, or b) is part of an image originally captured by photography or filming”. “Filming” is defined in section 34(7) as “a recording, on any medium, from which a moving image may be produced by any means”. Both include negatives as well as “data stored by any means which is capable of conversion into an image” (section 34(8)), for example, data stored on a hard drive or disc.13

Altered photographs or films

3.12 The section 33 offence also has a number of exceptions that apply to photographs or films that have been altered, combines two or more images or combines the photograph or image with something else. Section 35(5) states that:

The photograph or film is not private or sexual if—

(a) it does not consist of or include a photographed or filmed image that is itself private and sexual,

(b) it is only private or sexual by virtue of the alteration or combination mentioned in subsection (4), or

(c) it is only by virtue of the alteration or combination mentioned in subsection (4) that the person mentioned in section 33(1)(a) and (b) is

11 Above. It should be noted that these figures represent intimate image abuse of children as well as adults (30% of reported offences involved victims under the age of 19). See also Laura Linham, “Revenge porn victims in Somerset as young as 11, investigation reveals” (5 June 2018) Somerset Live, https://www.somersetlive.co.uk/news/somerset-news/revenge-porn-victims-somerset-young-1643343 (last visited 24 February 2021).

12 Criminal Justice and Courts Act 2015, Explanatory Notes [358].

13 The latter of which is clarified in Criminal Justice and Courts Act 2015, Explanatory Notes at [361].
shown as part of, or with, whatever makes the photograph or film private and sexual.

Limitations

3.13 This means that the disclosure of some forms of altered imagery, even if using some parts of a person’s photograph, may not fall within this offence if it is only private or sexual by way of alteration. An example of this is “deepfake pornography”, described in Chapter 2. Disclosing an image of a person’s head superimposed onto a pornographic image cannot be prosecuted under section 33 as it is only sexual by way of alteration. Prosecutors must instead try to apply one of the other potentially applicable offences identified later on in this chapter, such as harassment (if the behaviour can be considered a course of conduct) or the communications offences. As we will discuss in more detail below, these alternative offences were not designed to capture the unique harm of intimate image abuse and therefore do not always adequately reflect the level of harm caused.

3.14 As part of the Policing and Crime Bill 2016, an amendment was put forward in 2016 to repeal the provisions that exempt altered imagery in sections 33 to 35 of the CJCA 2015. However, this amendment was rejected, with the Minister of State for the Home Office, Baroness Williams of Trafford, stating:

Images that are photoshopped – for example, so that a non-sexual image of an individual becomes sexual – should not be covered by the offence. This is because the disclosure of such an image, though still distressing, does not have the potential to cause the same degree of harm as the disclosure of an undoctored photograph showing images of the kind referred to in section 35(3) of the 2015 Act.14

3.15 However, discussions with stakeholders have demonstrated that this view does not reflect the experiences of victims. Many raised concerns about the exclusion of altered images from section 33, noting that “deepfake pornography” and similar technologies produce sufficiently realistic representations that their creation and disclosure can cause similar harms to the sharing of a “real” intimate image.15 Henry Ajder, from Sensity (formerly known as Deeptrace), told us that while a lot of deepfakes may not be realistic, they are harmful and are a direct violation of an individual’s bodily integrity.

3.16 As Gillespie noted, “computer manipulation packages are so sophisticated that spotting fake images is not always easy”,16 and it is likely that many altered images (such as those where a person’s head is superimposed onto a body performing a

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14 Hansard (HL), 16 November 2016, vol 776, col 1443.
15 See Alisdair Gillespie, “‘Trust me, it’s only for me’: ‘revenge porn’ and the criminal law” [2015] Criminal Law Review 866; see also Dan Sabbagh and Sophia Ankel, “Call for upskirting bill to include “deepfake” pornography ban” (21 June 2018), The Guardian, https://www.theguardian.com/world/2018/jun/21/call-for-upskirting-bill-to-include-deepfake-pornography-ban (last visited 24 February 2021). Lord Marks proposed an amendment to have the exclusion removed, noting that “distress may be caused to the victim where people that view the images think they are real and are unaware of the doctoring of the image”: see Hansard (HL), 16 November 2016, vol 776, col 1445 per Lord Marks of Henley-on-Thames.
16 Alisdair Gillespie, “‘Trust me, it’s only for me’: ‘revenge porn’ and the criminal law” [2015] Criminal Law Review 866 at p 870.
sexual act) could be considered real and cause analogous harms to the person depicted as if it was an original photograph.

3.17 Erika Rackley and Kelly Johnson told us that 35% of victims in their survey sample had experienced the creation and sharing of pseudo images of themselves in compromising situations. They described the significant harm these images had caused; for many, it was life ruining. As one victim said, “it’s still a picture of me”.

### Meaning of “disclose”

3.18 Section 34(2) states that a person “discloses” an image to a person “if, by any means, he or she gives or shows it to the person or makes it available to the person.”

3.19 Disclosure includes sharing electronically (such as via email or posting on a website) and physically (for example, physically handing someone a photograph or showing them a film, or displaying the image/s in a public place). As Gillespie has noted, it is likely that the term “making available” will be interpreted similarly to its interpretation in the context of indecent photographs of children. In the indecent images of children case of *Dooley*, the court held that possession “with a view to distribution” included the use of peer-to-peer networks with an image being left in a shared folder. Gillespie goes on to say that by the same logic, placing images onto a web-hosting service, social network site etc should also constitute “making available”. Crofts and Kirchengast state that the definition would also cover a situation where a person shows their phone to another without giving that person control over the image.

### Secondary distribution

3.20 As we noted in our Abusive and Offensive Online Communications Scoping Report, those that re-tweet or forward such photographs or films would also disclose for the purposes of the CJCA 2015.

3.21 Section 34(3) of the CJCA 2015 states:

> Something that is given, shown or made available to a person is disclosed—

(a) whether or not it is given, shown or made available for reward, and

(b) whether or not it has previously been given, shown or made available to the person.

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18 Criminal Justice and Courts Act 2015, Explanatory Notes at [357].


20 Alisdair Gillespie, “ ‘Trust me, it’s only for me’: ‘revenge porn’ and the criminal law” [2015] Criminal Law Review 866 at p 867.

3.22 For the purposes of the offence therefore, an image is considered disclosed even if it is disclosed for a reward or has been disclosed before.\(^{22}\) This means that someone who forwards or re-tweets a private sexual image without consent – which is known as secondary distribution – is still considered to have disclosed it, for the purposes of this offence. Whether they are prosecuted, however, will depend on whether they intend to cause distress.\(^{23}\)

3.23 Each act of distribution is capable of constituting a criminal offence if the perpetrator intends to cause the person in the image distress.

**Limitations**

3.24 Stakeholders we spoke to during pre-consultation engagement noted the significant ongoing harm that is caused when a victim’s intimate image is continuously uploaded despite efforts to have the image taken down.

3.25 One stakeholder, Folami Prehaye,\(^{24}\) told us about her experience of so-called “revenge pornography” whereby her ex-partner set up a fake Facebook account in her name and used it to upload intimate images of her that they had taken together during their relationship.\(^{25}\) He then invited her friends and family to the page to see them. The photos were very quickly copied from the Facebook page and began to appear on numerous pornography websites around the world. On one website alone, the pictures had been viewed over 48,000 times. During pre-consultation engagement, she described to us the ongoing harm it had caused. Folami described her life as having been turned “upside down” at the time. At the time in 2014 she made several attempts to contact the multiple websites that held her explicit pictures to have them taken down, but some did not even respond. She told us the worst thing for her was that at the time she could not stop people continuing to view them.\(^{26}\)

3.26 The Revenge Porn Helpline also told us that many of their callers spent years constantly searching for their images in an attempt to control any further distribution. As Erika Rackley and Kelly Johnson said to us, “it’s part of the harm – the constant uploading – part of what this problem is – even if the secondary distributor did not know it was not consensual”.

3.27 Lawyers we spoke to in pre-consultation stakeholder engagement – such as Alexandra Whiston-Dew from Mishcon de Reya – highlighted that it was difficult to satisfy the intent requirement when an image is being re-published rather than shared for the first time. The intent element requires the perpetrator to intend to cause distress to the victim. It could be argued that the perpetrator is one step removed from

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\(^{22}\) Criminal Justice and Courts Act 2015, s 34(3).


\(^{24}\) Folami Prehaye is an experiencer, activist and founder of Victims of Internet Crime (VOIC).


the victim when they re-share something that has already been shared by another. It is harder to prove that the intent of the re-distributor was linked to the victim’s distress and not simply attached to the image. This is particularly so when images are re-distributed in a “viral” fashion, where an image spreads very rapidly and widely, or attracts a large amount of attention on an online platform.

3.28 Whiston-Dew also told us that some secondary distribution can be caught within the offence, for example where the sharer knew the individual in an image and re-shared it on a WhatsApp group to cause the victim more distress. Lawyers explained to us that there are many instances – particularly on applications such as Grindr amongst the LGBTQ community – where sexual images are distributed all the time and often, the person who receives such an image just thinks it is “funny” and something they want to share more widely. There are different types of intent which make any prosecution difficult where there is a narrowly defined, or single intent requirement built into the offence.

**Meaning of “private” and “sexual”**

3.29 For the purposes of section 33, the image disclosed without consent must be “private and sexual” in order to fall within the offence. The meanings of both “private” and “sexual” are contained in section 35 of the CJCA 2015.

3.30 According to section 35(2) of the CJCA 2015, a photograph or film is deemed “private” for the purposes of the offence if it “shows something that is not of a kind ordinarily seen in public”. \(^{27}\) It is stated in the explanatory notes that a photograph of people kissing would be an act ordinarily seen in public and therefore would not be considered private. \(^{28}\)

3.31 As well as being private, the photograph or film must also fit within the definition of “sexual” in section 35(2). In this provision, a photograph or film is defined as sexual if:

- (a) it shows all or part of an individual’s exposed genitals or pubic area,
- (b) it shows something that a reasonable person would consider to be sexual because of its nature, or
- (c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

3.32 The effect of section 35(2)(c) is detailed in the explanatory notes using the following example:

… a photograph of someone wearing their underwear is not necessarily sexual, but a reasonable person might consider it to be so if the content of the picture, including for example what else was (or was not) shown or the manner in which the person was posing, would lead a reasonable person to consider it as such. \(^{29}\)

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\(^{27}\) Criminal Justice and Courts Act 2015, s 35(2).

\(^{28}\) This example is given in Criminal Justice and Courts Act 2015, Explanatory Notes at [363].

\(^{29}\) Criminal Justice and Courts Act 2015, Explanatory Notes at [366].
3.33 This suggests that an image of a man or woman in their underwear, if they were not in a provocative pose, may not be caught within the definition of "sexual" (for example, if they were changing in a public changing room).

3.34 An image of a woman performing oral sex has been accepted as private and sexual.\textsuperscript{30} In 2015, Paul Marquis pleaded guilty to the offence after sending a photograph of a woman’s breasts to another man.\textsuperscript{31} Similarly, in \textit{R v Bostan}, the defendant pleaded guilty to the disclosure offence for sending a photograph of a woman naked from the waist up to the woman’s mother, despite the woman “not striking any overtly sexual pose or doing anything sexual beyond baring her top half”.\textsuperscript{32}

3.35 Similar concerns over the definition of “private” and “sexual” were outlined in our Abusive and Offensive Online Communications Scoping Report. We discussed the way in which the definition under section 33 presents difficulties in identifying precisely what types of images could be found to be “sexual”, beyond the obvious images showing sexual activity. For example, whether or not the image of a woman sunbathing topless on a beach could be defined as “private and sexual” is questionable as a jury may not consider it to be “sexual” and it may be considered to be of a kind ordinarily seen in public. It was concluded that these difficulties will continue to arise without a clearer definition of “sexual” and “private”.\textsuperscript{33}

Limitations

3.36 Limiting the nature of the image to private and sexual excludes the non-consensual disclosure of some types of images that can still be harmful but fall outside these parameters. Stakeholders have shared with us numerous examples of intimate image abuse that fall outside the definition of private and sexual for the purposes of this offence. We highlight some of these examples below.

\textit{Intimate images taken or shared without consent which cause significant harm to victims for cultural or religious reasons}

3.37 A large number of stakeholders we spoke to, including victim support organisations, operational staff and lawyers, provided numerous examples where images are shared without consent which cause harm to the victim for cultural or religious reasons. For example, an image of a Muslim woman without her hijab, in an intimate pose where her shoulders and upper chest are exposed or with a man who is not her husband hugging or kissing.

3.38 Such images are not sexual as defined by section 35 but are certainly intimate and harmful if shared in this way. While objectively, a woman with her hair visible and with


\textsuperscript{31} \textit{R v Marquis} Unreported (9 June 2015) Teeside Magistrates’ Court, cited in Samantha Pegg, “A matter of privacy or abuse? Revenge porn and the law” [2018] \textit{Criminal Law Review} 512. Note that breasts are specifically excluded from s 35(2)(a) so the prosecution would have had to bring a case under one of the other two subsections.

\textsuperscript{32} \textit{R v Bostan} [2018] EWCA Crim 494, [2018] 2 Cr App R 15 at [14].

\textsuperscript{33} Abusive and Offensive Online Communications: A Scoping Report (2018) Law Com No 381 pp 254 to 255. See also Alisdair Gillespie, “‘Trust me, it’s only for me’: ‘revenge porn’ and the criminal law” [2015] \textit{Criminal Law Review} 866, pp 869 to 870.
a man’s arms around her is of a kind ordinarily seen in public, in this context, the image is intended to remain private and its non-consensual disclosure can cause significant harm. As these stakeholders told us, the non-consensual sharing of these images had significant ramifications for those Muslim women who had experienced this. Most were excluded from their family and community; they became socially isolated, which had severe psychological consequences, and many were impacted financially as they either felt they could not go to work or lost their job as a result.

3.39 It was clear from the examples given to us by stakeholders that the non-consensual taking and sharing of these types of images had a devastating impact on particular members of society.

3.40 At our victims’ organisations roundtable, Co-Chair of the Muslim Women’s Network UK Nazmin Akthar said:

We work in the context of honour-based violence and one key thing we find is that in many cases an image that is shared is not specifically sexual – for example, a man hugging a woman. This can have huge cultural ramifications but is difficult to engage criminally.

3.41 Victim support organisations raised many other examples where intimate images were shared without consent which had significant impacts in a cultural context. These harms are discussed further in Chapter 5. There was a view from these stakeholders that taking or sharing these types of images without consent should be a criminal offence based on the harm that results from these acts.

Doxing

3.42 Other examples shared with us where images were intimate, but not necessarily “sexual” or “private” within the meaning of the disclosure offence, come under a phenomenon known as “doxing”. Doxing is where private or identifying information about a person is published without their consent. One specific form of doxing is known as “outing”. Outing is generally understood as disclosing a person’s sexual orientation, gender identity or HIV status without their consent. In the context of doxing, outing is where the information that is published without consent links the identity of an individual who is “out” to a different context where they are not “out”.34 For example, we were told of members of the LGBTQ community being deliberately “outed” through the non-consensual sharing of a relatively innocuous image. For example, gay men had been outed by images of them kissing or holding hands with another man. As Ronnie Meechan-Rogers (an academic doing research in this area) told us, this is particularly risky for gay individuals from strong religious backgrounds.

3.43 Another form of doxing described to us by Galop as extremely common practice is the sharing of private images of trans people without their consent online. Often these images are not explicit in nature but are images of what trans people looked like

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before they transitioned. These images are sought by coordinated hate groups and individuals in an attempt to “out” and invalidate trans people.

3.44 Galop described to us how for most trans people, disclosure of their trans status without their consent is likely to lead to serious physical or psychological harm because of the level of transphobia in society.35 This is regardless of the intention of the perpetrator. Images used to “out” in this way would not be considered sexual or private for the purposes of the disclosure offence. Galop also told us that as the photos by themselves can appear benign, any kind of legal action against their malicious disclosure is difficult unless there is an evidenced intent to cause harm.

3.45 The experiences described above are clearly harmful, but do not come within the disclosure offence. It is unsurprising, therefore, that the majority of stakeholders we engaged with felt that the terms “private” and “sexual” in this offence lack clarity and can be limiting in the way they exclude types of images as discussed above.36

Consent

3.46 Section 33(7)(a) of the CJCA 2015 states that:

“consent” to a disclosure includes general consent covering the disclosure, as well as consent to the particular disclosure.

3.47 This only describes the scope of consent to a disclosure, it does not define what consent is. In comparison, section 74 of the Sexual Offences Act 2003 provides an explicit definition of consent: “for the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. The disclosure offence relies on the concept of consent, but without a definition, it can lack clarity in application. We will now consider the criticism of the way consent is approached in the disclosure offence.

Lack of definition of consent

3.48 Academics in the field have expressed concern about the lack of a definition of consent. Samantha Pegg stated that “as consent has always been a thorny issue for the criminal law … we may have expected there to be a definition of consent in the Act, yet aside from s.33(7)(a) the Act is silent on how consent is to be approached”.37 As she argues, there are a number of circumstances where consent may be difficult to ascertain, such as consent made under duress or while intoxicated.38

35 The different types of harm experienced by victims of intimate image abuse is discussed in Chapter 5.


38 For further discussion, see Samantha Pegg, ‘A matter of privacy or abuse? Revenge porn and the law’ [2018] Criminal Law Review 512 at p 521.
Gillespie has questioned why Parliament felt the need to introduce section 33(7)(a) when it could have explicitly relied on contemporary understanding of consent, which could assist with interpreting situations where consent may be in issue.\textsuperscript{39}

Members of Parliament we spoke to, including Maria Miller MP and Liz Saville Roberts MP, were particularly concerned that the notion of consent in intimate image abuse must be clarified in the law.

\textit{Freedom to give consent}

The notion of consent and when it has been obtained in intimate image abuse circumstances can be difficult to ascertain. As Women’s Aid told us, while a lot of intimate images are taken and shared consensually, in many cases the person’s consent could be coerced. This is especially so in a domestic abuse context where, as they noted, one “cannot really consent in an abusive relationship”. Antoinette Huber’s research also revealed that a large portion of intimate images of women are taken and shared with apparent consent given under duress.\textsuperscript{40}

\textit{Consent with a defined extent}

In many other cases, as Andrew Lord from Leigh Day told us, adults would share images of themselves consensually while in a relationship or allow videos to be taken of consensual sexual activity between them while in the relationship. However, these images are then shared sometime later, often when the relationship has ended, without consent. Refuge told us they had seen cases where consent was given to take one image but not another, or consent was given to have an image taken but not to a video recording.

It is clear from these experiences that consent in one context does not mean consent in another. However, stakeholders including the CPS emphasised there was a need to educate police and prosecutors about this; that even if a person has sent someone a sexual image of themselves with consent, it does not mean that they have given consent for that image to be shared more widely. In a survey conducted by the Justices’ Clerks’ Society, many responses mentioned the legal issue of consent in relation to section 33. One response noted:

\begin{quote}
Generally, magistrates and jurors struggle with the issues that arise in sexual relationships specifically around the issue of when someone is consenting; they don't seem to understand that being silent doesn't mean you have consented.
\end{quote}

\textsuperscript{39} Alisdair Gillespie, “‘Trust me, it’s only for me’: ‘revenge porn’ and the criminal law” [2015] \textit{Criminal Law Review} 866.

\textsuperscript{40} Antoinette Huber, “Women, Image Based Sexual Abuse and the Pursuit of Justice” (February 2020), Doctoral Thesis, Liverpool John Moores University.
Intent to cause distress

3.54 The disclosure offence is committed only where the defendant intended to cause distress to the individual who appears in the photograph or film disclosed without consent. “Distress” is not defined in the legislation nor in the explanatory notes.41

Limitations

Reason for disclosure

3.55 In the initial House of Lords debate in 2014, Baroness Thornton raised concern over this intent element, warning that it could be limiting:

As it stands, depending on the interpretation of “distress”, the law will provide a remedy to a victim who is distressed, but not angry. Professors Rackley and McGlynn, who have been advising many Members of the House throughout the discussions about revenge porn and rape porn, explained that the focus of the law should be on the offender’s actions and the absence of consent, not on the victim’s response, and I think that is right … We have to ask whether the issue of distress could actually significantly limit the effectiveness of this offence.42

There, is however, no response to this recorded in Hansard, and the intent element was not amended. Although Baroness Thornton referred to a remedy for a victim who is distressed, the disclosure offence requires the prosecution to prove that the defendant intended to cause the victim distress, rather than that the victim suffered distress.

3.56 Stakeholders have provided us with numerous examples where private and sexual images are disclosed for reasons that may not fit within “intent to cause distress”, but which cause significant harm. These examples included non-consensual disclosure for the purposes of sexual gratification, for a joke or a “laugh”, or for financial gain.

3.57 The harms caused by these behaviours are considered in depth in Chapter 5. As the Revenge Porn Helpline emphasised, whatever the intent of the perpetrator, “the impact to the victim is there regardless”. Disclosure of images for sexual gratification or financial gain, as well as for reputational damage, are equally harmful and humiliating.43 Baroness Kennedy warned in the initial stages of the Criminal Justice and Courts Bill that:

it is important that this proposed new clause is drawn with real care. While I hear the discussions about the motivation to degrade and humiliate or to secure sexual gratification, it is important to draft widely without specifying the nature of the motivation. That is because it is always difficult to pin down motivation.44

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41 In other contexts, courts have stated that “distress” should be given its ordinary and natural meaning and will be context dependent. See, for example, Southard v DPP [2006] EWHC 3449 Admin; DPP v Smith [2017] EWHC 3193.


Recklessness

3.58 According to section 33(8) of the CJCA 2015, the accused is not taken to have intent to cause distress to the victim if their distress is “merely a natural and probable consequence” of the disclosure. A defendant who is reckless as to whether the victim is caused distress when disclosing a private, sexual photograph without consent therefore does not commit an offence under section 33. Gillespie argued that by inserting section 33(8), “Parliament has arguably muddied the waters by creating an extra provision of uncertain wording and application”.45

3.59 Recklessness is defined in R v G as follows:

A person acts recklessly … with respect to— (i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.46

The concept of recklessness is discussed in more detail in Chapter 10.

3.60 Presumably, the failure to include recklessness in the disclosure offence allows for more innocuous forms of sharing not to be criminalised. For example, D is in a long-distance relationship with V and sends him a topless photo of herself via WhatsApp with the caption “for you x”. D forwards this to his best friend to tell him he is excited to see his girlfriend again. In this instance, V’s distress would be a natural and probable consequence of the non-consensual disclosure, but it is unlikely that D intends to cause distress, although he may be reckless as to whether it would cause V distress.

3.61 However, as stakeholders told us (see further below) in the absence of recklessness, the offence requires proof of intent which is very difficult to evidence in practice.

3.62 An amendment was tabled as part of the Policing and Crime Bill to allow proof of recklessness as an alternative to proof of intention. This amendment was rejected. Minister for State Home Office, Baroness Williams of Trafford, said that to allow recklessness would “dilute” the “malicious intent” which she said was a “key feature” of the offence.47 Almost all stakeholders we have engaged with are of the opposite view. In fact, without a recklessness alternative to intention, it is very difficult for many forms of disclosing private, sexual images without consent to satisfy the fault element of the offence.

Intent of the perpetrator

3.63 The Joint Association of Police and Crime Commissioners Victim’s Portfolio Lead and the Police, Fire and Crime Commissioner for North Yorkshire Police, Julia Mulligan and Deputy Commissioner Will Naylor, emphasised the difficulties in proving this intent element and felt that the offence “doesn’t focus on the lack of consent, but focuses on the purpose of the perpetrator”. They noted that other motivations such as

45  Alisdair Gillespie, “‘Trust me, it’s only for me’: ‘revenge porn’ and the criminal law” [2015] Criminal Law Review 866.


47  Hansard (HL), 16 November 2016, vol 776, col 1443.
disclosure for money or for a joke were loopholes to the offence. Lawyers from McAllister Ollivarius said that “often these things are done for a laugh”.

3.64 Antoinette Huber told us that her research with victims of these behaviours highlighted that the intent element of the disclosure offence is difficult to prove, particularly in cases where there is no intention that the victim find out about the disclosure. For example, where someone shares an intimate image of an ex-partner with whom they have no contact, in a private chatroom on a niche website, they can reasonably argue that they had no intention that the victim would ever know their image had been shared.

3.65 In a survey conducted by the Justices’ Clerks’ Society, a number of magistrates had said that issues with intent arose when dealing with section 33. Chief Magistrate Emma Arbuthnot and DDJ Mike Fanning described the intent element of this offence as “far too narrow”.

3.66 Both Women’s Aid and the Revenge Porn Helpline described the intent element of the disclosure offence as a “barrier” to providing victims with sufficient protection from behaviour that should be criminalised. They noted that it can be difficult to prove the right intent, and that perpetrators will say it was for a laugh, not to cause distress, or that they never meant for the victim to find out. As discussed above, where intent to cause distress is in question, it can mean behaviour falls outside the disclosure offence. The Revenge Porn Helpline further noted that whatever the perpetrator’s motivation, “the impact to the victim is there regardless”. Carrie-Anne Myers and Hollie Powell-Jones said that “the need to prove intent is failing victims”.

Cross-jurisdictional challenges

3.67 These offences are often committed online, in particular the disclosure offence. This means there will be circumstances where the conduct takes place across borders and it will be difficult to determine in which jurisdiction it is committed. These challenges can arise where either the perpetrator, D, or the victim, V is located abroad, and also where websites or social media platforms are hosted in a country outside England and Wales. For example:

(1) V, who lives in England, sends D, who is located outside England and Wales, some naked images consensually. D then sends these images to V’s family and friends who also live in England, without V’s consent; or

(2) V, who lives in England, has her computer hacked by D, who finds some sexual images of her and posts them to a pornography site. There may be different consequences depending on whether the pornography site was hosted in England and Wales or abroad.

3.68 The CPS guidelines for the disclosure offence note that “the court would need to be satisfied that it was in substance an offence committed within the jurisdiction”.48 They

cite R v Smith (Wallace Duncan) (No 4),\textsuperscript{49} which held that a court in England has jurisdiction to try an offence if “substantial activities constituting the crime take place in England” or “a substantial part of the crime was committed here”. This requires the act to have a “substantial connection” with England and Wales. However, as the above examples suggest, this may be difficult to determine. The guidelines state that if the perpetrator is located in England and Wales this would be sufficient, but do not provide guidance when the perpetrator is located abroad. Anecdotal evidence from victim support organisations suggests this could certainly be the case, particularly where the victim’s family are also located abroad.

3.69 However, these challenges do not necessarily indicate anything inherently wrong with the offences, and they are not unique to intimate image abuse. The Law Commission’s recent scoping report on Abusive and Offensive Online Communications details how the wider criminal law has had to develop a practical approach to cross-jurisdictional issues due to their prevalence in offences with an online component\textsuperscript{50}. They cannot necessarily be fully addressed by reforming the law as cross-jurisdictional challenges will arise in any offence of this kind where the internet is readily used to commit it.\textsuperscript{51}

3.70 Such challenges go beyond the wording of individual offences and will be affected by international law and developing practice in the wider criminal law. In our Scoping Report, we concluded that even where domestic law is able to address cross-jurisdictional issues in the immediate offence, there will always be difficult questions where more than one jurisdiction is involved. For example, a defendant may face criminal charges in more than one country for the same act or there may be differences in the legality of certain acts or elements in the different countries that have a jurisdictional claim.\textsuperscript{52}

**Other gaps in the disclosure offence**

**Distributing to the person in the image without their consent**

3.71 Section 33(2), as noted earlier in this chapter, specifies that disclosing a private, sexual photograph or film to the person in that image without their consent, is not an offence under this provision. As we noted in our Scoping Report, it is suggested that the purpose of deliberately excluding this is to avoid criminalising consensual sharing of sexual photos between partners as part of their relationship.\textsuperscript{53} However, the effect of this exclusion is much more wide-reaching.

3.72 Gillespie has argued that any such steps taken to avoid criminalising this behaviour were unnecessary, however, as it would already not be an offence if it was done with the consent of the person in the image, and/or without an intention to cause distress.\textsuperscript{54}


\textsuperscript{50} Similar to the approach taken in the CPS guidelines.

\textsuperscript{51} See Abusive and Offensive Online Communications Scoping Report (2018) Law Com No 381 p 27 to 32.

\textsuperscript{52} See Abusive and Offensive Online Communications Scoping Report (2018) Law Com No 381 p 27 to 32.

\textsuperscript{53} Alisdair Gillespie, “‘Trust me, it’s only for me’: ‘revenge porn’ and the criminal law” [2015] Criminal Law Review 866 at p 867.

\textsuperscript{54} As above.
The result, as we highlighted in our Scoping Report, is that private and sexual photographs or films may be sent between sexual partners with intent to cause distress, without constituting an offence under section 33.55

3.73 For example, D and V were intimate partners. During their relationship, V sent D an intimate image of herself. After their relationship ended acrimoniously, D sends the intimate image to V with the caption “you will always be mine”. This could be very distressing for V, particularly if their relationship had been abusive.56 As Gillespie notes, it is “odd” that this would be deliberately excluded.57

3.74 In our Scoping Report we suggested that it is likely that the concept of privacy is the reason for this exclusion rather than a discounting of the harm done to such victims. Parliament intended this provision to be an offence of privacy; V’s privacy has not been violated by receiving a photo of herself as it would be if the photo had been shared with her boss, for example.58 This example shows that in intimate image abuse, the harm does not always emanate from the breach of privacy.

3.75 Stakeholders told us that in many cases, images are sent to the person who appears in the image as a form of threat. Examples were given of women receiving images of themselves engaged in some form of sexual activity from their ex-partner accompanied by some form of threat. In many cases the victims had been unaware that these images even existed. The threats were usually along the lines that if the victim did not get back together with the perpetrator, then he or she would further distribute the image to the victim’s family and/or friends. In other cases, images had been sent anonymously for the purpose of “sextortion” for money, or sexual favours, or additional similar images (sextortion is discussed further in Chapter 2). Such examples would fall outside the scope of the disclosure offence, despite causing severe distress to the victim. Threats to disclose are discussed further below.

**Threats to disclose**

3.76 The majority of stakeholders we spoke to emphasised that the lack of a specific offence governing threats to disclose private, sexual images without consent was one of the main limitations of the existing law. Victims’ support organisations have shared with us many examples where victims had suffered these types of threats and the debilitating consequences that follow; this is described in more detail in Chapters 2 and 5. Threats to disclose intimate images can cause a range of harms which can be significant, multi-faceted, long lasting and in some cases permanent.59 In many cases,

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56 It should be noted that in this instance it could possible for D to be prosecuted for a communications offence under Communications Act 2003, s 127 or Malicious Communications Act 1988, s 1. It is also possible that the disclosure of intimate images without consent in a domestic abuse context could constitute controlling or coercive behaviour in an intimate or family relationship, under Serious Crime Act 2015, s 76. These offences and their limitations will be discussed further below.

57 Alisdair Gillespie, “‘Trust me, it’s only for me’: ‘revenge porn’ and the criminal law” [2015] Criminal Law Review 866 at p 867.


59 For detailed discussion on harm caused by intimate image abuse, see Chapter 5. For detailed discussion of threats in the criminal law, see Chapter 12.
perpetrators use these threats as a way to control the victim, sometimes in a domestic relationship context. The Revenge Porn Helpline described the threats experienced by their clients as very "powerful, so degrading and humiliating". Approximately a quarter of their calls relate to threats to share. Erika Rackley said that there was "a big gap in the legislation around threats" despite more than half of victims she and others spoke to experiencing threats to disclose intimate images without their consent. Rackley and her colleagues note that the Scottish law on intimate image abuse specifically includes threats to disclose intimate images, and they consider it is therefore a better law than the current England and Wales framework.

3.77 Frances Ridout from the QMUL Legal Advice Centre also noted that at present, threats of this nature would have to be dealt with under harassment law (harassment in this context is discussed in more detail in the following chapter).

3.78 Threats to disclose were included as an amendment tabled in the Policing and Crime Bill in 2016. Members of the House of Lords such as Lord Faulks and Baroness Williams of Trafford, however, felt that this could be captured by existing offences such as blackmail, harassment and menacing communications under the Malicious Communications Act 1988. However, as discussed further below, these offences have their own limitations. Blackmail, for example, requires the accused person to seek to make a gain from the threat, while harassment would require more than one threat to constitute a "course of conduct". A communication under section 1 of the MCA 1988 or a menacing or indecent communication under section 127 of the Communications Act 2003 may be an alternative, but as we discuss at paragraph 3.176 below, their rationales and penalties do not always reflect the harm caused.

3.79 Stakeholders explained to us other examples of threats to disclose private, sexual images which are sometimes made without an accompanying image. Victim support organisations described experiences of their clients who had received text or private messages on social media from someone who said that they had sexual images of that person in their possession. The text or messages were usually accompanied by some form of demand; in some cases this was to send more images of this nature in other cases, it was not to report a domestically abusive partner to the police and that unless victim complied they would share those alleged images publicly on social media. As Refuge told us, some victims did not know whether such images existed. Lawyers at Kingsley Napley also told us that many of their clients had received threats to disclose but perpetrators are hardly ever charged because the images were not then disclosed. Many stakeholders explained to us that without a specific offence governing this behaviour, threats to disclose intimate images are rarely able to be

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61 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2. For further discussion of the application of the Scottish law to threats, see Chapter 12.


63 Protection from Harassment Act 1997, s 1(1).
Prosecuted under the current law. Only those that fit squarely within the alternative offences described above can currently be prosecuted. This is discussed in more detail in Chapter 12.

**Defences to the disclosure offence**

3.80 It is a defence under section 33(3) for the defendant to “prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.” The burden of proof for this defence is on the defendant.64

3.81 A defence is available under section 33(4) if:

(a) the disclosure was made in the course of, or with a view to, the publication of journalistic material, and

(b) he or she reasonably believed that, in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest.

3.82 This defence is, as noted in section 33(4)(a), available both to journalists and their sources.65 “Publication” for the purposes of this defence is defined as “disclosure to the public at large or to a section of the public” (section 33(7)(b)).

3.83 Section 33(5) provides that is a defence for the defendant to show that:

(a) “he or she reasonably believed that the photograph or film had previously been disclosed for reward”, either by the victim or by another person; and

(b) “he or she had no reason to believe that the previous disclosure for reward was made without the consent of the individual mentioned in subsection (1)(a) and (b)”.

3.84 The Explanatory Notes provide an applicable example: if the defendant can prove he or she saw the same photograph on a commercial pornography website or in a magazine, he or she may have a defence to section 33. However, if, for example, the victim told the defendant that he or she did not consent to that disclosure, the defence would fail.66

3.85 The defendant bears only an evidential rather than a legal burden of proof in relation to the defences in sections 33(4) and (5). Should the defendant provide sufficient evidence to raise an issue with respect to one of those defences, the prosecution bears the legal burden of proving beyond reasonable doubt that the defence is not made out.67

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64 Criminal Justice and Courts Act 2015, Explanatory Notes at [335].
65 Criminal Justice and Courts Act 2015, Explanatory Notes at [337].
66 Criminal Justice and Courts Act 2015, Explanatory Notes at [338].
67 Criminal Justice and Courts Act 2015, s 33(6); Criminal Justice and Courts Act 2015, Explanatory Notes at [336].
3.86 These defences are yet to be tested and there is very little academic analysis of them. We consider them further in Chapter 11 and Chapter 13; in particular, in the latter chapter, we consider the tension between the journalist’s right to freedom of expression protected by Article 10 of the ECHR and the depicted individual’s right to respect for their private and family life protected by Article 8 of the ECHR. As we noted in our 2018 Scoping Report, “[i]t is likely to be a rare case in which the publication of a private sexual photo or video of a person will be reasonably believed to be in the public interest.”

3.87 The defence under section 33(5) may also be difficult for prosecutors; as Samantha Pegg has argued, given that “sexual images are so widely available online … a reasonable belief that an image was of a pornographic model may raise an evidential burden that the prosecution could find difficult to disprove.”

**Voyeurism: section 67 of the Sexual Offences Act 2003**

3.88 There are four offences of voyeurism contained in section 67 of the SOA 2003 that relate to observing, recording, and operating or installing equipment to observe or record another doing a “private act”. We consider these offences in more detail below.

3.89 The first offence under section 67 of the SOA 2003 is the “observing offence”:

(1) A person commits an offence if—

   (a) for the purpose of obtaining sexual gratification, he observes another person doing a private act, and

   (b) he knows that the other person does not consent to being observed for his sexual gratification.

3.90 Although this observing offence is not directly relevant to taking or sharing intimate images without consent, it is indirectly relevant for the purposes of the installing equipment offence under section 67(4) as detailed below.

3.91 The three most relevant offences of voyeurism under section 67 of the SOA 2003 are as follows:

(2) A person commits an offence if—

   (a) he operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and

   (b) he knows that B does not consent to his operating equipment with that intention.

(3) A person commits an offence if—


(a) he records another person (B) doing a private act,

(b) he does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act, and

(c) he knows that B does not consent to his recording the act with that intention.

(4) A person commits an offence if he installs equipment, or constructs or adapts a structure or part of a structure, with the intention of enabling himself or another person to commit an offence under subsection (1).

3.92 “Equipment” may include, for example, the operation of a webcam or a camera phone to view live images of a private act.

3.93 The recording offence in section 67(3) is committed whether or not the other people viewing the recording of the private act knew that the recording was done without the victim’s consent.70

3.94 The defendant can be charged with the installing equipment offence in section 67(4) even if the equipment or structure (such as a peephole or mirror) is found before it is used.71

3.95 All four offences are triable either way, with a maximum sentence on summary conviction of no more than six months’ imprisonment and/or a fine (not exceeding the statutory maximum), and on indictment of no more than two years’ imprisonment. Similar to the disclosure offence in section 33 of the CJCA 2015, some stakeholders felt this did not reflect the significant harm inflicted by non-consensually taking these very private images.

3.96 According to the CPS Violence Against Women Report 2018-2019, there were 539 voyeurism offences prosecuted in the 2018-2019 year.72

Limitations

A “private act” and “reasonable expectation of privacy”

3.97 An act is a “private act” if a person:

is in a place which, in the circumstances, would reasonably be expected to provide privacy, and—

70  Sexual Offences Act 2003, Explanatory Notes at [129].
71  Sexual Offences Act 2003, Explanatory Notes at [130].
(a) the person’s genitals, buttocks or breasts\(^73\) are exposed or covered only with underwear,
(b) the person is using the lavatory, or
(c) the person is doing a sexual act that is not of a kind ordinarily done in public.\(^74\)

3.98 The examples of private acts given in the explanatory notes to the Act are people having sexual intercourse, someone getting undressed and someone masturbating.\(^75\)

3.99 Whether the victim had a “reasonable expectation of privacy” is a question for the jury. However, case law has indicated that this can be difficult to interpret.

3.100 In the case of Bassett,\(^76\) an appeal against a conviction of voyeurism, the appellant had been in a men’s swimming pool change room, with showers that were not separated by doors. The appellant was seen either filming or intending to film another man who was showering (and also washing the hair of his three-year-old daughter).

3.101 The Court of Appeal noted that one can have a reasonable expectation of privacy even if they are not “wholly enclosed or wholly sheltered from the possibility of being seen”.\(^77\) The fact that there were no doors on the shower did not affect whether there was a reasonable expectation of privacy. Further, whether there is a reasonable expectation of privacy depends on the nature of the observation rather than the mere purpose.\(^78\) For example, in a shared swimming pool change room, those using it can reasonably expect some “casual observation” from other users of the change room, and so there is no reasonable expectation of privacy in that circumstance. The mere fact that someone receives sexual gratification from observing does not necessarily demonstrate a reasonable expectation of privacy. However, the users of that change room could have a reasonable expectation of privacy from being covertly recorded. The expectation is not that people will not look at you, but that people will not film you for later viewing.

3.102 More recently, as mentioned in the previous chapter, in Richards\(^79\) the appellant had been convicted of two counts of voyeurism (among other offences) for two videos he had taken covertly on two separate occasions where he was having sexual intercourse with a sex worker. Although each sex worker consented to the intercourse, neither had consented to or known about the filming. It was for the jury to decide whether there was a reasonable expectation of privacy in those circumstances. Appealing against his convictions, the appellant argued that the complainants had no

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\(^73\) Note that this only relates to female breasts, as concluded by the Court of Appeal in *R v Bassett* [2008] EWCA Crim 1174, [2009] 1 WLR 1032.

\(^74\) Sexual Offences Act 2003, s 68(1).


\(^77\) Above at [7].

\(^78\) Above at [11].

\(^79\) [2020] EWCA Crim 95, [2020] 1 WLUK 499.
reasonable expectation of privacy from the appellant in the bedroom participating in private acts with him to which they consented.

3.103 The prosecution argued that although the appellant was participating in the private acts that were being filmed, the women could still have a reasonable expectation of privacy from filming. The court rejected the appellant’s submission, ruling that an act of voyeurism could be committed by a participant in the private act and, applying Bassett, the trial judge was right to leave the case to the jury, even though the appellant had participated in what was being filmed.

3.104 Emily Hunt was permitted to intervene in Richards. Hunt had applied for judicial review of a decision by the CPS against prosecution in a case in which she was the victim. Hunt had been covertly filmed sleeping naked in bed. The man who filmed her had acknowledged that he did not have her consent and that he was filming her for sexual gratification. The CPS decided not to prosecute on the basis that the act of filming had occurred when both the victim and perpetrator were in the same room, therefore it was not a place in which the victim could reasonably have expected privacy from the perpetrator.

3.105 This was a different approach to that taken in the Richards case, where the issue of whether the victim was in a place which would reasonably be expected to provide privacy in the circumstances of a bedroom was left to the jury. In Richards, Hunt’s counsel emphasised that section 67 does not provide that the relevant act must be private from the person doing the recording. These two cases suggest that the requirement that a person must be in a place which would reasonably be expected to provide privacy is difficult to interpret and has the potential to be misapplied.

3.106 It should be noted that in Police Service for Northern Ireland v MacRitchie, although the defendant was operating recording equipment (his phone) in a place where the victim could have a reasonable expectation of privacy (a swimming pool changing room), the victim was wearing swimwear at the time of recording and so was not engaged in a private act for the purposes of the offence. However, Kerr LCJ went on to say that had the victim been wearing swimwear as underwear (for example, bikini bottoms as underpants), then covert filming of this would be caught within the offence. As Gillespie has argued, this places a rather arbitrary distinction between,
for example, taking an image up a woman’s skirt of her bikini bottoms that she was wearing to go to the beach and taking the exact same image but where the woman forgot her underwear at the beach so was wearing her bikini bottoms as such. The only difference is the victim’s intention; the image remains the same, the act of violation remains the same, however in one instance the voyeurism offence is made out and in the other it is not.84

3.107 The voyeurism provisions specifically exclude acts of upskirting, which was highlighted in R v Henderson.85 In that case, the appellant had taken photographs up the skirt of a 14-year-old girl sitting on a step in a public place and of a woman in shop (amongst other photographs). Neither of these acts could be prosecuted under section 67 of the SOA 2003, because the victims were not engaged in a “private act” at the time and neither were in a place where they could reasonably expect privacy.86 “Upskirting” is now a specific offence in section 67A of the SOA 2003 (discussed further below).

For the purpose of obtaining sexual gratification

3.108 In limiting the purpose of the offence to obtaining sexual gratification (for themselves or others), the voyeurism offence could exclude taking the same type of image for any other reason such as the desire to humiliate,87 intending to cause distress, with a purpose of financial gain, or for a “laugh”. In contrast, the fault element of the disclosing offence in section 33 of the CJCA 2015, requires images to be disclosed with intent to cause distress but not for the purpose of obtaining sexual gratification.

3.109 As discussed in Chapter 2, taking intimate images without consent for purposes other than sexual gratification can have similarly severe impacts on the victim. Many stakeholders were of the view that the focus of such an offence should be on the lack of consent, rather than the defendant’s purpose.

3.110 There are a number of ancillary provisions available when a defendant is convicted of a voyeurism offence under section 67. A court may make a notification order (Part 2, section 80 of the SOA 2003) or sexual harm prevention order (Part 2, section 103A of the SOA 2003) against a person convicted88 of an offence in Schedule 3. Section 67 is an offence listed in Schedule 3 (at paragraph 34), however the following conditions must be satisfied:

the court noted that in some circumstances, if the victim was wearing swimwear as underwear, the offence may have been committed.

85 [2006] EWCA Crim 3264.
86 This could have been prosecuted as outraging public decency, although the “two-person rule” would need to be satisfied (see paragraphs 3.185 below).
88 Sexual Offences Act 2003, s 80 and s 103A have slightly different conditions as to when each order can be imposed, but both apply where the defendant is convicted of an offence listed in Schedule 3. See Chapter 14 for further detail.
(a) where the offender was under 18, he is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months;

(b) in any other case—

(i) the victim was under 18, or

(ii) the offender, in respect of the offence or finding, is or has been—

(A) sentenced to a term of imprisonment,

(B) detained in a hospital, or

(C) made the subject of a community sentence of at least 12 months.

3.111 The Sexual Offences (Amendment) Act 1992 provides anonymity to complainants where a person is accused of certain offences, including the voyeurism offences in section 67 of the SOA 2003.

3.112 These ancillary provisions are discussed in more detail in Chapter 14. It is important to note that while they are available for the voyeurism and (in part) upskirting offences (see further below), they are not available for the offence of disclosing private sexual images without consent in section 33 of the CJCA 2015. This has been the cause of much debate, with many victim support organisations and other stakeholders contending that similar provisions should be available in relation to the disclosure offence. Many have gone further to argue that the disclosure offence should be categorised as a sexual offence. This is discussed further in Chapter 14.

**Taking but not sharing**

3.113 The voyeurism offence focuses on taking images of a private act without consent but does not include an offence of distributing those images. This means that the distribution of such an image would have to be dealt with under a separate offence such as section 33 of the CJCA 2015.

3.114 However, the voyeurism offence relates to images of a “private act”, section 33 uses the terms “private and sexual”. The offences also have different intent requirements; the “taking” must be for the purpose of obtaining sexual gratification, but the “sharing” must be done with intent to cause distress.

3.115 Further, section 33 excludes some forms of disclosure, such as sending the image to the person in the image. While the taking of some types of images are criminalised in section 67, their disclosure may not be an offence under section 33, and vice versa. The result is that – as many stakeholders relayed to us - the law governing the taking and sharing of intimate images is piecemeal and conceptually inconsistent.
Upskirting: section 67A of the Sexual Offences Act 2003

3.116 As we noted in the previous chapter, the Press Association obtained data that shows an increase in the number of reported incidents of “upskirting”. The BBC has reported that:

[the vast majority of cases involve female victims and male perpetrators, according to the data released by police forces under Freedom of Information laws. Before the law was passed victims and police in England and Wales were only able to pursue offences of outraging public decency or voyeurism. Unlike other sexual offences, victims of those crimes do not have automatic anonymity.]

3.117 The Voyeurism (Offences) Act 2019 introduced section 67A into the SOA 2003 in February 2019. Driven by the campaign of Gina Martin, it is intended to address some of the limitations in the current voyeurism provisions, as noted above. In its first year, ten men were prosecuted for 16 upskirting offences under section 67A.91

3.118 Section 67A is designed to include “upskirting” (the taking or recording up women’s clothing without their consent) as a voyeurism offence. The provision reads as follows:

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

(a) A operates equipment beneath the clothing of another person (B),

(b) A does so with the intention of enabling A or another person (C), for a purpose mentioned in subsection (3), to observe—

   (i) B’s genitals or buttocks (whether exposed or covered with underwear), or

   (ii) the underwear covering B’s genitals or buttocks,

   in circumstances where the genitals, buttocks or underwear would not otherwise be visible, and

(c) A does so—

   (i) without B’s consent, and

   (ii) without reasonably believing that B consents.

(2) A person (A) commits an offence if—

90 Above.
(a) A records an image beneath the clothing of another person (B),
(b) the image is of—
   (i) B’s genitals or buttocks (whether exposed or covered with underwear), or
   (ii) the underwear covering B’s genitals or buttocks,
   in circumstances where the genitals, buttocks or underwear would not otherwise be visible,
(c) A does so with the intention that A or another person (C) will look at the image for a purpose mentioned in subsection (3), and
(d) A does so—
   (i) without B’s consent, and
   (ii) without reasonably believing that B consents

(3) The purposes referred to in subsections (1) and (2) are—
   (a) obtaining sexual gratification (whether for A or C);
   (b) humiliating, alarming or distressing B.

3.119 Section 67A(3) requires the prosecution to prove that the defendant’s “purpose” was either to obtain sexual gratification (similar to the section 67 voyeurism offence) or to humiliate, alarm or distress the person who is the subject of the taking or recording of images or video.

3.120 The offence is also one listed in Schedule 3 (at paragraph 34A), but only where the defendant’s purpose was to obtain sexual gratification. A court may therefore impose a notification requirement or a sexual harm prevention order on a defendant convicted of the offence in section 67A if the following conditions apply (where the offender is 18 years or over):92

   (a) The victim was under 18, or
   (b) The offender, in respect of the offence or finding, is or has been—
       (i) Sentenced to a term of imprisonment,
       (ii) Detained in hospital, or
       (iii) Made the subject of a community sentence of at least 12 months.

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92 Where the offender is under 18, the relevant condition is that the offender is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months (SOA 2003, Sch 3, para 34A(2)).
3.121 Victims of the section 67A offence have automatic anonymity.\(^{93}\)

3.122 Similar to section 67 of the SOA 2003, this offence is concerned mainly with the taking or recording of such images, rather than their disclosure. The offence is committed once the image is recorded, with the intent that either the person who took or recorded the image or another person will look at it (for the purposes of obtaining sexual gratification or humiliating, alarming or distressing the person recorded). Whether or not they or another person actually do look at the image at another time is not relevant for the offence. There is no requirement for the victim to be engaged in a private act or have a reasonable expectation of privacy.

**Limitations**

*Limited to upskirting*

3.123 This offence was designed to fill some of the gaps in the existing law, namely the limitation of the voyeurism offence in section 67 of the SOA 2003 to “private acts” in places with a reasonable expectation of privacy (victims of upskirting are typically not engaging in private acts), or the offence of outraging public decency – discussed below – which is limited to places where two or more people are capable of witnessing the act (excluding acts of upskirting with no capable witnesses).\(^{94}\)

3.124 As pointed out by the Advocate-General for Scotland, Lord Keen of Elie, in the Bill’s second reading, such limitations had meant that some acts of “upskirting” – such as those committed in a semi-public place but with no one around (an empty train carriage, for example) – were at risk of not being prosecuted.\(^{95}\) The new offence is designed to address this.

3.125 However, although the section 67A offence was designed to address some of the gaps in the current legislation, it applies only to acts of upskirting. As Lord Keen noted, this offence is “intended to be narrow, clear and focused on the issue of upskirting”.\(^{96}\) Any other form of taking images – such as “downblousing” (the taking or recording of images down a female’s shirt, discussed in Chapter 2) – is not covered by this offence and must be dealt with under the existing voyeurism offence.

3.126 Further, similar to the voyeurism offence, the upskirting offence only focuses on *taking* upskirting images. The distribution of upskirting images would have to fall under another offence such as section 33 of the CJCA 2015 or potentially the communications offences. However, as discussed earlier in this chapter, section 33 excludes some instances of disclosure and is limited to disclosure with intent to cause the person in the image distress. Therefore, while taking an upskirting image is specifically criminalised, the sharing of that image is not.

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95 Hansard (HL), 23 October 2018, vol 793, col 785.

96 Above.
3.127 The section 67A offence has a two-pronged intent element. The act must be done for the purpose either of obtaining sexual gratification or humiliating, distressing or alarming the victim. This is different from section 67, which is limited to voyeurism for the purpose of obtaining sexual gratification. Therefore, while taking an image up a person’s skirt intending to humiliate them is specifically criminalised, taking an image of another area of the body – or indeed, of the naked body as a whole – for the same purpose is not (certainly not under the section 67 voyeurism offence).

3.128 However, while slightly more expansive than section 67, these intent elements are still limiting. As Dame Vera Baird QC, then Police and Crime Commissioner for Northumbria, raised in her written evidence regarding the Bill and Wera Hobhouse MP emphasised in the House of Commons’ debate, this excludes upskirting images taken for other purposes such as “financial gain, non-sexual enjoyment or ‘having a bit of a laugh’”. Further, Gillespie has argued that the wording of section 67A(3)(b) makes it unclear whether the offence could be made out in situations where the victim never sees the image being taken and/or where the perpetrator does not intend for the victim ever to see the image. He questions:

Can a person be humiliated if they are not aware of the footage? Similarly, if someone never intends a person to see the recording: can it be said that they intend to humiliate that person? As Gillespie notes, it is possible that introducing, for example, recklessness as a form of fault into the offence may have resolved this uncertainty. That is, intending to humiliate, distress or alarm B or being reckless as to whether that would happen. Including this recklessness element could also resolve the exclusions noted above – that is, even if the perpetrator intended only to gain a laugh from taking the image, he could still be reckless as to the humiliation of B and commit the offence.

3.129 Other stakeholders questioned whether the intent element should be included at all. Wera Hobhouse MP was of the view that “upskirting should be an offence regardless of the motive” as the harm caused to the victim is the same. This is similar to what we have heard from stakeholders regarding the intent element in both the disclosure offence in section 33 of the CJCA 2015 and the voyeurism offence in section 67 of the SOA 2003. As we note earlier in this chapter, many stakeholders we spoke to – including victim support organisations, lawyers and Julia Mulligan, Joint Association of Police and Crime Commissioners Victim’s Portfolio Lead and the Police, Fire and Crime Commissioner for North Yorkshire Police – were of the view that an intent element focused on the perpetrator’s purpose, rather than the non-consensual nature of the acts, is too limiting and makes it very difficult to prosecute non-consensual

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99 Above.
taking, making or sharing of intimate images which may not satisfy the intent element but which still cause significant harm.

OTHER OFFENCES

3.130 There are a number of other offences that police officers and prosecutors may apply when considering whether and how to prosecute a particular form of taking, making or sharing intimate images without consent. These include, but are not necessarily limited to:

1. sections 2 and 4 of the Protection from Harassment Act 1997;
2. the controlling or coercive behaviour offence under section 76 of the Serious Crime Act 2015;
3. blackmail under section 21 of the Theft Act 1968;
4. the communications offences contained in section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003;101
5. the common law offence of outraging public decency; and
6. the offence of possession of extreme pornography contained in section 63 of the Criminal Justice and Immigration Act 2008.

3.131 This chapter will demonstrate that while these laws may be relevant, they are not fit for purpose in effectively criminalising these behaviours.

Harassment, stalking and controlling or coercive behaviour

Harassment

3.132 The offence of harassment applies when an individual behaves in a manner which harasses or alarms another or which causes that person distress on at least two occasions which, taken together, amount to a course of conduct. Both the criminal offence and civil law remedy102 are contained in the Protection from Harassment Act 1997 (“PHA 1997”). There is no requirement under the PHA 1997 for the parties to have any type of relationship between them. The prosecution must prove that the defendant knew or ought to have known that the behaviour amounted to the harassment of another.103

3.133 Harassment under section 2 is a summary offence with a maximum penalty of six months’ imprisonment and/or fine not exceeding 5 on the standard scale. Section 5 of the PHA 1997 makes restraining orders104 available to the courts upon conviction as

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101 For a full analysis of the communications offences and proposals for reform, see Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 248.

102 Protection from Harassment Act 1997, s 3 provides the civil remedy. This will not be discussed at length here.

103 A further offence of harassing two or more persons is provided in Protection from Harassment Act 1997, s 1(1A).

104 Restraining orders are discussed further (along with other ancillary provisions) in Chapter 14.
part of sentencing. The order may prohibit the defendant from doing anything which protects the victim from conduct which amounts to harassment or will cause fear of violence. As a summary only offence, the section 2 offence must have information or a complaint laid within six months from the time when the offence was committed or the matter of complaint arose. This runs from the last date of the course of conduct alleged.

3.134 A more serious offence of harassment is found in section 4(1) where the victim fears violence. The section 4 offence is an either way offence, with the maximum sentence on indictment being ten years’ imprisonment. On summary conviction, the maximum sentence is six months’ imprisonment, the same as the section 2 offence.  

3.135 Stalking or harassment that occurs in the context of an intimate relationship can now also be pursued as an offence of controlling or coercive behaviour under section 76 of the Serious Crime Act 2015.  

Stalking

3.136 Section 2A of the PHA 1997 provides for a separate offence of stalking. A course of conduct amounts to stalking of another person if:

(a) it amounts to harassment of that person,

(b) the acts or omissions are ones associated with stalking, and

(c) the person whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.

3.137 Subsection 3 lists a number of acts that are associated with stalking which include types of behaviour which may overlap with intimate image abuse such as contacting, or attempting to contact, a person by any means, publishing any statement or other material relating or purporting to relate to a person, or purporting to originate from a person, monitoring the use by a person of the internet, email or any other form of

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105 Protection from Harassment Act 1997, s 7(3A) aims to address campaigns of collective harassment by two or more people. As we noted in our Abusive and Offensive Online Communications Scoping Report, this is a complex offence which has rarely been prosecuted and there is currently very little case law concerning it. See Abusive and Offensive Online Communications Scoping Report (2018) Law Com No 381 paras 8.46 and 8.47. The limitations of this offence are discussed more fully along with proposals for reforming the law in Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 248.

106 There is a further harassment offence; harassment at home as provided in Criminal Justice and Police Act 2001, s 42A introduced by the Serious and Organised Crime Act in 2005. It is unlikely to be used as an intimate image offence so it is not considered further in this chapter. The offence occurs when a person is outside or in the vicinity of the victim’s home and intends their presence to amount to harassment or to cause alarm or distress to him (or knows or ought to know that his presence is likely to do so). The perpetrator’s purpose must be to “represent to, or persuade” him either “that he should not do something that he is entitled or required to do” or “that he should do something that he is not under any obligation to do”.

107 Protection from Harassment Act 1997, s 2A(2).


electronic communication, interfering with any property in the possession of a person, and watching or spying on a person.

3.138 Stalking is also a summary offence, with a current maximum penalty of not more than 6 months’ imprisonment and a fine of no more than 5 on the standard scale. As with harassment, a more serious stalking offence is provided for in section 4A where the course of conduct caused the victim to either fear violence or caused serious alarm or distress which has a substantial adverse effect on the victim’s usual day-to-day activities.

3.139 This more serious offence of stalking under section 4A is an either way offence. On summary conviction the maximum penalty is not more than 12 months’ imprisonment and a fine not exceeding the statutory maximum. On indictment, the maximum penalty is not more than 10 years’ imprisonment and a fine.

Limitations of harassment and stalking in the context of intimate image abuse

3.140 Harassment requires the prosecution to prove harm. Harassment is defined inclusively in section 7(1), which states that “references to harassing a person include alarming the person or causing the person distress”. Lord Sumption in Hayes v Willoughby defined harassment as a persistent and deliberate course of “unreasonable and oppressive conduct”, which is calculated to – and does – cause that person alarm, fear or distress.

3.141 There must be a minimum degree of alarm or distress for conduct to constitute harassment. However, the Court of Appeal emphasised in R v N that this on its own would not be determinative of harassment, and that the conduct must also be oppressive.

3.142 It is fair to say that many forms of intimate image abuse could constitute unacceptable or unreasonable and oppressive conduct and therefore come within the definition of harassment in section 2 of the PHA 1997. However, the other elements of this offence – namely, the need for there to be a course of conduct and to prove harm – may exclude some forms of intimate image abuse. The course of conduct requirement may exclude isolated incidents or multiple incidents which do not have sufficient ‘nexus’

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110 Protection from Harassment Act 1997, s 2A(3)(d).
111 Protection from Harassment Act 1997, s 2A(3)(f).
112 Protection from Harassment Act 1997, s 2A(3)(g).
113 Protection from Harassment Act 1997, s 2A(4) states that the maximum sentence on summary conviction is a term not exceeding 51 weeks’ imprisonment. S 2A(5) states that this reference to 51 weeks should be read as six months until s 281(5) of the Criminal Justice Act 2003 comes into force. There is no date currently set for the coming into force of s 281(5).
114 [2013] UKSC 17, [2013] 1 WLR 935 at [1].
115 See also Crawford v CPS [2008] EWHC 148 (Admin).
118 R v N [2016] EWCA Crim 92; [2016] 2 Cr App R 10 at [32].
between them. The level of alarm or distress required may exclude some incidents where the harm was of a different nature; embarrassment or financial. This offence is therefore unfit for purpose in relation to these types of behaviour which are also intimate image abuse.

3.143 Simply having two incidents of a similar behaviour is unlikely to be enough to constitute "course of conduct"; they have to be connected incidents; it has to be repetitious behaviour. The reality is that most taking, making and sharing of intimate images without consent may not be repetitive; it is likely to be a single threat or disclosure and will therefore fall outside this offence.

3.144 It is possible that some forms of intimate image abuse could be considered as acts that are associated with stalking for the purposes of subsection 2A(3). For example, section 2A(3)(b) – contacting a person by any means; section 2A(3)(c) – publishing material that relates to the person or purports to originate from the person; and section 2A(3)(g) – watching or spying on a person.

3.145 The stalking offence could therefore be used in circumstances where the voyeurism offence cannot apply, for example where images are taken without a person’s consent but for a purpose other than obtaining sexual gratification. It could also be used where intimate images of a person are sent to the person depicted (which is excluded from the disclosure offence) as a form of harassment.

3.146 However, for the stalking offence to apply in the above case and others, there must be a course of conduct. As noted earlier, simply because something is done on two or more occasions is not sufficient. The stalking offence may therefore also only apply in a limited way and exclude many forms of intimate image abuse where, although done for the purposes of stalking, the elements of the offence cannot be made out. This is discussed further below.

3.147 Stakeholders told us that the harassment offences have been used in the context of intimate image abuse, but usually only when the abuse of images formed one part of the course of conduct. The CPS said that when there is a case of harassment or stalking in which intimate image abuse is used, the PHA 1997 is used more often than the disclosure, voyeurism or “upskirting” offences because it has increased sentencing powers. Chief Magistrate Emma Arbuthnot said that the disclosure offence was hardly ever charged on its own, and the behaviour was often only captured in harassment. The harassment or stalking offences could also be used where a victim suffered a number of threats to disclose intimate images (so long as there were enough to constitute a course of conduct).

3.148 However, despite its potential application, there was a general agreement amongst stakeholders that the offence was not fit to deal with intimate image abuse. The basic harassment offence under section 2 (the most applicable to intimate image abuse) is a summary only offence and many stakeholders believed this does not sufficiently acknowledge the seriousness of these behaviours. Frances Ridout from the QMUL


Legal Advice Centre told us that the basic harassment offence “does not reflect the gravity” of the harm caused to victims. She termed harassment a “bread and butter offence” and emphasised that the six-month imprisonment maximum sentence was problematic and not sufficient. The CPS also felt that the harassment offence “didn’t allow the impact on the victim to come through”. Further, as a summary offence the six-month time limit to bring a case forward can be a barrier for victims for whom it may take a long time to gather evidence or for whom the trauma they have experienced makes it very difficult to report it.

3.149 As those who work with victims of intimate image abuse told us, even if harassment laws could be applied in cases of intimate image abuse, it is very difficult to gather enough evidence to satisfy the elements of the harassment offences. A representative from Refuge said that “the pattern required for harassment is really hard to establish”. The Professionals Online Safety Helpline (“POSH”) also agreed it was difficult to have enough evidence to prove harassment even if this is the only offence option available.

3.150 Indeed, the offence – enacted over 20 years ago – was never intended to apply to the range of taking, making and sharing intimate images we see today, and is not designed with the same mischief in mind. As one law firm told us, there are different elements of this offence that makes it “slightly off-focus” when trying to apply it to intimate image abuse.

**Controlling or coercive behaviour**

3.151 Section 76(1) of the Serious Crime Act 2015 provides an offence of controlling or coercive behaviour in an intimate or family relationship. It requires the defendant to engage in repeated or continuous behaviour towards the victim that is controlling or coercive while they are ‘personally connected’. This requires the abuser and the victim to be in an intimate personal relationship, be living together or be members of the same family (whether by marriage, engagement, civil partnership or as parents).\(^{121}\) The offence requires proof of harm in that the behaviour must have a serious effect on the victim and the defendant must know or ought to have known that the behaviour will have a serious effect on the victim. Behaviour is said to have a “serious effect” on the victim if it causes them to fear, on at least two occasions, that violence will be used against them, or, it causes serious alarm or distress which has a substantial adverse effect on the victim’s usual day-to-day activities.\(^{122}\)

3.152 The aim of the controlling or coercive behaviour offence was to protect victims who had experienced “the type of behaviour that stops short of serious physical violence, but amounts to extreme psychological and emotional abuse”.\(^{123}\)

3.153 As described in Chapter 2, our engagement with stakeholders made clear intimate image abuse is commonly experienced in the context of domestic abuse where the perpetrator’s intention is to use the victim’s personal images as a means of gaining and retaining control, and to coerce that victim into, for example, remaining in the

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\(^{121}\) Serious Crime Act 2015, s 76(6).

\(^{122}\) Serious Crime Act 2015, s 76(4).

relationship. Victim support organisations such as Refuge and the Revenge Porn Helpline said they had many clients where intimate image abuse was being experienced in this context. Threats to share intimate images had been used to control the behaviour of the victim or to obtain child contact where they had separated. In one case, a woman had discovered her partner was sharing intimate images of her in groups and on porn sites. When the Revenge Porn Helpline asked if she could share anything else that was happening, she replied, “there was that time he held a knife to my throat”. This behaviour is often normalised and so victims may not even realise they are victims of controlling or coercive behaviour.

3.154 As Women’s Aid noted, even in cases where an image appeared to be taken consensually, the victim could have been coerced by her abuser: “you cannot really consent in an abusive relationship”. Academic Antoinette Huber also noted there were a stark number of cases of intimate image abuse where consent was given under duress.

3.155 Some victim support organisations welcomed this new offence as it was helpful to widen the understanding of domestic abuse. Maithreyi Rajeshkumar from Childnet International said:

If we think a bit how [intimate image abuse] happens in terms of power … the coercive control offence has helped us to understand how power can be held over somebody, in all those cases power is enacted against or on somebody in a certain way. It doesn’t have to be intended or for sexual gratification to cause that harm.

3.156 Catherine Bewley from Galop also told us how difficult it is for those in homosexual relationships to obtain remedies from the criminal law, and that this offence has helped to improve that. She said that “domestic abuse, honour-based abuse and homophobic or transphobic abuse within families is often not recognised by police as domestic abuse”. However, she did note that the label of controlling or coercive behaviour was helpful in these circumstances as the abuse “needs to fit within an understanding of coercive control, and then there are remedies”.

3.157 The lack of specific motive element in this offence is therefore appealing in helping to address intimate image abuse. It does not require proof that the behaviour was in order to obtain sexual gratification as with other offences. While the perpetrator must know, or ought to have known, that their behaviour will have a serious effect on the victim, it does not require a specific intent to cause a particular harm. This has been the barrier to prosecution in other offences as described in this chapter.

Limitations of controlling or coercive behaviour in the context of intimate image abuse

3.158 While there is a clear cross-over between intimate image abuse and controlling and coercive relationships, only a subset of intimate image abuse is for the purposes of control or coercion, and not all criminally controlling or coercive relationships will have elements of image abuse.

3.159 This offence would not apply to an isolated instance of intimate image abuse unless there were other examples of behaviour that met the definition of controlling or coercive. The offence also requires the perpetrator and the victim to be in a relationship at the time that the behaviour occurred. This would be an insurmountable
obstacle where intimate image abuse occurred after the ending of the relationship in order to coerce the victim into rekindling the relationship with their abuser. This was a familiar pattern according to stakeholders.

3.160 Aside from the operational difficulties in domestic abuse cases (such as the low levels of reporting and evidential difficulties), there are limitations in applying this offence to the range of taking, making and sharing of intimate images (and threats to do so) experienced by victim survivors. An Independent Domestic Abuse Advisor told us that the controlling or coercive behaviour offence is just “not being utilised” in these situations; that despite them showing evidence of coercion and control, “police officers not doing enough to gather that information”. It is a complicated picture but undoubtedly confusion caused by a patchwork of poorly fitting offences appears to contribute to any operational response. Strikingly, we did not hear from any stakeholders with experience of the controlling or coercive behaviour offence being used in cases of intimate image abuse.

Blackmail

3.161 Section 21(1) of the Theft Act 1968 outlines the offence of blackmail:

A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—

(a) that he has reasonable grounds for making the demand; and

(b) that the use of the menaces is a proper means of reinforcing the demand.

3.162 The demand in question can be express or implied, and includes writing, speech or through conduct. It is irrelevant whether or not the person who made the threat intended to carry it out.

3.163 Although menace is not specifically defined, it is not limited to threats of violence and can include threats of any action which is detrimental to or unpleasant to the person who is being threatened. Menace is said to be an ordinary English word to be construed by the judge or jury without further explanation.

3.164 The offence is triable only on indictment to the Crown Court. The maximum sentence for blackmail is fourteen years’ imprisonment.

3.165 As noted in the Parliamentary debate on the Policing and Crime Bill, it is possible that this offence could be used for threats to disclose intimate images without consent, which are excluded from the disclosure offence in section 33 of the CJCA 2015.

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125 R v Lawrence (Rodney Brian) [1971] 7 WLUK 76, (1973) 57 Cr App R 64.
126 Hansard (HL), 16 November 2016, vol 776, col 1442.
Limitations of blackmail in the context of intimate image abuse

3.166 A “gain” for the purposes of the offence need not be financial. As noted in the case of Bevans,\(^\text{127}\) in which the defendant had held a doctor at gunpoint in order to receive a morphine injection, there is no requirement to prove financial motivation. However, the Court of Appeal ruled that the gain must consist of “property”, which includes money.\(^\text{128}\)

3.167 It is this element that can limit the offence’s application to threats to disclose intimate images without consent. As many stakeholders told us, such threats to disclose are experienced by victims in a number of different contexts and with a range of perpetrator motivations. This will be explored further in Chapters 4 and 12.

3.168 In some cases, where the victim experiences what is known as sextortion, the demand for payment or some other property would satisfy this element of the offence. Some perpetrators may threaten to share an intimate image they already have, or threaten to share more widely an image they have already shared, in order to obtain more intimate images from a victim. This could be charged as blackmail as those further images that are the subject of the demand could be considered “property”.

3.169 The case of Matthew Falder demonstrates the way in which blackmail could be applied to the use of threats involving intimate images, however, this was predominantly in the context of indecent images of children. Falder pleaded guilty to blackmail (among a number of other serious offences) in the Crown Court in 2017.\(^\text{129}\) He blackmailed a number of young victims in exchange for increasingly graphic photographs of them. He often began by offering them money in exchange for the images, usually through deception such as posing as a female artist suffering from depression who made life sketches from photographs as therapy. He then threatened to disclose these images to their family, friends and neighbours unless they obeyed his commands.

3.170 Falder’s behaviour was not motivated by financial gain. As stated in the sentencing appeal judgment:

> In contrast to many blackmailers, the applicant does not appear to have been motivated by financial reward. Rather, he appears to have derived pleasure from manipulating, humiliating and distressing his victims.\(^\text{130}\)

According to stakeholders,\(^\text{131}\) this appears to be the motivation of many perpetrators who extort sexual images from victims and threaten to disclose sexual images without consent.

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\(^{127}\) R v Bevans (Ronald George Henry) [1988] 87 Cr App R 64.

\(^{128}\) R v Bevans (Ronald George Henry) [1988] 87 Cr App R 64.

\(^{129}\) R v Falder [2018] EWCA Crim 2514, [2019] 1 Cr App R (S) 46. The facts are briefly summarised in this sentencing appeal judgment.

\(^{130}\) R v Falder [2018] EWCA Crim 2514, [2019] 1 Cr App R (S) 46 at [15].

\(^{131}\) Perpetrator motivations are explored in more detail in Chapter 4.
3.171 However, this use of the offence is likely to be rare, particularly when the victim is not a child. No lawyer we spoke to had had any experience of the blackmail offence in this context, and although the CPS were unable to give any indicative data, they suggested that this use of the blackmail offence would not match the instances of threats to disclose intimate images being experienced.

3.172 There are many instances of threats of this nature where the blackmail offence would not apply because of the absence of gain or intent to cause loss. For example, some stakeholders shared with us experiences of threats to disclose in the context of domestic abuse, where the perpetrator seeks to control or coerce their victim and threatens to disclose intimate images of them unless they, for example, stay in the relationship. Others explained the way in which ex-partners could use these threats simply for their own revenge, or to humiliate or distress the victim.

3.173 The blackmail offence is simply not fit for purpose in its application to threats to disclose intimate images without consent. It cannot deal with the different motivations and contexts experienced and does not accurately reflect the range of behaviour.

Communications offences

3.174 The offences contained in section 1 of the Malicious Communications Act 1988 (“MCA 1988”) and section 127(1) of the Communications Act 2003 (“CA 2003”) govern a range of grossly offensive, indecent, false, threatening and menacing communications. These provisions can be used to prosecute intimate image abuse behaviours that are considered to be criminal but which currently fall outside of other more specific offences. Most notably in this context, threats to disclose intimate images without consent fall outside the scope of the disclosure offence in section 33 of the CJCA 2015 but could be prosecuted as a communications offence.132

3.175 Prior to the introduction of the disclosure offence in section 33 of the CJCA 2015, the communications offences were (among other offences) used to prosecute disclosing private sexual images without consent; they are still used to fill the gaps in the disclosure offence. Indeed, some Parliamentarians felt that this was still an effective way to deal with behaviours not covered by that disclosure offence, such as threats to disclose or disclosing images that are private and sexual by way of alteration. On the fifth sitting of the Policing and Crime Bill, the House of Lords considered an amendment that would have brought threats to disclose within the disclosure offence in section 33 of the CJCA 2015. In response to this proposed amendment, Parliamentarians including Lord Faulks and Baroness Williams of Trafford (Minister of State, Home Office) did not consider there was sufficient reason to include threats in section 33 as they are captured by current offences including malicious communications.133 Even those behaviours that could be caught within the disclosure offence may still be prosecuted by way of the communications offences. Sophie Gallagher, a journalist who writes about intimate image abuse, has spoken to police officers about this issue and said that of those she spoke to there was a common understanding that this behaviour should be treated as a communications offence.

132 Threats to disclose are discussed in more detail in Chapter 12.

133 Hansard (HL), 16 November 2016, vol 776, col 1442 to 1443.
Limitations of the communications offences in the context of intimate image abuse

3.176 However, there are difficulties in using these offences to prosecute sharing intimate images without consent. We reviewed these offences in detail as part of a more general review of criminal offences that could apply online in our Abusive and Offensive Online Communications Scoping Report, published in November 2018. Reform of these offences are considered in our consultation paper Harmful Online Communications: The Criminal Offences, published in September 2020. In our Scoping Report, we concluded that the communications offences cast a very wide net and concepts such as “gross offensiveness” relied on in both provisions are “ambiguous and subjective, making the law less certain and leading to inconsistent outcomes”. This can also be the case when applying these offences to intimate image abuse.

3.177 While the section 127 offence does not require any specific or additional intention – other than to intend to send the communication – as a summary only offence, its sentencing powers are limited. Stakeholders told us that this did not sufficiently reflect the significant harm that can be caused when such an image is disclosed without consent. It is also limited to distribution via a public electronic communications network and will therefore exclude any image sharing done via a private network (such as a work intranet) or peer-to-peer network (such as Bluetooth).

3.178 Further, the fact the image must be “indecent” or “grossly offensive” restricts the kind of intimate images the disclosure of which can be captured by these offences. As we have noted in Chapter 2, the disclosure of intimate images which are not indecent or grossly offensive still causes significant harm to victims, for example, images of a Muslim woman not wearing her hijab in an intimate situation, or relatively innocuous images that can “out” someone (such as two gay people holding hands or kissing).

3.179 Many stakeholders also felt that trying to apply the communications offences to intimate image abuse did not acknowledge the nature of the impact of these types of behaviours. The harms caused were often categorised as analogous to sexual offences, and prosecuting this behaviour as a communications offence did not reflect this. While the communications offences could be used to plug the gaps in other offences, they too were not designed for intimate image abuse. These alternatives are not fit for purpose and cannot effectively address these behaviours.

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136 Above at p 329.

137 In Chapter 2 we described stakeholders’ experience of threats to share audio recordings of sexual acts. While these are outside the scope of our project as it relates to images only, it is worth noting that these existing communications offences could be used to prosecute such behaviour. Communications Act 2003, s 127 could be used where the audio recording was sent over a public communications network and is grossly offensive, indecent, obscene or menacing. Whether an audio recording would satisfy one of these terms will depend on the nature of the recording itself. The more serious offence in Malicious Communications Act 1988, s 1 could apply where the audio recording sent is grossly offensive or indecent and one of the purposes in sending it was to cause the recipient, or anyone they intended to know about the recording, distress or anxiety. Prosecutions for sending intimate audio recordings under the current communications offences would face the same challenges as outlined above in respect of meeting the definitions of grossly
3.180 In our Harmful Online Communications consultation paper, we provisionally propose a new communications offence that would replace the offences in the MCA 1998 and in section 127(1) of the CA 2003. The proposed harm-based offence contains the following elements:

1. the defendant sends or posts a communication that was likely to cause harm to a likely audience;
2. in sending or posting the communication, the defendant intended to harm, or was aware of a risk of harming, a likely audience; and
3. the defendant sends or posts the communication without reasonable excuse.\(^{138}\)

3.181 In respect of intimate image abuse, the proposed offence removes some of the barriers by making the offence technology neutral, so all types of communication are covered regardless of how they are sent. It also removes the adjectives such as “grossly offensive” and moves to a harm-based model. This will ensure a wider range of intimate images, such as those described at paragraph 3.178 above, could be captured by the proposed offence.\(^{139}\) However, even though the proposed offence would be capable of capturing a wider range of intimate image offences, it does not escape the criticisms that the nature of and harms caused by intimate image abuse are not sufficiently captured by a communications offence.

**Outraging public decency**

3.182 Outraging public decency is a common law offence, developed through case law rather than enshrined in legislation.\(^{140}\) To commit an offence of outraging public decency, an act must be “lewd, obscene or disgusting” and “of such a nature as to outrage minimum standards of public decency as judged by a jury in contemporary society”.\(^{141}\) However, a particular member of the public does not need to be outraged for the offence to be satisfied.\(^{142}\) The offence is one of strict liability, meaning that the accused does not have to intend to outrage public decency but merely has to carry out the act.\(^{143}\)


\(^{139}\) This proposed harm-based communications offence could also make it easier to prosecute disclosure, or threats to disclose, intimate audio recordings. As discussed at footnote 135 above, such recordings are outside of the scope of this project but we are aware of stakeholders experiencing this behaviour (see Chapter 2 para 2.114). We consider that the current communications offences might apply to intimate audio recordings, but that the proposed new communications offence could have wider application due to the removal of ambiguous terms such as “grossly offensive” and the focusing of the offence on likely harm.


\(^{142}\) *Mayling* [1963] 3 QB 717; *Choi* [1999] EWCA Crim 1279.

\(^{143}\) As noted by the court in *R v Gibson* [1990] 2 QB 619.
3.183 The offence is triable either way, with a maximum penalty of six months’ imprisonment and/or unlimited fine on summary conviction, or imprisonment and/or fine at large on indictment.\textsuperscript{144}

3.184 Outraging public decency has been used to prosecute acts of taking intimate images or recordings of others in public places without their consent, including (prior to the introduction of the Voyeurism (Offences) Act 2019) acts of “upskirting”.\textsuperscript{145} However, as we note below, there are limitations in the use of this offence to govern the range of behaviours relating to intimate image abuse.

Limitations of outraging public decency in the context of intimate image abuse

3.185 An act is “public” for the purposes of the offence if more than one person is present and could have seen the act.\textsuperscript{146} This is known as the “two-person” rule. In the case of \textit{R v Hamilton},\textsuperscript{147} the defendant was convicted of outraging public decency for “upskirting” a number of women, including a 14-year-old girl, in supermarkets. The Court of Appeal concluded that although no one saw the defendant taking photographs at the time, it was sufficient that more than one person could have seen it. The acts were committed in a public place (a supermarket) where a number of people could have been present and capable of seeing him committing the act.\textsuperscript{148}

3.186 This case can be distinguished from the case of \textit{Rose v DPP},\textsuperscript{149} in which the defendant’s actions were found not to outrage public decency because, although the act took place in the foyer of a bank, there was no evidence that anyone was around to be capable of seeing the act at that time of the night. It should also be noted, as it was in the case of \textit{R v F}, that more than one person being present is not sufficient to pass the two-person test; they must be both present and capable of seeing the act.\textsuperscript{150}

3.187 The two-person rule limits the application of this offence to intimate image abuse cases where an indecent image is taken in public with a sufficient number of bystanders capable of witnessing the act. For example, if D takes an intimate photo down V’s blouse covertly in an empty train carriage, this could not constitute an offence of outraging public decency because no one is capable of seeing the act. Nor would the facts of this case constitute an offence of voyeurism under the SOA 2003 outlined in the previous chapter. This is because V was not engaged in a private act at the time (V would not have had a reasonable expectation of privacy).

\begin{itemize}
\item \textsuperscript{144} D Ormerod and D Perry (eds), \textit{Blackstone’s Criminal Practice} 2019, para B3.353.
\item \textsuperscript{145} See, for example Rebecca Shepherd and Dominic Smithers, “The public school pervert who spent years secretly filming up women’s skirts in one of Britain’s wealthiest villages” (29 March 2018) \textit{Manchester Evening News}, https://www.manchestereveningnews.co.uk/news/greater-manchester-news/aldersley-edge-upskirt-film-pervert-14470375 (last visited 24 February 2021); Bradley Jolly, “Upskirt pervert who took 9,000 secret photos in just five weeks avoids jail” (28 January 2015) \textit{Mirror} https://www.mirror.co.uk/news/uk-news/upskirt-pervert-who-took-9000-secret-photos-in-just-five-weeks-avoids-jail-9647370 (last visited 24 February 2021).
\item \textsuperscript{146} \textit{R v May} (1989) 91 Cr App R 157.
\item \textsuperscript{147} [2007] EWCA Crim 2062, [2008] 2 WLR 107.
\item \textsuperscript{148} \textit{R v Hamilton} [2007] EWCA Crim 2062; [2008] 2 WLR 107 at [21].
\item \textsuperscript{149} [2006] EWHC 852 (Admin), [2006] 1 WLR 2626.
\item \textsuperscript{150} \textit{R v F} [2010] EWCA Crim 2243.
\end{itemize}
3.188 While outraging public decency has been applied to acts of taking images without consent, it has not been applied to the sharing of such images, particularly online. It has not yet been decided by the courts in England and Wales whether an online space can be a "public place" for the purposes of the offence.151

**Possession of extreme pornographic images**

3.189 The only existing law that criminalises the possession of an adult’s intimate image without consent is the offence of possessing extreme pornographic images, contained in section 63 of the Criminal Justice and Immigration Act 2008 ("CJIA 2008").

3.190 The introduction of the offence was particularly encouraged after the case of Graham Coutts in 2005, who brutally murdered Jane Longhurst and was found to be in possession of a large number of violent pornographic images, the downloading of which declined in the weeks after her death.152 While the Government rejected any direct link between possession of these images and the commission of such violent crime,153 the offence could at least attempt to reduce the demand for these images and address the social harm that could arise from exposure to such "deeply offensive" and "vile material".154

3.191 It is an offence under section 63 of the CJIA 2008 to be in possession of an extreme pornographic image. The meaning of "extreme" image is contained in sections 63(5A), (7) and (7A). Section 63(5A) provides that an image is "extreme" if it is an image of one of the contexts described in subsection (7) or (7A) and "is grossly offensive, disgusting or otherwise of obscene character". As noted above, we discussed the difficulties of these terms in our Abusive and Offensive Online Communications Scoping Report.155

3.192 Section 63(7A) includes images that portray in an explicit and realistic way, either of the following:

(a) an act which involves the non-consensual penetration of a person’s vagina, anus or mouth by another with the other person’s penis, or

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151 Although other jurisdictions have done so, such as Hong Kong. This was discussed in more detail in our Abusive and Offensive Online Communications Scoping Report (2018) Law Com No 381 at paras 6.120 to 6.137. However, in our report Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com No 358, we explain that it is likely that “public place” will be interpreted as a physical, tangible place which therefore would not include a website. It is noted that an image from the internet can be used in the offence if it is shared in a physical place such as projecting a webpage onto the side of a building.


154 As described by then Secretary of State for Justice and Lord Chancellor, Jack Straw: Hansard (HC), 8 October 2007, vol 464, col 60.

155 Abusive and Offensive Online Communications Scoping Report (2018) Law Com No 381, p 139 to 142.
(b) an act which involves the non-consensual sexual penetration of a person's vagina or anus by another with a part of the other person's body or anything else,

and a reasonable person looking at the image would think that the persons were real. 156

3.193 As noted by the Court of Appeal in the case of DB, 157 “the circumstances in which the images are received are immaterial” and so long as the image was “produced (and by whom is utterly immaterial) for the purpose of sexual arousal of anyone who comes to have it”, it is sufficient for the offence. In other words, the mere possession of such an image described in sections 63(5A), (7) and (7A) constitutes the offence. 158

Limitations of the extreme pornography offence in the context of intimate image abuse

3.194 Chapter 2 details a range of behaviours where sexual assaults are filmed and shared. This includes sexual assaults where the victim has been incapacitated by drugs, which we have been informed can occur at “chemsex” parties. 159

3.195 Section 63(7A) could apply to incidents where images of such sexual abuse have been taken or shared, whether in the context of chemsex parties or other circumstances where there is possession of an image or film showing non-consensual sexual activity. The offence could also apply to altered images or “deepfakes” of these behaviours, given that the image can be “produced by any means” (section 63(8)(a)). Where the offence relates to an image that portrays non-consensual sexual activity, it is only required that the image portrays it in an “explicit and realistic way” (section 63(7A)); it does not require the non-consensual activity to be real, as long as it is portrayed in a realistic way such that a reasonable person looking at it would think it was real.

3.196 However, it is unlikely that the possession of extreme pornography offence would be used to prosecute this kind of behaviour. First, as Galop explained to us, victims of this behaviour are very unlikely to report it to the police.

3.197 Secondly, for those who do report this behaviour to the police, their recollection of events may be challenged by the police if they have taken drugs, voluntarily or not. A victim’s account of their experience may be perceived as unreliable. Ronnie Meechan-Rogers, an academic conducting qualitative research into the mental health impacts of intimate image abuse on the LGBTQ+ community, explained to us how the police may respond to such reporting. Where victims had been engaging in a certain element of illegal activity by taking certain drugs, if they do report associated intimate image abuse, the police might say “are you sure it’s not something you have taken? Is this an element of your imagination?”

156 Note also that Criminal Justice and Immigration Act 2008, s 63(7B) notes that penetration “is a continuing act from entry to withdrawal” and that vagina includes vulva for the purposes of the offence.


159 See Chapter 2, para 2.18.
3.198 While on paper, the possession of extreme pornography offence could be applied to much of this behaviour, there is one significant limitation: that the film or image must have been produced "solely or principally for the purposes of sexual arousal". While this would likely apply to most instances of intimate image abuse in the context of chemsex, it would not apply if the recording was done for any other purpose, such as humiliation, to extort money or to cause the victim distress.

3.199 For those instances of chemsex where the sexual activity is consensual, but the recording of it is not, the offence is not applicable.

3.200 Even if this offence could apply to such instances of abuse in the context of chemsex, the reality is that it is not being used to prosecute these types of behaviours. As noted above, victims are reluctant to report this behaviour to the police. Further, if they do, police do not take the behaviour seriously or may not know that this offence could be applicable. As the offence itself deals with a broader range of behaviours than those that apply to intimate image abuse, it may not necessarily be utilised where it should.

3.201 This is illustrated by the case of Reynard Sinaga. Described by the CPS as "Britain’s most prolific rapist", Sinaga would lure intoxicated men back to his home, spike their drinks with heavy sedatives, and film himself sexually assaulting and raping them. When Greater Manchester Police examined Sinaga’s devices, they discovered 3.29 terabytes of extreme material – equivalent to 250 DVDs or 300,000 photos – depicting sexual assaults lasting, in one case, for eight hours. Sinaga was found guilty in Manchester Crown Court of 159 offences across four trials, convicted of various counts of rape, attempted rape and sexual assault. However, despite the fact he had filmed each of these assaults and kept the footage, reports of the trial suggest that the indictment did not contain any counts of possession of extreme pornography under section 63 of the CJIA 2008. Given that the jury found these incidents to amount to non-consensual sexual activity, and the judge’s finding that she was sure Sinaga used video recordings of his crimes for "perverted pleasure at a later time", they would have met the evidential test for section 63.

CONCLUSION

3.202 As this chapter demonstrates, the applicable law is not all in one place, and in attempting to prosecute these behaviours one must look to a number of different statutes which have varying terminology, additional intent requirements and sentencing provisions. The law forms a “patchwork” of different offences that provides a piecemeal response to intimate image abuse. In our discussions with stakeholders, it was very clear that with such a wide variety of offences available, the law was difficult to apply in practice. Below we expand on the key problems identified: the effect of having a patchwork of offences; inconsistency of safeguards; limited

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161 Above. The Solicitor General appealed against the sentence for undue leniency, see R v McCann, Sinaga and Shah [2020] EWCA Crim 1676.

understanding within the police and CPS; and the impact of this on prosecutions. The
overriding view from stakeholders was that the law was currently not fit for purpose.

Patchwork of offences

3.203 In their report “Shattering Lives and Myths”, Clare McGlynn and others described the
law in this area as “inconsistent, outdated and confusing” and argued that it failed to
“adequately respond” to all forms of this behaviour.\(^\text{163}\) Stakeholders we spoke to in
pre-consultation engagement – including academics, lawyers and victim support
organisations – agreed with these views.

3.204 Responders to a survey conducted by the Justices’ Clerks’ Society for this project
made reference to the wide range of offences available to prosecute these behaviours
and the overlap that results. One responder, for example, stated that “there is overlap
and a risk of the ‘wrong’ offence being charged. This can lead to acquittals if the
offence is not made out on a technicality”. Another responder said the offences
“overlap and this can cause issues at charging. Even the CPS guidelines accept that
there are a number of different offences that prosecutors can choose from”.

3.205 Frances Ridout from the QMUL Legal Advice Centre told us that there was a need for
simplicity in this area and a “proper codified piece of legislation”. Tim Thompson from
Mishcon de Reya said that “the law needs to be equipped to deal with a range of
developing behaviour with different motives”. Erika Rackley and Kelly Johnson told us
that the law does not reflect how victims experience these types of behaviour, which is
often on a “continuum”, not as distinct, fragmented behaviours.

3.206 The protection these offences offer is piecemeal and conceptually inconsistent, and
this was confirmed in our discussions with stakeholders. The specific intimate image
abuse offences suffer from two main limitations:

1. the way in which the image is defined varies for each offence (from “private and
   sexual” to doing a “private act” with a “reasonable expectation of privacy”) and
   may not address some similarly harmful instances of the taking, making or
   sharing of some types of intimate images without consent; and

2. the additional intent element also varies and is unduly restrictive in some cases,
   for example, intent to cause distress in the disclosure offence, or for the
   purpose of obtaining sexual gratification in the voyeurism offence.

3.207 Beyond the specific disclosure, voyeurism and upskirting offences, there are a number
of other existing offences that can be used to prosecute some instances of taking and
sharing intimate images without consent. However, these offences were not initially
designed to govern these behaviours, and even in combination with the specific
offences, they are not fit for this purpose.

Inconsistent safeguards

3.208 Erika Rackley and Kelly Johnson also expressed concern for the different ways in
which victims are treated by the law, depending on whether their image is taken or

\(^\text{163}\) Clare McGlynn, Erika Rackley, Kelly Johnson and others, “Shattering Lives and Myths: A Report on Image-
Based Sexual Abuse” (July 2019) *Durham University and the University of Kent*, p 5
shared without consent. Voyeurism (taking images of a private act without consent) and “upskirting” both sit within the SOA 2003, which triggers additional measures such as the availability of sexual harm prevention orders and notification requirements as well as providing victims with anonymity from the point of accusation. However, disclosing private, sexual images without consent under section 33 of the CJCA 2015 (the disclosure offence) does not trigger the same additional measures and safeguards.

3.209 As many other stakeholders expressed to us, this does not necessarily reflect the seriousness of disclosing private, sexual images without consent, and adds to the inconsistency of the law in this context. There was a common view that this offence should be similarly categorised as a sexual offence, which is discussed further in Chapter 14. Stakeholders also told us that the maximum sentence (two years’ imprisonment on indictment and six months’ imprisonment on summary conviction) for the disclosure offence did not reflect the seriousness of the acts and the significant harm that can be caused to victims.

Lack of clarity in the criminal justice system

3.210 As Emily Hunt, a victim of voyeurism and campaigner for legal reform, noted, “laws need to be constructed in a way that makes it easier to prosecute and encourages the police and CPS to take cases forward”. The CPS expressed concerns that the existing law “lacked clarity” and that the CPS guidance is “almost just [filling] a hole”.

3.211 Other stakeholders emphasised that as a result of this, police responses varied. Many victims’ organisations saw behaviours that could have been prosecuted not being taken forward. Police find it difficult to know which provisions should apply in any given circumstance. A national survey of almost 800 police officers in the United Kingdom showed that almost 95% had not received training on how to conduct investigations in “revenge pornography”. Further, only 1% of respondents reported that they had an “excellent” understanding of revenge pornography. 80% of respondents reported that they would not know how to contact internet companies to gather evidence for a case of revenge pornography.

Impact on prosecution

3.212 As a result, these types of behaviours – even those that do fall within the current offences – are frequently not prosecuted and in some cases, other legal avenues are sought. Chief Magistrate Senior District Judge Emma Arbuthnot told us that there were “hardly any cases of this behaviour coming through the criminal courts” and a majority of these cases were being prosecuted through Integrated Domestic Violence Courts. Similarly, of the 20 magistrates who responded to a survey conducted by the

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164 Provided that the relevant sentencing conditions are met as per Sexual Offences Act 2003, sch 3, s 34 and 34A.


166 See for example the experiences of Emily Hunt and Gina Martin, discussed in Chapter 2.

Magistrates Association for this project, no magistrate in the adult courts had any experience of these types of cases.

3.213 However, in the Magistrates Association Family Court Committee, a majority of magistrates had seen these types of behaviour in the family courts. In many cases this involved threats to disclose intimate images in a domestic abuse context as a form of ongoing harassment or abuse, with complex cases involving children. Often in these cases victims are advised to obtain a non-molestation order from the family courts because it is far easier and quicker than trying to obtain redress through the criminal justice process.

Gaps in protection

3.214 Additionally, there is currently no law that specifically criminalises:

1. threatening to disclose an intimate image without consent;¹⁶⁸
2. “downblousing” (the taking or recording of images down a female’s top);
3. sending an intimate image to the person who appears in the image without their consent;¹⁶⁹
4. recording or streaming rapes or sexual assaults;
5. taking, making or sharing without consent an intimate image that is not necessarily sexual or private within the meaning of the disclosure offence (for example, an image of a Muslim woman without her hijab in an intimate situation, or an image revealing a person’s sexuality but which is not inherently sexual in nature, such as two men holding hands or kissing); or
6. making or altering an intimate image without consent.

The specific offences, therefore, fail to capture behaviour which is wrong, harmful, and comparable to behaviour that is captured by existing offences.

3.215 As a result, there may be some instances where the taking of an image may be criminalised, but the sharing of that image may not be, and vice versa. Further, while in cases of voyeurism and upskirting notification requirements may be triggered and the courts may have available sexual harm prevention orders – and victims have anonymity from the point of accusation – such ancillary provisions are not available in respect of the disclosure offence. Almost all stakeholders we spoke to did not agree with the way these behaviours – which are often experienced in tandem – are treated differently by the law.

3.216 There are still some forms of intimate image abuse that are not effectively dealt with by the criminal law. It is difficult for police and prosecutors to know which offence should apply, and invariably the application of these laws would be inconsistent between forces. Different elements are required to prosecute different forms of

¹⁶⁸ This may be prosecuted as a communications offence, however, as noted above these offences are not sufficient to address the specific harm that arises from these acts.

¹⁶⁹ This may also be prosecuted as a communications offence, with the same limitations, as above.
intimate image abuse, including different intent elements. There is a wide range of maximum sentences. In some cases, these could all relate to the same image, but the taking and sharing are each treated differently by the law.

3.217 Without a specific and comprehensive set of offences governing this behaviour, some forms may not be effectively dealt with by the criminal law.\textsuperscript{170} Therefore we conclude that there is a compelling case for reform of the three intimate image abuse offences in order to ensure that taking, making and sharing intimate images without consent is dealt with in a way that provides the most effective protection for victims.

\textsuperscript{170} In Appendix 1, we briefly summarise the reasons why the civil law does not provide an effective remedy in this context.
## TABLE 1: INTIMATE IMAGE OFFENCES

<table>
<thead>
<tr>
<th>Intimate Image Offence</th>
<th>Conduct Element</th>
<th>Fault Element</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>DISCLOSURE</strong> s 33 of the Criminal Justice and Courts Act 2015</td>
<td>Disclosure of a private sexual photograph or film without the consent of the person who appears in the photograph or film.</td>
<td>Intention to cause the person who appears in the photograph or film distress.</td>
</tr>
<tr>
<td><strong>VOYEURISM</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>OBSERVATION</strong> s 67(1) of the Sexual Offences Act 2003</td>
<td>Observing another doing a private act.</td>
<td>For the purpose of obtaining sexual gratification and knowing the other person does not consent to being observed for their sexual gratification.</td>
</tr>
<tr>
<td><strong>OPERATION OF EQUIPMENT</strong> s 67(2) of the Sexual Offences Act 2003</td>
<td>Operating equipment.</td>
<td>Intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act; and Knowing B does not consent.</td>
</tr>
<tr>
<td><strong>RECORDING</strong> s 67(3) of the Sexual Offences Act 2003</td>
<td>Recording another person (B) doing a private act.</td>
<td>Intention that they or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act; and Knowing that B does not consent to his recording the act with that intention.</td>
</tr>
<tr>
<td><strong>INSTALLATION</strong> s 67(4) of the Sexual Offences Act 2003</td>
<td>Installing equipment, or constructing or adapting a structure or part of a structure.</td>
<td>Intention of enabling himself or another person to commit an observation offence under s 67(1) which requires the purpose to be obtaining sexual gratification.</td>
</tr>
<tr>
<td><strong>UPSKIRTING</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>OPERATING EQUIPMENT</strong> s 67A(1) of the Sexual Offences Act 2003</td>
<td>A operates equipment beneath the clothing of another person (B) without consent (in circumstances where B’s genitals, buttocks or underwear would not otherwise be visible)</td>
<td>A must have no reasonable belief in consent. Intention of enabling A or another person (C) to observe B’s genitals, buttocks or underwear for the purpose of obtaining sexual gratification or humiliating, alarming or distressing B.</td>
</tr>
<tr>
<td><strong>RECORDING</strong> s 67A(2) of the Sexual Offences Act 2003</td>
<td>A records an image beneath the clothing of another person (B) of B’s genitals, buttocks or underwear without B’s consent (in circumstances where B’s genitals, buttocks or underwear would not otherwise be visible)</td>
<td>A must have no reasonable belief in consent. Intention that A or another person (C) will look at the image for the purpose of obtaining sexual gratification or humiliating, alarming or distressing B.</td>
</tr>
</tbody>
</table>
Chapter 4: Motivations

INTRODUCTION

4.1 This chapter considers what motivates individuals to take, make or share, or threaten to take, make or share, intimate images without consent. The chapter will begin with a summary of the motivation(s) individuals must have in order to be caught by current intimate image offences. It will then outline evidence of the far wider range of motivations for intimate image abuse.

4.2 We will conclude that, because the perpetrator must have a specific intention, current intimate image offences only capture a subset of those taking and sharing intimate images without consent. In Chapter 10 we will consider whether this is desirable, or whether intimate image offences should capture a broader range of perpetrator motivations.

MOTIVATIONS IN CURRENT OFFENCES

4.3 As detailed in Chapter 3, current intimate image offences in the UK all have specific intent requirements, meaning that the perpetrator must have acted with a particular motivation in order to be caught by the offence.

4.4 To be convicted of a disclosure offence under section 33 of the Criminal Justice and Courts Act 2015 (“CJCA 2015”), the perpetrator must have acted with the intention of causing the victim distress. To be convicted of a voyeurism offence under section 67(3) of the Sexual Offences Act 2003 (“SOA 2003”) they must have acted for the purpose of obtaining sexual gratification. And to be convicted of an “upskirting” offence under section 67A(2) of the SOA 2003, they must have acted for the purpose either of obtaining sexual gratification (for themselves or for a third party) or humiliating, alarming or distressing the victim.

4.5 In Scotland, the disclosure offence in section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 contains an intent and recklessness element: the perpetrator must have intended to cause the victim to suffer fear, alarm or distress, or been reckless as to whether the victim suffered fear, alarm or distress.

4.6 We have found that the motivations of individuals who commit intimate image abuse are far wider than this. The motivations of which we are aware are considered below.

REVENGE

4.7 One common motivation for disclosing an intimate image without consent (or threatening to do so) is to get “revenge” when the perpetrator deems that the victim has wronged them in some way. Often, it will be after the victim has ended their relationship with the perpetrator.

1 This was explored in greater depth in Chapter 3.
4.8 In one survey conducted in the US, those who reported that they had non-consensually disclosed a sexual image were asked why they did it. 11% said that they were upset with the victim, often as a result of a fight or a breakup.\(^2\) In a survey conducted by Netsafe (New Zealand), victims were asked what they thought had motivated the perpetrator. 14% responded that they thought the perpetrator was motivated by a desire to get revenge. Among female victims, a desire to get revenge was the reason given most often.\(^3\)

4.9 Zak Franklin suggests that the primary motivation of perpetrators (almost always men) is to humiliate former romantic partners (almost always women), which they believe is justified by the “wrongs” that former partner committed against them.\(^4\)

4.10 Additionally, Matthew Hall and Jeff Hearn examined revenge porn posts on MyEx.com and found “the men diffusing culpability and responsibility by presenting themselves as aggrieved in some way”. They often justified their posts by referencing things the victim had, in their eyes, done “wrong”, such as being controlling in their relationship or taking back control by leaving the relationship.\(^5\) This was also found by a similar analysis of revenge porn posts by Ganaele Langlois and Andrea Slane, with posters commonly accusing the victim of cheating, promiscuity, lying and generally “doing wrong”.\(^6\) Research commissioned by the Australian eSafety Commissioner found that “shaming” and “retribution” were common motivations in intimate image abuse that occurs following relationship breakdown. The research also found that perpetrators of this type of intimate image abuse often have negative attitudes towards women and a tendency to blame the victims.\(^7\)

4.11 A desire for revenge has also motivated some perpetrators to take intimate images. For instance, in 2016 Andrew Braithwaite was found not guilty of voyeurism. He had installed hidden cameras above his ex-partner’s bed and shower, but his purpose was to disclose the recordings as an act of revenge, rather than to obtain sexual gratification (as required under the voyeurism offence).\(^8\)

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EXERTING POWER AND CONTROL

4.12 Another key motivation for committing intimate image abuse is a desire to exert power and control over the victim.

4.13 In a Netsafe (New Zealand) survey, respondents were asked what they thought had motivated the perpetrator. 12% said they thought it was a desire to gain control over them.9 In their research, Hall and Hearn found that power, control and heterosexuality were the main themes underlying perpetrators’ posts of intimate images of ex-partners.10 Furthermore, figures from the Crown Prosecution Service (“CPS”) show that of the 376 prosecutions commenced in the year ending March 2019, 83% (313) were flagged as being domestic abuse-related.11

4.14 Several studies have examined the link between domestic abuse and intimate image abuse. Henry and Powell’s research suggested that “perpetrators of domestic and family violence are increasingly using sexual imagery as a tool to threaten, harass and/or control both current and former partners”.12 Their interviews with domestic violence support workers described examples where sexual assaults between intimate partners were recorded, intimate partners were coerced into consenting to having intimate images taken of them, and the perpetrator threatened to disclose intimate images if their partner took legal action for the domestic abuse.13 Similarly, the SmartSafe study conducted by the Domestic Violence Resource Centre Victoria (Australia) of a sample of victims of domestic violence and domestic violence workers, showed that non-consensual “sexting” was common in domestically violent relationships as a means of humiliation and intimidation.14

4.15 Studies also highlight that intimate image abuse must be understood in the context of wider patterns of control. In one study, a stakeholder who works with victims said: “It’s not one act of revenge after a breakup. It’s a continued pattern of control ... It’s another means to degrade them, to humiliate them, shame them, control them, maybe coerce them into coming back.”15 Nicola Henry and Anastasia Powell similarly argue that sharing and threatening to share an intimate image is often a way for abusive

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partners and ex-partners to intimidate, silence and extend power and control over their victims.\textsuperscript{16}

4.16 Intimate image abuse is viewed as an effective way for perpetrators to “lash out” at ex-partners over whom they have lost control. It is used as a way to “repair” their damaged masculinity. Often, this method is used when the perpetrator cannot see the victim physically, for instance because they have a restraining order against them or they are in another country.\textsuperscript{17}

4.17 Sometimes, intimate image abuse is motivated by a specific event or desire. There have been cases where a perpetrator has threatened to share images of the victim to discourage her from reporting to the police that he had sexually assaulted or raped her.\textsuperscript{18} There have also been cases where an ex-partner has threatened to disclose an image so that they can keep a pet, or some joint property, in the break up.\textsuperscript{19}

4.18 Where nothing specific sparks the abuse, perpetrators may be motivated by attention-seeking, jealousy, obsession and misogyny.\textsuperscript{20} Many male perpetrators feel entitled to women’s bodies. They feel they can view women’s bodies when they please and can decide if and when others view their bodies.\textsuperscript{21} In one study with 100 participants (82 women, 16 men and two undisclosed), those who held sexist beliefs, or had narcissistic or psychopathic traits, were more likely to disclose an intimate image of another without their consent.\textsuperscript{22}

4.19 It should be noted that female perpetrators can also be motivated by a desire to exert power and control over their victim. For example, ManKind has seen cases where women have taken pictures of men in submissive positions and shared them, or threatened to share them.\textsuperscript{23}

4.20 Power and control are not only motivating factors for sharing images in the context of relationships and wider patterns of control. The research commissioned by the Australian eSafety Commissioner looking specifically at motivations included one stakeholder who explained motivations for taking intimate images without consent. They described the resulting images as:

\begin{itemize}
  \item Sandra Paul (Kingsley Napley).
  \item Sophie Mortimer (Revenge Porn Helpline).
  \item Marilyn Selwood (ManKind).
\end{itemize}
a trophy, or a memory — a physical memory they’ve got of how much power and control they’ve been able to exert over something, or someone...and that gives them ongoing pleasurable feelings.24

If the image was taken for the perpetrator’s own use and the victim is not aware it was taken, this type of motivation of power and control is not reliant on the victim’s response to the abuse.

SOCIAL STATUS

4.21 Some perpetrators will commit intimate image abuse as a way of improving their social status and bonding with their peers. This appears to be a fairly common motivation: in one American survey, 8% of perpetrators said they had disclosed an intimate image without consent either to gloat or brag (4%) or for the likes and comments on social media (4%).25

4.22 It seems to be a particularly common motivation for young perpetrators. As Michael Salter describes, collecting and disclosing intimate images of girls and women enables “a form of abusive homosociality in which boys and men distinguished themselves amongst their peers”. Boys at high school will huddle around their phones “in a competitive display of their ‘collections’”. The aim is to gain status, popularity and respect from their peers. If a boy is in a relationship with the victim, he may want to prove that the girl is infatuated enough to let him take pictures or send pictures to him. If the victim broke up with him, he may be motivated by a desire to restore his pride and masculinity, especially if he believes the girl cheated on him, so deserves to be exposed as a “slut”.26

4.23 For some young perpetrators, the aim may be to shame or bully the victim, also as a means to improve their social status.27

4.24 While this behaviour is typically associated with young people, the Revenge Porn Helpline suggested that improving one’s standing in the pecking order can also be a motivation for adults.28 Some adult perpetrators are motivated by wanting their social group to view them as a “lad”, by wanting their peers to be impressed by and jealous of how attractive their girlfriend or sexual partner is, and by a sense of entitlement ie “her body is mine, I can take images and show them to whoever I want.”29 Intimate


27 Carmel Glassbrook (Professionals Online Safety Helpline (POSH)).

28 Sophie Mortimer (Revenge Porn Helpline).

image abuse can be used as a way to “sustain status among their peers”. Perpetrators are simultaneously bonding and competing with peers, who will often encourage them to take and share images. 

SEXUAL GRATIFICATION

4.25 Another motivation for perpetrators is obtaining sexual gratification. This is often what motivates perpetrators to take images of victims engaging in private acts, or to take images up a victim’s clothing. Additionally, in cases of sextortion\(^\text{31}\) for more images, the perpetrator is usually motivated by obtaining sexual gratification.\(^\text{32}\) A police officer told us about an unusual case where a woman’s intimate images were obtained without her consent by a third party who did not have a relationship with the victim. They used the victim’s images on dating websites, so that the men they were talking to would send nude images in return. The perpetrator did not intend to cause the victim distress, and therefore the disclosure offence could not be charged.

EXTORTION

4.26 A desire to make money is also a common motivation for perpetrators. This is what motivates all perpetrators of sextortion for money, but it may extend to other forms of intimate image abuse too. In a survey conducted by Netsafe (New Zealand), victims were asked what they thought had motivated the perpetrator. 17% responded that they thought the perpetrator was motivated by a desire to make money. For male victims, a desire to extort money was one of the top motivations identified.\(^\text{33}\) This is consistent with the finding that men are victims of sextortion for money more often than women.

A JOKE OR PRANK

4.27 Some perpetrators report that they took, made or shared an intimate image without consent as a joke or prank. In Netsafe’s survey, 19% of victims stated that they believed the perpetrator did what they did as a joke. Among male victims, this was one of the answers provided most frequently.\(^\text{34}\)

4.28 Young people in particular often claim that they shared an image as a joke or “banter”.\(^\text{35}\) Sarah Boland of the Crown Prosecution Service (“CPS”) suggested to us that young people often take and share intimate images of others as a joke or prank.


\(^{31}\) Sextortion is used to describe a type of extortion where intimate images are used by a perpetrator to extort money or more intimate images from a victim. We discuss sextortion in more detail in Chapter 2.

\(^{32}\) Julia Slupska (DPhil Candidate, Oxford Internet Institute).


\(^{35}\) Dr Carrie – Anne Myers and Holly Powell-Jones.
A policing stakeholder told us of a case where a young male accessed online accounts of a number of victims and shared their intimate images. The police could not pinpoint a motive for sharing; he appeared to be doing it for “a laugh”. Dr Adrian Scott suggested to us that sometimes, and especially among young people, the perpetrator will take or share images to be funny, flirty or sexy. He also found some evidence that this behaviour is not taken as seriously by young people, nor does it cause the same harm. Indeed, some young people reported finding their image being taken or shared funny.36

4.29 This is perhaps an indication that some perpetrators are unaware of the harm their behaviours can cause (for more on the harms caused by intimate image abuse, see Chapter 5).

ART

4.30 More unusually, some perpetrators claim that they took, made or shared an image without consent for its artistic value.

4.31 In *R v D*, the defendant claimed that he was taking pictures without the victim’s knowledge or consent as part of a photography project, not for sexual gratification.37 In addition, there are a number of sites where intimate images are effectively traded for other intimate images. They claim not to be seeking to harm the victim or obtain sexual gratification, and view the images as a kind of “collector’s item”.38

4.32 Two things should be said about this. First, one might be sceptical about these perpetrators’ claimed motivations. Secondly, as with perpetrators who commit intimate image abuse as a “joke”, it seems clear that perpetrators who view the images they have taken, made or shared as pieces of art do not appreciate the severity of the harms that can be caused by their behaviour.

NO IDENTIFIABLE REASON

4.33 Finally, there seem to be a large number of cases where no motivation can be identified.

4.34 In one survey conducted in the US, those who reported that they had non-consensually disclosed a sexual image were asked why they did it. 79% said they were just sharing the image with friends and did not intend to hurt the victim.39 Moreover, callers to the Revenge Porn Helpline whose images had been uploaded to commercial pornography sites, dedicated revenge porn sites or image boards frequently explained that their relationship with the perpetrator had ended amicably.

36 Dr Adrian Scott (Goldsmiths, University of London).
37 *R v D* [unreported], Truro Crown Court, see http://devonchambers.co.uk/component/content/index.php?option=com_content&view=article&id=36&Itemid=149 (last visited 22 February 2021).
38 Sophie Mortimer (Revenge Porn Helpline).
years ago and they had not been in touch since. The abuse seemed to come “out of the blue”.40

4.35 Again, two observations should be made about this. First, perpetrators who claim they had no motivation may in fact be covering up a malicious motive. Secondly, if perpetrators are committing intimate image abuse unthinkingly, this is further evidence that perpetrators are often unaware how serious the consequences of their behaviour can be.

CONCLUSION

4.36 This chapter has shown that some perpetrators are motivated by a desire to humiliate, alarm or distress their victim, or to obtain sexual gratification, as required by current intimate image offences. However, these are far from the only motivations. We will further discuss perpetrators’ motivations in Chapter 10, when we consider whether new intimate image offences should include an intention element, and if so what that intention (or those intentions) should be.

Chapter 5: The Wrongs and Harms of Intimate Image Abuse

INTRODUCTION

5.1 This chapter has two aims. Firstly, to explore why intimate image abuse is a wrong that warrants criminalisation. It will therefore begin with a brief examination of the literature on what makes something a wrong worthy of criminalisation. It will then explore the arguments academics have made for why intimate image abuse is wrongful. We conclude that intimate image abuse is a violation of a victim’s sexual privacy, sexual autonomy, bodily privacy and dignity.

5.2 The wrongs of intimate image abuse link directly to the harm it causes to victims: because intimate image abuse infringes upon a victim’s sexual privacy, sexual autonomy, bodily privacy and dignity, it can cause them significant and lasting harm. Therefore, the second aim of this chapter is to explore the ways in which intimate image abuse harms victims.

5.3 There is no consensus over how the harm caused by intimate image abuse should be categorised. For the purposes of this chapter, we will divide harm into psychological, physical and financial harm. We will also consider how particular groups experience different types or degrees of harm. The groups we consider are women, men, religious and cultural groups, LGBT+ people, people with a disability, young people, teachers, sex workers and wider society.

5.4 We recognise that this categorisation is imperfect. There is significant overlap between psychological, physical and financial harm which does not lend itself to individual classifications. We are also aware that the psychological, physical and financial harm a victim experiences is related to their individual circumstances, so separating out these discussions is challenging. Finally, focusing on individual types of harm can obscure the broader structural reasons for this abuse, including misogyny, homophobia and racism. That said, we are of the view that the categorisation we have adopted is a useful one. It enables us to give a broad and comprehensive account of the range of harms experienced.

THE WRONGS OF INTIMATE IMAGE ABUSE

5.5 Stuart Green argues that, when deciding whether something warrants criminal punishment, we should consider three things:

(1) culpability;

(2) social harmfulness; and
Culpability refers to the degree of fault or blameworthiness on the part of the perpetrator. Harmfulness refers to the degree to which a criminal act causes, or risks causing, harm to others. Moral wrongfulness refers to the violation of a moral norm or set of norms.

5.6 Culpability will be considered in Chapter 10, when we explore what mental state an individual should be required to have in order to have committed an intimate image offence. Harmfulness will be considered in the second section of this chapter. Now, we begin with the third of these criteria: wrongfulness.

Wrongfulness as a justification for criminalisation

5.7 Green suggests that to be criminalised an action must be “morally wrongful”. Smith, Hogan and Ormerod argue that an action must also be a “public wrong”:

Despite the lack of a universally accepted definition of criminal law, it is possible to point to certain characteristics which are generally found in conduct which is criminal; in particular, it usually involves a public wrong and a moral wrong. They define something as a “public wrong” where it “has a particularly harmful effect on the public and goes beyond interfering with merely private rights”. “Moral wrongs” are described as “immoral acts deserving of punishment”.

The wrongfulness of intimate image abuse

5.8 Academics have offered various explanations of the wrongfulness of intimate image abuse. These explanations centre around something fundamental to the victim that intimate image abuse is said to violate or infringe. Examples include the victim’s sexual privacy, sexual autonomy, bodily integrity and dignity.

5.9 Some academics view intimate image abuse as an attack on the victim’s dignity. Clare McGlynn and Erika Rackley argue that this behaviour “violates the dignity of victim-survivors by its deliberate infringement of their self-worth and failure to treat them with respect.” Similarly, Ganaele Langlois and Andrea Slane claim that “revenge porn operates overall as an attack on human dignity” which “plays especially brutally on the
victim’s disempowerment, robbing her of her sexual integrity and of her dignity to inhabit her body as her own.\(^7\)

5.10 In 2015, Nicola Henry and Anastasia Powell located the wrong of intimate image abuse in the “direct violation of an individual’s sexual autonomy”.\(^8\) In their recent collaborative work with Clare McGlynn, Kelly Johnson, Erika Rackley, Nicola Gavey and Asher Flynn, a more expansive understanding of the wrongs of intimate image abuse was presented. It was argued that image-based abuse is wrong because it violates the victim’s dignity, privacy, freedom of sexual expression and autonomy. Unlike most scholars writing in this area, they separate this from the harm caused, arguing that harm is a consequence of the wrong, rather than the wrong itself.\(^9\)

5.11 Other academics, most prominently Danielle Citron and Mary Anne Franks, view this behaviour as wrongful because it constitutes a violation of the victim’s intimate and sexual privacy rights.\(^10\) When speaking with us, Marthe Goudsmit also suggested that intimate image abuse is a breach of sexual privacy.\(^11\)

5.12 Finally, PJ Patella-Rey argues against intimate image abuse being exclusively, or even primarily, a violation of sexual privacy. He argues that victims describe intimate image abuse as chiefly a violation of their bodily integrity, or a violation of their right to determine what happens to their bodies and whether their bodies are exposed to others.\(^12\) He points to testimony from victims, in which they do not distinguish between images of their bodies and their actual bodies (for example, Jennifer Lawrence explaining how, after her intimate images were shared without her consent, she felt “like a piece of meat that's being passed around for a profit”).\(^13\) Patella-Rey explains:

Rather than perceiving such images as ‘content’ that we produce and either do or do not publish, we tend to think of them more like ‘digital prostheses’ – extensions of


\(^{11}\) Marthe Goudsmit (DPhil Candidate, University of Oxford).

\(^{12}\) PJ Patella-Rey, “Beyond privacy: bodily integrity as an alternative framework for understanding non-consensual pornography” (2018) 21 Information, Communication & Society 786. See also Alisdair Gillespie, “’Trust me it’s only for me’: ‘revenge porn’ and the criminal law” [2015] Criminal Law Review 866 at 874.

ourselves, of our will and our agency. They do not merely represent us but also *embody* us.14

5.13 This is an interesting interpretation of bodily integrity. However, it should be noted that a much narrower interpretation of bodily integrity is well-established in the law of England and Wales, and in particular in medical law. In this context, bodily integrity relates to touching of or physical interference with a person’s body.15 It has been applied to, as examples, the withdrawal of patient consent to a medical procedure,16 the continuation of life-sustaining treatment (including the insertion of a feeding tube into the body of) someone in a vegetative state,17 and the issue of whether to separate conjoined twins.18 The right to “physical integrity” has also been read into Article 8 of the European Convention on Human Rights (“ECHR”).19 As the phrasing suggests, the focus is on physical interferences with a person’s body. For example, in *YF v Turkey*, the European Court of Human Rights (“ECtHR”) held that a forced gynaecological examination in police custody breached Article 8.20

5.14 Because bodily integrity has an established meaning in the law of England and Wales, as well as in the jurisprudence of the ECtHR, we are inclined to move away from this concept as a descriptor of the wrongs of intimate image abuse. Instead, we suggest that infringing a victim’s “bodily privacy” can describe the way in which intimate image abuse removes the victim’s control over how their body is viewed, perceived and used.

5.15 While academics have conceptualised the wrongs of intimate image abuse in different ways, they agree that this behaviour is an attack on something fundamental and precious to the victim’s personhood. The next section builds on this by exploring the harm that intimate image abuse causes. This harm, we say, stems from the fact that intimate image abuse violates a victim’s sexual privacy, autonomy and freedom, their bodily privacy, and their dignity.

**HARM CAUSED BY INTIMATE IMAGE ABUSE**

**Harm as a justification for criminalisation**

5.16 The harm a particular action (or failure to act) causes is one of the key things that turns something wrongful into something criminal. As David Ormerod and Karl Laird put it: “Crimes, then, are wrongs which the judges have held, or Parliament has

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16 *Connolly v Croydon Health Services NHS Trust* [2015] EWHC 1339.


18 *Re A (Conjoined Twins)* [2001] Fam 147.


enacted, to be sufficiently injurious to the public to warrant the application of criminal procedure to deal with them.”

5.17 Some offences include proof of actual harm, or an intention to cause harm, as an element of the offence. As we outlined in Chapter 3, the current disclosure offence includes a requirement that the perpetrator intended to cause the victim distress, and one of two motivations in the current “upskirting” offence is to humiliate, alarm or distress the victim.

5.18 We will consider whether proof of actual harm should be an element of intimate image offences in Chapter 9 and in Chapter 10 we will consider whether an intention to harm should remain part of a taking and/or sharing offence. Our provisional views on these issues aside, it is important to set out the harm caused by intimate image abuse because this provides a key justification for criminalisation. As such, this section will describe the psychological, physical and financial harm experienced by individuals who fall victim to intimate image abuse. It will also describe the unique harms suffered by members of particular, often marginalised, groups.

Consistency of harm across forms and methods of intimate image abuse

5.19 Our meetings with stakeholders and the literature in this area paint a consistent picture: the types of harm experienced by victims of intimate image abuse are significant, wide-ranging, and enduring. As Clare McGlynn, Erika Rackley and Kelly Johnson put it, the impact on victims is “all-encompassing and pervasive, radically altering their everyday life experiences, relationships and activities, and causing harms which permeated their personal, professional and digital social worlds.”

5.20 It is also clear that the harm suffered by victims is similar regardless of the type of intimate image abuse they experience. Perhaps surprisingly, this is even true of deepfake pornography and images which have been photoshopped or altered in other ways to appear sexual. These images sexually objectify their victims (predominantly women) and rob them of any control over how they are portrayed to and perceived by the outside world. As Clare McGlynn and Erika Rackley argue, “while these generated images are not ‘real’, the harms are very real.” This argument was echoed by Henry Ajder from Sensity (formerly known as Deeptrace), who told us that

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22 Criminal Justice and Courts Act 2015, s 33(1)(b).
23 Sexual Offences Act 2003, s 67A(3)(b).
“realism isn’t a controlling factor for harm.”\(^{28}\) In fact, it seems that these images are harmful \textit{because} they are not real. According to Mary Anne Franks, "the harm of such images is not their truth, but their falsity".\(^{29}\)

5.21 Additionally, we were told that the form of harm is similar whether an image is disclosed online or offline.\(^{30}\) To give an example, a victim is likely to suffer comparable forms of harm if an image of them engaging in a sex act is sent to members of their family in an email or in the post.\(^{31}\) The harms they experience could be psychological, physical and financial (explored below) in both cases. For this reason, we have not distinguished in this chapter between images disclosed online and offline, and the types of harm discussed are applicable to both online and offline disclosures. However, it is important to note that the level of harm experienced by a victim may be affected by the way an image was shared. There may be a higher level of harm if it is disclosed to a wider audience, or in a more public forum.

5.22 It should also be acknowledged that in some cases the victim will suffer little or no harm.\(^{32}\) For instance, some young people report finding their image being non-consensually taken or shared funny.\(^{33}\) However, the vast majority of victims will experience significant psychological, physical and/or financial harm.

\textbf{Psychological harm}

5.23 Many victims of intimate image abuse report feeling embarrassed, ashamed and stupid for "allowing" the abuse to happen.\(^{34}\) As Julia Mulligan puts it: "There is a real sense of shame experienced by victims; they feel they have been abused. Their sexual autonomy has been violated".\(^{35}\)

5.24 Often, this translates into victims feeling too ashamed to report their abuse to the police. On top of this, reporting to the police or support services, and even telling friends and family, can be deeply retraumatising, especially if the victim is forced to disclose the image which caused them so much shame and humiliation.\(^{36}\)

\(^{28}\) Henry Ajder, Sensity, (formally known as Deeptrace).

\(^{29}\) Cited in Madeline Buxton “The Deep, Dark World of Fake Porn” (2 December 2018) HuffPost, https://www.huffpost.com/entry/the-deep-dark-world-of-fake-porn_b_5a7dd50ce4b0a0f40892eb64 (last visited 23 February 2021).

\(^{30}\) Dr Adrian Scott (Goldsmiths, University of London).

\(^{31}\) Although images disclosed online can be shared further far more easily than images disclosed offline, so have the potential to cause greater harm.


\(^{33}\) Dr Adrian Scott (Goldsmiths, University of London). That said, young people may feel they have to “laugh off” intimate image abuse, even when they suffer significant harm.


\(^{35}\) Julia Mulligan (Joint Association of Police and Crime Commissioners (APCC) Victim’s Portfolio Lead and Police, Fire and Crime Commissioner for North Yorkshire).

\(^{36}\) Maithreyi Rajeshkumar (Childnet International).
5.25 For those who find the courage to report to the police, victims have described feeling as though their complaints fell on unsympathetic ears, which amplified their feelings of shame and embarrassment. However, this may be in part because police officers often do not receive sufficient training in how to handle intimate image abuse cases. When victims’ complaints are taken seriously, they may be advised not to delete images in case they are needed as evidence. It should be noted that there are many offences where victims would be given similar advice by police to keep photos, messages or a log of contact. Examples include crimes such as stalking, harassment and blackmail. But while this may be necessary in order to preserve evidence for a prosecution, it can prolong the victim’s distress. Sometimes victims will blame themselves for their abuse, rather than seeing themselves as wrongfully harmed. Alternatively, victims may become defensive and be unwilling to talk about their abuse because they are concerned that they will be blamed. Indeed, victim blaming is a pervasive response to this behaviour, as Thomas Crofts and Tyrone Kirchengast explain:

Harm to the person whose image has been distributed can also be intensified through victim blaming. Where the original image was taken with consent, or is seen to be taken with consent, there can be a tendency to blame the victim for the eventual distribution. Victim blaming may also be prevalent where the victim did not consent to the taking of an original image, with some forming the view that the victim ought to have taken measures to better protect their person being filmed in the first instance… Blaming may be intensified where the victim has been in a tenuous or compromised relationship, with a problem spouse or partner, or where the image is taken by, or shared with, someone not well known to the victim, such as during a one-off sexual encounter. Here, blame apportioned to the victim may go as far as excusing the offender’s conduct.

5.26 Operators of “revenge porn” websites have also blamed victims when defending the existence of their sites. For instance, the operator of the “revenge porn” site Texxxan.com has stated: “When you take a nude photograph of yourself and you send it to this other person, or when you allow someone to take a nude photograph of you, by your very actions you have reduced your expectation of privacy”.

5.27 Embarrassment, shame and concerns over victim blaming can result in victims not seeking the help they need. For instance, Frances Ridout, who runs Sharing and

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38 The challenges police face when handling intimate image cases are explored in the introduction.
39 Georgina Calvert-Lee (McAllister Olivarius).
41 Laura Thompson (PhD Candidate, City University London).
43 D K Citron, Hate Crimes in Cyberspace (1st ed 2014) p 77.
Publishing Images to Embarrass (“SPITE”) for Schools at Queen Mary University, said that victims are “terrified to pick up the phone to us” and often do not attend appointments.44

5.28 Victims also frequently report feelings of anxiety, depression and post-traumatic stress disorder (“PTSD”), which increase over time.45 In a survey conducted by the Cyber Civil Rights Initiative, 93% of victims whose private sexual images had been shared without their consent said they suffered “significant emotional distress”.46 Importantly, there is some evidence that when a victim is threatened with an intimate image being disclosed they experience comparable or even slightly higher levels of distress than when an intimate image of them is actually disclosed. Research conducted in Australia by Nicola Henry, Asher Flynn and Anastasia Powell found that 80% of victims of threats to disclose an intimate image reported “high levels of psychological distress”, compared to 75% of victims of actual disclosure.47

5.29 A common theme among stakeholders was that anxiety and depression stays with victims as an “ongoing harm”.48 It can take victims years to overcome the fear and anxiety,49 stakeholders have told us the effects can last a lifetime.50 For these victims, the consequences are “utterly devastating”.51 One victim said that intimate image abuse “impacts your sense of self on every level … Because, for me, that has changed who I am as a person”.52 Another described it as “torture for your soul”.53

5.30 Victims of intimate image abuse also report feeling like they have been sexually assaulted or raped. This, according to Clare McGlynn, Erika Rackley and Kelly Johnson, leaves them feeling exploited and vulnerable.54 When contributing to our Abusive and Offensive Online Communications Scoping Report, Folami Prehaye told us: “I felt ashamed, disgusted, I used the term ‘online rape’”.55 More recently, researcher Elena Sharratt described the experiences of victims like this: “The effects

44 Frances Ridout (Queen Mary Legal Advice Centre).
48 Emily Hunt (victim of voyeureism).
49 Folami Prehaye (Experimenter, Activist & Founder of Victims of Internet Crime (VOIC)).
51 Sophie Mortimer (Revenge Porn Helpline).
53 Above at p 9.
54 Above at p 2.
on victims are remarkably similar to rape and sexual assault: fear, vulnerability, exposure. It’s very traumatising and extremely violating”.56

5.31 Additionally, many victims worry about onward distribution of images without their consent. Some describe feeling constantly panicked and anxious about their intimate images being shared (or shared further).57 In one survey, 65% of respondents reported feeling nervous or anxious more than 50% of the time, and 50% of respondents worried that something awful might happen.58

5.32 Because it is very challenging for victims to have material taken off the internet, victims report living in constant fear that their images will be shared or re-shared and discovered by family, friends, colleagues or people interviewing them for jobs. This has a tangible impact on their every-day social interactions. They begin to second-guess all their interactions, and even become paranoid about looks from strangers on the street, out of fear that those people have seen their intimate images. Some become obsessed with trawling the internet to see whether their intimate images have been uploaded or discovered.59 This process of searching for images, we were told, is part of the abuse because it continues the harm. Some victims will spend hours every day “going down the wormhole”, in an attempt to gain control of their intimate images.60 This process can leave victims feeling extremely powerless.61

5.33 This fear has a profound and enduring impact on victims’ daily lives once control of their images is lost.62 When speaking with us, Gina Martin, a victim of “upskirting” who led the campaign to criminalise this behaviour in England and Wales, described her experiences as follows:

The impact of image abuse lives on for much longer than you expect. It’s a complete lack of control, complete lack of bodily autonomy. You are living with the emotional distress of it all. It’s a prolonged assault… compounding and haunting. It takes on its own life. Two years later and I am still wondering are they are going to be uploaded? They can send it to an employer or an ex-boyfriend. It’s a second round of abuse.63

56 Elena Sharratt (PhD Candidate, University of Exeter).
60 Prof Erika Rackley and Dr Kelly Johnson.
63 Gina Martin (activist and victim of “upskirting”).
When speaking with us, Sue Jones from Ditch the Label captured how all-consuming the fear is, stating: “emotionally, it affects every aspect of people’s lives: what they do, how they socialise, they’re constantly on alert.”

It is also worth noting that, perhaps unsurprisingly, victims seem to be particularly concerned about images being shared with their children or future children. In a survey conducted by the Cyber Civil Rights Initiative, 54% of victims feared their images being sent to or discovered by their children or future children.

In addition, victims of intimate image abuse will often withdraw from online life, friends, family and romantic relationships. This could be because they have received negative reactions and judgement from others, or because they worry that they will. As Amanda Cecil explains: “Victims may try to confine the harm by deleting their online presence, but they isolate themselves from rewarding social connections and personal contacts, limiting their friendships and dating opportunities.” Danielle Citron makes a similar point, arguing that victims often become risk averse when it comes to starting new relationships. They may be afraid to date, or they may struggle to trust future partners and constantly second guess them.

According to the Cyber Civil Rights Initiative survey, non-consensual sharing of intimate images jeopardised 34% of victims’ relationships with their families and 38% of victims’ relationships with their friends. Another survey found similar results, with 38% of victims’ relationships with family and friends affected, and 22% of victims giving up social activities. Of course, this harms victims’ family and friends as well as harming victims.

Finally, one victim, who later became a police officer, pointed out that the way we expect victims to respond to their abuse is harmful in itself. Intimate images of her were first shared without her consent in 2015 and they have been shared sporadically ever since. She told us that victims should not be required to demonstrate significant levels of distress every time their images are shared in order for the police to act. This,

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64 Sue Jones (Ditch the Label).
66 Carmel Glassbrook (Professionals Online Safety Helpline (POSH)).
she argued, disempowers victims and excludes those who have been re-victimised several times and are immune to the abuse or have found coping strategies. She told us that intimate image abuse is wrong and the police should take action, regardless of whether the victim demonstrates the “right” level of distress.

**Physical harm**

5.39 As well as psychological harms, victims of intimate image abuse experience a number of physical harms.

5.40 Many victims have difficulty concentrating at school or work and struggle to sleep.\(^\text{72}\) For some victims, this develops into severe insomnia. In one survey, 40% of respondents reported experiencing “extreme sleep disturbances”.\(^\text{73}\)

5.41 Victims also report a general worsening of their physical health. They may adopt less healthy diets, stop eating and lose significant amounts of weight, stop washing and stop taking care of themselves.\(^\text{74}\)

5.42 Sometimes, victims feel forced to change their appearance or even their name in order to not be recognised. Research shows that around 8% of victims will change their appearance,\(^\text{75}\) 3% will change their name and a further 42% will consider changing their name.\(^\text{76}\) In one particularly severe case, the victim’s images were viewed tens of thousands of times. She became depressed and anxious, had several breakdowns, could not leave the house, and eventually changed her appearance to avoid being recognised.\(^\text{77}\)

5.43 Victims may also delete social media accounts, change their email address or phone number, leave their school or job and even move out of their homes.\(^\text{78}\) As Amanda

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Cecil describes: “Offline, the victims completely alter their lives in an attempt to disassociate themselves from the images. They change jobs, drop out of school, relocate to new cities, or “go into hiding” to avoid threats of sexual abuse and stalking”.79

5.44 These concerns are not unjustified: the threat of stalking is very real. The Cyber Civil Rights Initiative’s survey found that 49% of victims whose private sexual images had been shared without their consent had been harassed or stalked online, and 30% had been harassed or stalked offline.80

5.45 Often, when a victim’s intimate images are shared online they are accompanied by personal information about the victim, including their name, telephone number and home address. Sharing personal information in this way is called “doxing”. When this happens, victims are at risk of offline harassment, stalking and physical attack. This can make victims unwilling to leave their homes.81

5.46 Finally, in an alarmingly high number of cases victims of intimate image abuse will self-harm or have suicidal thoughts. One survey found that 59% of respondents had self-harmed82 and another found that 51% of victims of non-consensual sharing had suicidal thoughts.83 In the most extreme cases, victims have taken their own lives.84

Financial harm

5.47 Many victims of intimate image abuse also suffer financial harm.

5.48 First, victims often struggle to concentrate at work and may have to take significant periods of time off.85 In one survey, 22% of respondents said that their performance at

85 Andrew Lord (Leigh Day).
work was affected. Sometimes, victims will be fired or demoted, or feel that they
must leave their job. In the same survey, 5% of respondents were fired or demoted,
and 12% chose to change jobs. This, it seems, is particularly likely where the
victim’s images are shared by someone at work or seen by people they work with.

5.49 Victims who leave or lose their jobs will also often struggle to find another one. As we
mentioned at paragraph 5.45 above, when images are shared they are often
accompanied by personal information about the victim. Because of this, when
employers interviewing the victim Google them (as has become standard practice) the
image will often appear at or near the top of the search results. This can prove “truly
devastating to a victim’s professional life.” Additionally, as described in paragraph
5.36 above, victims of intimate image abuse regularly withdraw from online life,
including networking sites like LinkedIn and Twitter. This can substantially reduce their
employment opportunities.

5.50 Another way in which victims are financially harmed is through the process of trying to
have images which have been shared online removed. Some “revenge porn” websites
advertise that they will take images down for a set fee. Other victims will pay huge
sums of money to hire someone to search the internet for images and appeal to the
websites to have them taken down. Alternatively, we learned that there are
companies victims can pay to “flood” their results on Google, so that the images
appear further down the list, or to “optimise” the material online about them. Again,
this can be an expensive and exploitative process.

5.51 More sinister still, websites have been set up which source intimate images via
coercion or hacking and extort the victims for money. Often, victims face a barrage of
online harassment and abuse which puts extreme pressure on them to pay the money
or meet the perpetrator’s other demands.

Impact on particular groups

5.52 When discussing the harm caused by intimate image abuse with stakeholders, it
became clear that victims experience the abuse differently depending on their
personal characteristics. One element of this is some harms are specific to, or worse
for, some groups of people.

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86 Emma Short, Antony Brown, Melanie Pitchford and another, “Revenge Porn: Findings from the Harassment
and Revenge Porn (HARP) Survey – Preliminary Results” (2017) 15 Annual Review of CyberTherapy and
Telemedicine 161, 164.

87 Above.

88 Amanda L Cecil, “Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an
Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography” (2014) 71 Washington
and Lee Law Review 2513, 2523.

89 D K Citron, Hate Crimes in Cyberspace (1st ed 2014) p 175.

90 Prof Erika Rackley and Dr Kelly Johnson.

91 Eleanor Butt (Refuge).

92 Michael Salter and Thomas Crofts, “Responding to revenge porn: Challenges to online legal impunity” in L
5.53 Often, the groups most affected are also marginalised groups. As Nicola Henry and Anastasia Powell point out, and as the following discussion shows, intimate image abuse frequently “stems essentially from the objectification and debasement of the ‘other’”.93

5.54 We will discuss the harms that particularly affect women, men, people from certain religious and cultural groups, LGBT+ people, people with a disability, young people, teachers and sex workers. We will also discuss harm to society at large.

Women

5.55 As we discussed in Chapter 2, research indicates that women are more likely to be victims of intimate image abuse than men. First, in the Cyber Civil Rights Initiative’s survey of revenge porn victims, 90% of respondents were women.94 Secondly, the Revenge Porn Helpline told us that, since it opened, up to 70% of calls have been from women and girls.95 Thirdly, a Freedom of Information (“FOI”) request made in 2015 revealed that the vast majority of non-consensual sharing cases reported to police involved female victims and male perpetrators.96 Finally, there is some research to suggest that women are also more likely than men to be victims of a particular type of “sextortion”, where intimate image abuse is utilised to blackmail victims into performing sexual acts or sending more intimate images.97

5.56 On top of this, there is evidence that intimate image abuse harms women more and in different ways than it harms men. Danielle Citron and Mary Anne Franks describe the consequences of revenge porn for women and girls as “far more serious” than the consequences for men and boys.98 We were also told that women feel the harms of intimate image abuse more keenly and the damage is more permanent.99 Because of this, Nicola Henry and Anastasia Powell understand the harm caused by intimate image abuse (as well as other forms of “technology-facilitated sexual violence and harassment”) as a “qualitatively gendered phenomenon”.100 In this section we will first

95 Sophie Mortimer (Revenge Porn Helpline).
97 Benjamin Wittes, Cody Poplin, Quinta Jurecic and others, “Sextortion: Cybersecurity, teenagers and remote sexual assault” (2016) Brookings, https://www.brookings.edu/research/sextortion-cybersecurity-teenagers-and-remote-sexual-assault/ (last visited 23 February 2021). Stakeholders have told us that men are more likely to be victims of a different type of “sextortion”, one that involves intimate image abuse being utilised to blackmail victims for financial gain. This suggests a gendered difference in what perpetrators commonly extort from victims in line with their traditional societal value, women’s sexuality and men’s material wealth.
99 Sandra Paul (Kingsley Napley).
examine how women experience the types of psychological, physical and financial harm identified above. We will then outline the additional unique harms caused to women by intimate image abuse.

5.57 As explored at paragraphs 5.23 to 5.38 above, intimate image abuse can have a profound psychological effect on victims. The most comprehensive study to date of how intimate image abuse affects women’s mental health was conducted by Samantha Bates. She conducted in-depth interviews with women whose private sexual images had been disclosed without their consent and found that their mental health had been significantly affected in a huge variety of ways. In fact, Bates concluded, the mental health impacts are akin to those suffered by victims of sexual assault.

5.58 Victims suffered from anxiety, depression, PTSD, low self-esteem, high levels of stress, difficulty being in public (especially at night), trust issues and suicidal thoughts. Victims described becoming more reserved and less care-free. They also reported feeling like they had lost control over their privacy, their bodies and their sexual autonomy. One victim explained how she felt the abuse had “stripped her of her femininity” and made her think negatively about her own body, another described the traumatic invasion of her privacy, while another described not having control over who saw her pictures as a “violation”.

5.59 Bates also found evidence of physical and financial harm. In some cases, victims reported that they had resorted to binge drinking and self-medication to deal with the trauma. Another victim described how her life had been completely ruined. In her words:

I lost my reputation… financially I’m ruined, I lost my career, a 25-year stellar career… I had a doctorate degree. I lost everything. So, how did that make me feel? Um, devastated. I just don’t even have words to describe it. Horrifying, humiliated, embarrassed, betrayed, I mean, I just never thought that a man I had loved, I married him, he was my husband, I trusted him. How could he do something like this? So I just felt very, very worthless.

5.60 Women have also reported feeling unsafe, wary and constantly on alert while in public or around men they do not know and trust. They report viewing the world differently: as a hostile place which poses an immediate threat to their bodily autonomy and safety. Sometimes, this can limit women’s options and choices, and lead to them taking up less space in the world, as a mechanism for self-protection. This can result in women feeling closed off, claustrophobic and like their worlds have become smaller and more limited.

101 Samantha Bates “Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors” (2017) 12 Feminist Criminology 22.
102 Above at p 34.
103 Above at p 35.
104 Above at p 32.
5.61 Social scientists point to the sexual double standard as the chief reason why intimate image abuse harms women more acutely. Women are stigmatised and punished for sharing intimate images or allowing them to be taken, but at the same time this behaviour is demanded of them. As Ganaele Langlois and Andrea Slane describe: “Publicly revealing and condemning a woman for her willing participation in sexual practices has long been a means of ostracizing her, especially by the men who have enthusiastically taken her up on her sexual availability.”

5.62 Indeed, women are stigmatised and punished regardless of the circumstances under which the images were taken. When a woman takes or shares an intimate image herself, or allows another to take it, she is labelled as irresponsible, undesirable and a slut. When an intimate image is taken of a woman without her knowledge (as in the case of voyeurism) she is labelled as careless. As Clare McGlynn and Erika Rackley put it: “The impact of image-based sexual abuse is that all women are made to feel constrained in their sexual choices and expression.”

5.63 The sexual double standard also makes women more likely to blame themselves for their abuse than men. Women will often say: “I deserved this, it’s my fault for taking (or sharing) the image”. In contrast, men are often much quicker to identify themselves as victims.

5.64 The sexual double standard plays out particularly starkly on “revenge porn” websites and mainstream pornography sites. Danielle Citron and Mary Anne Franks describe disclosing someone’s private sexual images without consent as a “degrading form of sexual harassment”. When women’s images are posted onto pornography sites, they are humiliated, slut-shamed and receive demeaning and frightening messages from men who have viewed their images. Ganaele Langlois and Andrea Slane describe those who post or comment on “revenge porn” websites as participating in the abjection of the women depicted, who are “framed as disgusting active female sex agents, accused of being dirty, diseased, indiscriminate in choosing their sexual partners.” Similarly, Laura Thompson described disclosing private sexual images without consent as “an act of sexual terrorism”.

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109 Elena Sharratt (PhD Candidate, University of Exeter).


112 Laura Thompson (PhD Candidate, City University London).
Additionally, Mary Anne Franks has described how intimate image abuse is used as a mechanism for “shutting women up”.\textsuperscript{113} She writes: “Women shut down their blogs, avoid websites they formerly frequented, take down social networking profiles, refrain from engaging in online political commentary, and choose not to maintain potentially lucrative or personally rewarding online presences”.\textsuperscript{114} Michael Salter and Thomas Crofts also comment on the power of intimate image abuse to create and encourage “misogynist online subcultures”, where victims are harassed and experience threats of sexual violence designed to force them to withdraw from online life.\textsuperscript{115}

A further way in which intimate image abuse harms women in particular is that they are more likely to fear and experience physical violence after an intimate image of them is taken or shared. Research conducted by Nicola Henry, Anastasia Powell and Asher Flynn found that women are more likely than men to fear for their safety after an intimate image of them has been non-consensually taken (32% of women compared with 23% of men) or shared (40% compared with 36%), or they have been threatened with an intimate image being taken or shared (50% compared with 42%). They also found that women are more likely than men to experience stalking alongside intimate image abuse.\textsuperscript{116}

The threat of violence is exacerbated when personal information about the victim is shared alongside the image (“doxing”). Often, victims will receive messages from strangers taunting and shaming them, and threatening them with sexual violence.\textsuperscript{117} Alternatively, men viewing the image may incite others to make sexual demands of the victim, leading to stalking and sometimes physical and sexual assault. This can leave victims feeling unsafe in their own homes.\textsuperscript{118}

Finally, it is important to recognise that the sharing of and threats to share intimate images is often used in abusive relationships as a mechanism of coercion and control.\textsuperscript{119} Figures from the Crown Prosecution Service (“CPS”) show that of the 464 prosecutions for the disclosure offence in the year ending March 2018, 86% (400) were identified as being domestic abuse-related.\textsuperscript{120} For this reason, Molly Dragiewicz

\begin{itemize}
\item \textsuperscript{114} Mary Anne Franks, “Unwilling Avatars: Idealism and Discrimination and Cyberspace” (2011) 20 Columbia Journal of Gender and Law 224, 229.
\item \textsuperscript{115} Michael Salter and Thomas Crofts, “Responding to revenge porn: Challenges to online legal impunity” in L Comella and S Tarrant (eds), New views on pornography: Sexuality, Politics and the Law (1st ed 2015) p 238.
\item \textsuperscript{116} Nicola Henry, Anastasia Powell and Asher Flynn, “Not Just ‘Revenge Pornography’: Australians’ Experiences of Image-Based Abuse: A Summary Report” (2017) RMIT University 6.
\item \textsuperscript{117} Ganaele Langlois and Andrea Slane “Economies of reputation: the case of revenge porn” (2017) 14 Communication and Critical/Cultural Studies 120, 124.
\item \textsuperscript{119} Clare McGlynn and Erika Rackley, “More than ‘Revenge Porn’: image-based sexual abuse and the reform of Irish law” (2017) 14 Irish Probation Journal 38, 40.
\item \textsuperscript{120} Meghan Elkin, “Domestic abuse in England and Wales: year ending March 2018” (22 November 2018) Office for National Statistics,
\end{itemize}
and others describe intimate image abuse as a form of “technology facilitated coercive control”, which is used to harass, humiliate and damage the reputation of women.\footnote{Molly Dragiewicz, Jean Burgess, Ariadna Matamoros-Fernández and others, “Technology facilitated coercive control: domestic violence and the competing roles of digital media platforms” (2018) 18 Feminist Media Studies 609, 613.}

Victims in abusive relationships will often be coerced into taking or sending images, or allowing them to be taken, then threatened that the images will be shared if they try to leave the relationship and actually shared if they do leave.\footnote{Danielle Keats Citron and Mary Anne Franks, “Criminalizing Revenge Porn” (2014) 49 Wake Forest Law Review 345, 351.} Sometimes pictures or videos will be taken during sexual assault, when the victim felt forced to say yes because saying no was not a safe option. Then, the perpetrator will threaten to show the images to the victim’s friends and family if they attempt to leave the relationship or take legal action against the perpetrator.\footnote{Nicola Henry and Anastasia Powell, “Beyond the ‘sext’: Technology-facilitated sexual violence and harassment against adult women” (2015) 48 Australian and New Zealand Journal of Criminology 104, 113.} Where the perpetrator and the victim have children together, the perpetrator may threaten to share the images if the victim does not allow them to see their child whenever they want or give them custody of the child (i.e. agree that the perpetrator will be the resident parent).\footnote{Eleanor Butt (Refuge); and Zabaida Anwar (Victim Support).} When victims are threatened in these ways, this is intended to scare and intimidate them into compliance.\footnote{Delanie Woodlock, “The Abuse of Technology in Domestic Violence and Stalking” (2017) 23 Violence Against Women 584, 596.}

Women in abusive relationships often already find it extremely challenging to leave or go to the police for a myriad of reasons. It is clear that intimate image abuse makes leaving abusive relationships and reporting the perpetrator harder still.\footnote{Asher Flynn, Nicola Henry and Anastasia Powell, “More than Revenge: Addressing the Harms of Revenge Pornography, Report of the More than Revenge Roundtable” (2016) Monash University 5.}

One less obvious way in which intimate image abuse makes it harder for women to leave abusive relationships is through cutting women off from the online world. As we discussed above at paragraph 5.36, victims of intimate image abuse often become isolated, and withdraw from online life, friends, family and romantic relationships. When women are escaping abusive relationships, they often rely heavily on the support of friends and family and will use technology as a mechanism for staying in touch with them. Therefore, when victims feel forced to withdraw from online life and become isolated with their abuser, leaving that relationship can seem impossible.\footnote{Nicola Henry and Anastasia Powell, “Beyond the ‘sext’: Technology-facilitated sexual violence and harassment against adult women” (2015) 48 Australian and New Zealand Journal of Criminology 104, 114.}
5.72 This must be put in the context of the COVID-19 pandemic, which, as we explained in the Introduction and Chapter 2, has led to a sharp rise in reports of domestic abuse and calls to the Revenge Porn Helpline.

Men

5.73 While women are most often the targets of intimate image abuse, men are also targeted and the abuse affects them in unique ways. In comparison with female victims, data in relation to the impact upon male victims is much more limited.

5.74 First, one form of intimate image abuse does seem to be directed at men more often than women. The Revenge Porn Helpline told us that men tend to be the victims of a particular breed of “sextortion”, where the perpetrator poses as a woman on a dating site to extract intimate images of the victim and threatens to disclose those images unless money is sent.

5.75 Other times, men will be victimised by women with whom they are in a relationship. In one case on which ManKind worked, the man found out that images of him had been disclosed to a group of men by a woman with whom he was in a relationship. He did not recognise the images and believed that the woman had drugged him and taken them while he was unconscious. He described feeling humiliated, belittled, embarrassed and emasculated. However, he felt unable to disclose his abuse to family, friends or the police because he was, in ManKind’s words, a “burly six-foot four chap”. He also did not recognise that his partner’s treatment of him was sexual abuse.

5.76 ManKind told us that his reaction was typical of male victims. Often, they feel unable to tell anyone about their abuse because, in their eyes, it is deeply emasculating. Some female perpetrators play on this fear, by taking images which depict the victim in a submissive position in order to humiliate them.

5.77 Male victims also rarely understand that they are suffering sexual abuse and are unaware of the legislation and the terminology surrounding sexual abuse. This, ManKind told us, is a wider societal issue which stems from the misguided belief that men cannot, or should not, be the victims of sexual abuse.

5.78 Finally, some men will feel such a deep sense of shame and helplessness, and so unable to report the abuse, that they feel taking their own life is the only option. In


130 Sophie Mortimer (Revenge Porn Helpline). Research suggests that men and women are usually victimised by different types of “sextortion”. See paragraph 5.74 above.

131 Marilyn Selwood (ManKind).

132 Marilyn Selwood (ManKind).

133 Marilyn Selwood (ManKind).

134 Marilyn Selwood (ManKind).
2017 it was reported that the suicides of at least five men in the UK had been linked to sextortion by criminal gangs.\textsuperscript{135}

**Religious and cultural groups**

5.79 When individuals from particular religious and cultural groups fall victim to intimate image abuse, they can experience both more serious harm and unique harms. This is because prevailing views on acceptable conduct in relation to intimacy, sexuality and nudity may differ from the prevailing view in “Western” societies. Victims are likely to experience the psychological, physical and financial harms described above, but they may experience a range of further unique harms. At the extreme end of this, so called “honour-based” violence is an example of a serious harm victims might experience as a result of intimate image abuse which is deemed to damage their family’s “honour”.\textsuperscript{136}

5.80 In one particularly horrific case we learned of, a woman was filmed being raped and the perpetrators told her that the video would be shared if she did not have sex with more men. When the victim’s parents found out that she had been raped they forced her to get married, and when her husband found out that she had been raped he began to beat her. On top of this, a friend of the victim discovered the video and used it to extort money from the victim: at one point she was giving away half of her salary every month.\textsuperscript{137}

5.81 The religious or cultural group to which a victim belongs may also impact on the types of images that are deemed intimate. People from religious and cultural groups which follow codes of honour can be seriously harmed by the sharing of or threats to share images which are not intimate by “Western” standards, but are intimate to the victim or the victim’s family or community. As the Muslim Women’s Network helpfully pointed out, often it is as much if not more about the victim’s family or cultural group thinking that the image is unacceptably intimate, as it is the victim herself finding the image humiliating or shameful.\textsuperscript{138} An example we heard several times was a Muslim woman hugging or kissing a man who is not her husband, or in an intimate setting without her hijab and with her shoulders and upper chest exposed.

5.82 These images, we were told, can have a totally devastating impact on the victim. In one case, pictures of a Muslim Pakistani woman lying in bed without her hijab on and with her shoulders showing were taken by her partner. The relationship was abusive, and when she ended it he threatened to send the pictures to her family in Pakistan. The threats made her extremely distressed, because she did not want her family to feel like she was dishonouring them. Then, when the perpetrator shared the images


\textsuperscript{137} Nazmin Akthar (Muslim Women’s Network).

\textsuperscript{138} Nazmin Akthar (Muslim Women’s Network).
with the woman’s grandfather, he told her that she should end her life jumping from a tall building.\textsuperscript{139}

5.83 We learned that victims are often ostracised from their families, “sentenced to a life of shame and seclusion”,\textsuperscript{140} or forced to flee the country.\textsuperscript{141} Women in abusive and controlling relationships have also found that their husbands will use the fact that an intimate image of them was non-consensually taken or shared to control their actions. For instance, they may limit or monitor the victim’s use of social media and justify this by telling the victim that she was targeted because of her online presence.\textsuperscript{142}

5.84 Threats to disclose images can be particularly damaging. Perpetrators have been known to extort thousands of pounds from their victims by threatening to disclose their intimate images, and in one case the perpetrator demanded that his victim marry him (so that he could obtain a British visa) in return for her images not being disclosed.\textsuperscript{143} Additionally, Privacy International told us that there have been cases where threats to disclose an image have led to the victim taking her own life, even when there was no proof that the image actually existed.\textsuperscript{144}

5.85 Additionally, when an image is altered to look intimate the damage is often just as severe as when the image was already intimate. In one example brought to our attention by the Revenge Porn Helpline, a Muslim woman’s ex-husband photoshopped pictures of her to make them look sexual and shared the pictures with people in her community. The woman was cut off from everyone in her community and even received abuse when taking her child to school.\textsuperscript{145}

5.86 Even when the victim’s friends and family know the image is fake, they may still blame her for putting herself in a position where the perpetrator noticed her and wanted to portray her like that. For instance, she may be blamed for wearing makeup, dressing provocatively or going out with the “wrong” people. By doing these things, she is thought to bring dishonour upon the family.\textsuperscript{146}

\textbf{LGBT+ people}

5.87 As we discussed in Chapter 2, some research suggests that LGBT+ people are more likely to experience intimate image abuse than heterosexual people. For instance, a study conducted by the Data and Society Research Institute found that LGB people

\begin{itemize}
\item \textsuperscript{139} Zabaida Anwar (Victim Support).
\item \textsuperscript{140} Georgina Calvert-Lee (McAllister Olivarius).
\item \textsuperscript{141} Carmel (Professionals Online Safety Helpline).
\item \textsuperscript{142} Nazmin Akthar (Muslim Women’s Network).
\item \textsuperscript{143} Katie Razzall, “The men who exploit family shame using ‘revenge porn’” (15 April 2015) \textit{BBC News}, \url{https://www.bbc.co.uk/news/uk-32316335} (last visited 23 February 2021).
\item \textsuperscript{144} Lucy Purdon (Privacy International).
\item \textsuperscript{145} Sophie Mortimer (Revenge Porn Helpline).
\item \textsuperscript{146} Ksenia Bakina (Privacy International).
\end{itemize}
are four times more likely to be victims of revenge porn than heterosexual people. \(^{147}\) Similarly, a survey conducted by researchers at RMIT University in Australia found that 36% of LGB participants had experienced intimate image abuse, compared to 21% of heterosexual participants.\(^{148}\) Because LGBT+ people are so often the victims of this abuse, it is vital we understand the unique harms that they are experiencing.

5.88 Many LGBT+ victims will experience significant emotional trauma, feelings of depression and hopelessness and become isolated, and often the abuse will occur in the context of an otherwise physically or emotionally abusive relationship. In these ways, LGBT+ people experience the same harms as heterosexual people. However, LGBT+ people also experience several unique harms.

5.89 Stakeholders informed us that when LGBT+ people experience intimate image abuse, it is often perpetrated by individuals and groups outside the LGBT+ community and motivated by homophobia or transphobia.\(^{149}\) When this is the case, victims may experience a range of different forms of harm.

5.90 First, victims who are not in a position to be “out” as LGBT+ (either at all or with certain individuals or groups) may be outed or threatened with being outed.\(^{150}\) Importantly, this process of “ outing” rarely stops once the perpetrator has shared the image. The victim is repeatedly outed every time someone new views the image, which serves to compound the harm. This is equally true when images are shared with police during an investigation or shown in court during a trial, both of which can be retraumatising for victims.

5.91 Two stakeholders told us that outing trans people in this way is extremely common: many trans people have had images of themselves pre-transition shared (or been threatened with those images being shared) to “out” them as trans and invalidate their identity. Often, this occurs within the wider practice of “doxing”, where other sensitive information about them, like their phone number and home address, is published to incite harassment or abuse of them.\(^{151}\)

5.92 Being outed exposes LGBT+ people to a wide range of harms. Their family and friends may attempt to control or erase their sexual or gender identity, they may cut off emotional or financial support, or they may cease contact altogether. More severely still, and particularly when the victim is a member of certain religious and cultural groups, family and friends may subject them to corrective abuse, “honour-based” violence or forced marriage. This treatment can result in victims becoming homeless, developing addictions to drugs or alcohol and, sometimes, committing suicide.\(^{152}\)


\(^{149}\) Catherine Bewley (Galop).

\(^{150}\) Josh Bradlow (Stonewall).

\(^{151}\) Catherine Bewley (Galop); and Josh Bradlow (Stonewall).

\(^{152}\) Catherine Bewley (Galop).
5.93 Another harm to which LGBT+ victims are particularly susceptible is losing their job. As an example, a gay teacher at a high school in America had a consensually filmed video of himself and his partner on his computer. An anonymous hacker, motivated by homophobia, accessed this video and posted it on the school’s website, where a number of students viewed it. The victim lost his job, received no redundancy pay and was held to be at fault by school officials, who even attempted to get his teacher license revoked. He has been unable to find another job and continues to grapple with the emotional strain.\footnote{Lou Chibbaro Jr, “Gay teacher’s sex video stolen, posted to school site” (10 February 2016) Washington Blade, \url{https://www.washingtonblade.com/2016/02/10/gay-teachers-sex-video-stolen-posted-to-school-site/} (last visited 23 February 2021).}

5.94 A second example is US congresswoman Katie Hill, who was forced to resign in 2019 after her ex-husband shared intimate images of her with a woman. When Hill resigned, she criticised the media for relentlessly running invasive stories about her relationship with the woman and accused them of capitalising on her sexuality for the purposes of entertainment.\footnote{Kristen Zaleski, “Revenge porn is sexual violence, not millennial negligence” (6 November 2019) The Conversation, \url{https://theconversation.com/revenge-porn-is-sexual-violence-not-millennial-negligence-126233} (last visited 23 February 2021).}

5.95 LGBT+ victims, like victims from all communities, can face victim blaming, hatred and abuse (including from strangers online).\footnote{Folami Prehaye (Experiencer, Activist & Founder of Victims of Internet Crime (VOIC)).} Such reactions may be experienced differently by some LGBT+ victims because of the marginalisation that they may already face in society. Victims report feeling ashamed and humiliated, because they have been revealed as not conforming to society’s expectations about their gender or sexuality.\footnote{Jane Bailey, “‘Sexualised online bullying’ through an equality lens: Missed opportunity in AB v Bragg?” (2013) 59 McGill Law Journal 733.} This can lead to victims feeling unable to speak about their abuse or report it to the police, and becoming increasingly isolated.

5.96 Stakeholders also told us that it is not uncommon for LGBT+ people to be perpetrators of this abuse. For instance, an ex-partner may share or threaten to share an intimate image in order to “out” their victim. Rather than being motivated by homophobia, they are seeking to humiliate, manipulate or control their victim, in much the same way as happens in heterosexual relationships.

5.97 Another way in which we have been told that this abuse manifests is through chemsex. Several stakeholders explained that some men within the LGBT+ community who participate in chemsex parties, may fall unconscious because of excessive drug consumption or “spiking” (where another person deliberately adds alcohol or another drug to their drink without their knowledge). Victims may be sexually assaulted by other men, with the assault being recorded or live streamed over the internet.\footnote{Catherine Bewley (Galop); and Marilyn Selwood (ManKind).} These men often experience significant physical and emotional harm, and the perpetrators may use the images to blackmail or extort money from them. Those victims who consensually took illegal drugs also describe being scared to
report the abuse to the police, which often leads to feelings of self-blame and isolation.

**People with disabilities**

5.98 Research conducted by Nicola Henry, Anastasia Powell and Asher Flynn found that 56.1% of Australians with a disability reported being victims of intimate image abuse. By contrast, the figure for people who did not report having a disability was much lower – 17.6%.

5.99 Despite research suggesting that there is a very significant difference in victimisation rates between people with and without disabilities, to our knowledge there have been no studies examining the harm experienced by people with disabilities when they become victims of intimate image abuse.

5.100 That said, the disability charity Sense was able to provide us with some insights. They said that victims with complex disabilities may not recognise the abuse or understand that something is wrong. They emphasised that, much like everyone else, people with disabilities are searching for friendships, relationships and life partners. When these things do not come easily, this can leave them feeling lonely and isolated. This then opens the door to controlling, coercive and abusive relationships, in which intimate image abuse can easily take place.

5.101 Additionally, Sense told us that people with disabilities sometimes have a skewed or incomplete picture of what behaviour is normal and acceptable in a relationship. They may think that everyone is taking and sharing intimate and sexual pictures, and that they should do the same despite how uncomfortable it makes them or any misgivings they have. This, again, can leave people with disabilities particularly vulnerable to intimate image abuse.

**Children and young people**

5.102 Taking and sharing intimate images seems to be prevalent among older children and young people. This is a complicated and nuanced issue and we do not consider the consensual sharing of intimate images between children and young people in this paper. However, it is right to say that where it is done non-consensually the consequences can be devastating. To distinguish these behaviours, some describe the consensual behaviour as “experimental sexting” and the non-consensual behaviour as “aggravated sexting”.

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159 Sue Larner (Sense).

160 Sue Larner (Sense).


5.103 Focusing on the non-consensual behaviour, research indicates that children and young people are more likely than people from other age groups to become victims of intimate image abuse.\textsuperscript{164} In the year after the disclosure offence was introduced in England and Wales, 36% of victims were 19 or younger and 39% were between 20 and 29.\textsuperscript{165} Additionally, in the Cyber Civil Rights Initiative’s survey, 27% of individuals whose private sexual images were shared without consent were between 18 and 22 years old.\textsuperscript{166}

5.104 There is also substantial evidence that children and young people suffer a range of unique harm. They often worry that they will be blamed for their abuse, feel they have to laugh along or suffer in silence, are very reluctant to report to the police, find that their whole school experience is tainted and struggle to develop romantic relationships as adults.\textsuperscript{167} Children and young people are also turning to self-harm and cyber self-harm (a form of self-harm where victims send abusive messages to themselves online) to deal with their feelings of self-blame, shame and humiliation.\textsuperscript{168} Additionally, even when children and young people have not been threatened that an intimate image of them will be shared, they often feel extremely concerned that an ex-partner will share images of them when the relationship breaks down.\textsuperscript{169}

5.105 Despite this range of significant harms, we have been told by some stakeholders that the taking and sharing of intimate images without consent is prevalent among children and young people and is normalised. We were told that children and young people are almost groomed by social norms to tolerate violations of their privacy, as well as coercive and controlling behaviour.\textsuperscript{170} Many children and young people also do not seem to recognise the risks involved in taking and sharing intimate images and have little understanding of when taking or sharing an intimate image is a criminal offence.\textsuperscript{171}

5.106 This means that often victims either do not view their experiences as abuse or feel they must minimise or downplay their experiences. This is particularly true of girls, who are socially conditioned to view sexual objectification as normal.\textsuperscript{172} It also means

\begin{itemize}
\item \textsuperscript{165} Peter Sherlock, “Revenge pornography victims as young as 11, investigation finds” (27 April 2016) BBC News, https://www.bbc.co.uk/news/uk-england-36054273 (last visited 23 February 2021).
\item \textsuperscript{168} Dr Carrie-Anne Myers and Holly Powell-Jones.
\item \textsuperscript{169} Carmel (Professionals Online Safety Helpline (POSH)).
\item \textsuperscript{170} Dr Emma Short.
\item \textsuperscript{171} Dr Carrie-Anne Myers and Holly Powell-Jones.
\end{itemize}
that victims often feel unable to disclose what happened to them. This feeling is then reinforced when a victim’s friends and family are not supportive. For instance, in one case we were told about, a girl told her parents what had happened to her and they said: “you’ve made your bed, lie in it”. A victim support organisation has said that children and young people’s fear of being judged even prevents them seeking emotional support from professional services.

5.107 There also seems to be a perception among children and young people that, when images are shared without consent, the sharer does not intend to harm the victim. In a UK study of 681 teenagers, 44% were aware that images were being spread beyond the intended recipient, and 68% said they did not think this was being done to upset the person in the image.

5.108 Finally, there have been cases where a child has reported their abuse to the police and they have been punished, alongside or instead of the perpetrator, for taking or sharing the image in the first place. Under section 1 of the Protection of Children Act 1978 it is a criminal offence to take, distribute, show, or possess, for the purposes of distributing or showing to others, an indecent image of a person under 18. There is no exception for children taking or sharing indecent images of themselves. Therefore, even where a nude photo of a 17-year-old was sent by the person depicted to another 17-year-old consensually, this would fall within the offence. While it may not always be in the public interest to prosecute such behaviour, the fact it is a criminal offence means children who report image abuse are at risk of being criminalised themselves. This, of course, heightens their feelings of self-blame and serves to amplify the harm they are caused.

**Teachers**

5.109 Another group who are particularly affected by intimate image abuse is teachers. The abuse can happen in a variety of ways. Three common examples were shared with us.

5.110 First, an ex-partner may share an intimate image (which they took or were sent consensually) with the school where the teacher works or with the students at that school. Second, a female teacher may be upskirted by her students on school

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173 Marilyn Selwood (ManKind).


premises. Third, students may alter images of their teachers to make them appear sexual. Usually, this will involve students photoshopping a teacher’s head onto the body of someone who is naked, scantily clad or performing a sex act. This continued to be an issue during the COVID-19 lockdown, with teachers who held video lessons discovering that a screenshot had been altered to look sexual. As a result, teachers in some schools refused to hold video lessons.

5.111 We were told that, regardless of how the abuse is carried out, the harm can be extremely significant. Some teachers have become “seriously ill” as a result of the abuse. The threat to a teacher’s reputation is also “enormous”. They may lose their job, struggle to find another job and be pushed out of their local communities. Even if they do not lose their job, the abuse is humiliating and likely to affect the victim’s authority and the level of respect they are shown in the classroom.

Sex workers

5.112 We also learned that sex workers are particularly vulnerable to intimate image abuse. Some sex workers will choose to send pictures to clients as part of their work. However, their clients may share or threaten to share those pictures to extort further services from them.

5.113 Sometimes they will share or threaten to share the images with the victim’s family, friends or community, to “out” them as a sex worker. This puts the victim at risk of being shamed, cut off from their community, physically assaulted and even killed. Alternatively, they may share the images with other men. If they are shared alongside personal information about the victim, this can result in the victim receiving a barrage of unwelcome propositions, or being harassed, stalked and ultimately sexually assaulted. This trauma puts sex workers at real risk of further psychological harm, in addition to the psychological harm associated more generally with non-consensual sharing of intimate images explored at paragraphs 5.23 to 5.38 above.

5.114 Sex workers also face additional barriers to reporting their abuse to the police. They are at particular risk of victim-blaming and being dismissed, because of the kind of

179 Carmel (Professionals Online Safety Helpline (POSH)).
180 Sue Larner (Sense).
182 Sophie Mortimer (Revenge Porn Helpline).
183 Carmel (Professionals Online Safety Helpline (POSH)).
184 Sophie Mortimer (Revenge Porn Helpline).
185 Sophie Mortimer (Revenge Porn Helpline).
work that they do. They may also fear that their work will result in them being prosecuted, rather than the perpetrator.  

5.115 Finally, while individuals whose faces are used are the primary victims of deepfake pornography, those acting in porn videos used to make deepfake pornography also have not consented to their bodies being used for that purpose. Porn actresses have spoken about how deepfake pornography harms them, as well as the women who are targeted. They say that it feels violating, and they are deeply uncomfortable about how their bodies are being used as tools to harass and abuse other women.

Society

5.116 As well as harming particular groups, intimate image abuse has a wider societal impact.

5.117 Clare McGlynn and Erika Rackley warn that this behaviour, if left unaddressed, can normalise the taking, making and sharing of intimate images without consent. They argue it may even go so far as to "sustain a culture … in which sexual consent is regularly ignored".

5.118 Additionally, Adrienne Massanari argues that the design, policies and cultures of prominent “geek”-led online platforms like Reddit and 4chan support “toxic technocultures” which serve to harass, humiliate and abuse those deemed “others”, most prominently women. Incidents such as “The Fappening” (where naked images of dozens of celebrities were leaked online) are a symptom of and contribute towards those toxic technocultures.

5.119 Finally, Danielle Citron presents intimate image abuse as bringing about three societal harms. First, it undermines the development of romantic relationships, based on trust, which are vital for human happiness. Secondly, because victims will often withdraw from work and hobbies as a result of their abuse, any contributions that they would have made to society are lost. Thirdly, the fact that women and minority groups are most often the targets of intimate image abuse means that their subordination and marginalisation becomes further entrenched in society.

CONCLUSION

5.120 This chapter has demonstrated that intimate image abuse is both wrongful and harmful. It is wrongful because it violates the victim’s sexual privacy, autonomy and
freedom, their bodily privacy and their dignity. A consequence of the wrongs of intimate image abuse is that it can cause victims to suffer serious and lasting harm.

5.121 It is clear to us that intimate image abuse is capable of causing severe harm. Far from simple embarrassment and regret, victims experience a wide range of serious psychological, physical and financial harm. That harm will also differ, and may be more severe, depending on the group(s) that the victim falls into. In some cases, a victim's life will be devastated by their abuse.

5.122 It does not matter that the act is not one of physical violence: the type of harm experienced, and level of harm, can be comparable. As Nicola Henry and Anastasia Powell explain, harm that occurs in the social world we have developed, shaped by technology, “may have at least as much impact on a person as traditional harms occurring against the physical body”. What’s more, intimate image abuse can give rise to physical harm, as we explored above. There is also broad agreement that the harm suffered by victims of intimate image abuse is routinely underplayed, misunderstood or ignored, by both the criminal justice system and wider society. This often serves to amplify the harm.

5.123 Because the harm caused by intimate image abuse can be severe, we conclude that there are compelling arguments for criminalising this behaviour more broadly than under the current law. We are also of the view that the law must be sensitive to the different ways in which people are targeted and harmed. Finally, we are of the view that the law must be able to respond to emerging forms of abuse. In particular, we are deeply concerned about the ways that new technologies are being used to perpetrate intimate image abuse, on the basis that these technologies are capable of causing substantial harm. In Part 2 of this paper, we set out the conduct and fault elements of our proposed offences which seek to address the issues we have identified in this chapter. As we set out in the Introduction, we propose a base offence without any additional intent element. This broader offence avoids the gaps created by the existing patchwork of offences. We also propose specifically including altered or made images in a way that will address and respond to new technological developments.


Part 2: The new model

Chapter 6: Definition of “intimate image”
Chapter 7: The acts
Chapter 8: Without consent
Chapter 9: Proof of harm
Chapter 10: Fault requirements
Chapter 11: Intimate images taken or previously shared in public
Chapter 12: Threats
Chapter 13: Reasonable excuse
Chapter 14: Conclusion
Chapter 6: Definition of “intimate image”

INTRODUCTION

6.1 This chapter will explore how an “image” is defined in the current law for the purposes of the three intimate image offences: section 33 of the Criminal Justice and Courts Act 2015 (“CJCA 2015”) (“the disclosure offence”), section 67(3) of the Sexual Offences Act 2003 (“SOA 2003”) (“the voyeurism offence”) and section 67A(2) of the SOA 2003 (“the “upskirting” offence”).

6.2 This chapter is divided into two parts: the first focuses on what constitutes an image (whether intimate or not); the second focuses on what makes an image “intimate”.

6.3 In the first part of this chapter, we discuss what constitutes an image under the current law. We begin by reviewing how an image is defined in relation to the three intimate image offences in England and Wales and compare the approach taken in other jurisdictions. We examine whether the definition of an image should be expanded beyond photographs and videos to include other visual representations of individuals, such as paintings, sculptures and other works of art. Finally, we briefly discuss the growing phenomenon of images which have been altered to appear sexual or nude (most notably “deepfake pornography”), and explain that these images are excluded from the definition of the image under the disclosure offence. We will consider the issue of altered images in more depth in the next chapter.

6.4 In the second part of this chapter we focus on the nature of the image, and the categories of image that we provisionally propose should be included within an intimate image offence. We begin by examining the nature of images captured by intimate image offences in England and Wales, and in other jurisdictions. We conclude that images can be categorised as “sexual”, “nude or semi-nude” and “private”. We discuss whether and to what extent each of these three classifications of images should be captured by an intimate image offence.

THE DEFINITION OF “IMAGE”

Photographs and videos

6.5 The first question is what is meant by the term “image”. The three specific intimate image offences in England and Wales differ in their approach to defining an image as an element of the offence.

6.6 Sections 67(3) and 67A(2) of the SOA 2003, which criminalise voyeurism and “upskirting” respectively, do not define the image, beyond saying that the perpetrator

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1 As we explain in the Introduction, in this consultation paper “intimate image” is the umbrella term used to capture the different categories of images that we provisionally propose should fall within an intimate image offence. These categories of images (sexual, nude, semi-nude and private) are explored at length in this chapter.
must “record” the victim. “Record” is not defined, but the Explanatory Note to section 67 indicates that it includes filming.

6.7 Section 33 of the CJCA 2015, the disclosure offence, defines the image in much more detail. The image must be a “photograph or film”, which is defined in section 34 of the CJCA 2015. Subsection (4) states:

“Photograph or film” means a still or moving image in any form that—

(a) appears to consist of or include one or more photographed or filmed images, and

(b) in fact consists of or includes one or more photographed or filmed images.

Subsection (5) makes clear that this includes “photographed or filmed images that have been altered in any way”.2

6.8 “Photographed or filmed image” is further defined in subsection (6) as:

a still or moving image that—

(a) was originally captured by photography or filming, or

(b) is part of an image originally captured by photography or filming.

The Explanatory Note to section 34 makes clear that this was intended to exclude photographs and films which have been digitally altered such that they no longer look like photographs or films, for instance where they have been made to look like a drawing. But it was intended to include images where at least part of the image consists of an original photograph or film, for instance a drawing with a photograph transposed onto it.

6.9 Subsection (7) defines “filming” as “making a recording, on any medium, from which a moving image may be produced by any means”, and subsection (8) makes clear that a negative version of an image and stored data which can be converted into an image, are included.

6.10 Other jurisdictions have opted for simpler definitions. For instance, Scotland’s disclosure offence also applies to photographs and films.3 “Photograph” is defined as “a still image in any form, whether or not the image has been altered in any way, that was originally captured by photography, and includes a copy of the image”. “Film” is defined as “a moving image in any form, whether or not the image has been altered in any way, that was originally captured by making a recording, on any medium, from which a moving image may be produced, and includes a copy of the image”.4

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2 See below for further discussion of altered images.
3 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(1).
4 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 3(2).
6.11 More simply still, every Australian jurisdiction which has enacted intimate image offences defines “image” in the same, circular, way: as a still or moving image. In New Zealand, the phrase “visual recording” is used. It is not defined, but “photograph, videotape or digital image” are given as examples. Canada has also adopted the phrase “visual recording”, which “includes a photographic, film or video recording made by any means”.

6.12 While the definition of an image differs by offence and jurisdiction, they all broadly capture the same thing: photographs and videos. It is clear that, whatever else is included in the definition of an image, photographs and videos must be included. Is there anything else that “image” should capture?

Other visual representations of individuals

6.13 Aside from photographs and videos, there are other ways that individuals can be represented visually, for example, through works of art (other than photography or video art). For instance, an individual could be depicted nude, or engaging in a sexual act, in a drawing, painting or sculpture without their consent. To our knowledge, making and sharing a nude or sexual drawing, painting or sculpture is not criminalised in any jurisdiction. Indeed, as we highlighted above, the Explanatory Note to section 34 of the CJCA 2015 (which defines the image for the purposes of the disclosure offence) makes clear that a photograph or film which has been digitally altered to look like a drawing is not included. This, of course, is not conclusive evidence that these types of images should not fall within the scope of intimate image offences, but it does demonstrate a consensus that this is not a wrong that warrants criminalisation. While this behaviour could be harmful to the depicted person, as representing someone in a sexualised or nude form without their consent is arguably an invasive and disrespectful act, we do not propose that this type of visual representation should amount to an image for the purposes of an intimate image offence.

6.14 Nude or sexualised drawing, painting or sculpture is not, even in part, an actual image of the victim. It is far enough removed from the victim not to warrant criminalisation. Additionally, we recognise the importance of artistic expression, and do not think that this should be curtailed without compelling evidence that doing so is both necessary, to protect the public, and proportionate. None of the stakeholders we met with pre-consultation raised the making or sharing of naked or sexualised drawing, painting or sculpture without consent as a significant form of abuse experienced by victims.

Altered images

6.15 We mentioned above that the disclosure offence includes “photographed or filmed images that have been altered in any way”. This would include, for example, a picture which has been digitally enhanced, or a picture where the background has been

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5 Section 91N Crimes Act 1900 (New South Wales); Section 207A Criminal Code 1899 (Queensland); Section 40 Summary Offences Act 1966 (Victoria); Section 26A Summary Offences Act 1953 (South Australia); Section 221BA Criminal Code Act Compilation Act 1913 (Western Australia); Section 208AA Criminal Code Act 1983 (Northern Territory); and Section 72A Crimes Act 1900 (Australian Capital Territory).

6 Crimes Act 1961, s 216G.

7 Criminal Code, RSC 1985, c C-46, s 162.

8 Criminal Justice and Courts Act 2015, s 34(5).
edited to make it appear as though the victim is somewhere else. However, by virtue of section 35(4) and (5) of the CJCA 2015, the disclosure offence does not include pictures or videos that are only private or sexual because of the way in which they have been altered.

6.16 In Chapter 2, we discussed the growth in non-consensual sexualised photoshopping and “deepfake” pornography. Sexualised photoshopping involves photoshopping an image to make it appear sexual (or nude). Deepfake pornography involves creating artificial, highly realistic pornographic images or videos using technology. One way this is done is by “deep learning”, a method where a large number of photos or a video of someone’s face are analysed so that an artificial intelligence algorithm can learn to manipulate that face, and then map it onto the face of someone in a pornographic video. Another method of which we are aware is where clothing is digitally removed from an image so it appears nude.

6.17 Both sexualised photoshopping and deepfake pornography are not covered by the disclosure offence, because the picture or video is only sexual by virtue of how it has been photoshopped, or by virtue of being inserted into a pornographic video. We consider whether altered images should be captured in Chapter 7, when considering a “sharing” offence. We are not considering this now because we do not think altered images should be included or excluded as part of the definition of the image. This is because altered images could only be included within a sharing offence: it is not possible to take an altered image, because altering is a process that happens after an image has been taken. The only point that needs to be made at this stage is that if altered images were included as part of a sharing offence, then they could not be excluded as part of the definition of the image (as they are currently in section 35(4) and (5) of the CJCA 2015).

THE NATURE OF THE IMAGE

The current law

6.18 Having considered the definition of an image, we go on to consider the nature of the image. As discussed above, there are currently three offences in England and Wales which apply specifically to different forms of intimate image abuse. These are:

1. the disclosure offence in section 33 of the CJCA 2015;
2. the voyeurism offence in section 67(3) of the SOA 2003; and
3. the “upskirting” offence in section 67A(2) of the SOA 2003.

The nature of the images which are within the scope of each of these three offences differ.

6.19 The disclosure offence makes it an offence to "disclose a private sexual photograph or film" without the consent of the person in the image and intending to cause that person distress. To be caught by the offence, an image must be both “private” and

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9 Criminal Justice and Courts Act 2015, s 33.
“sexual”. In section 35(2), “private” is defined as “something that is not of a kind ordinarily seen in public” and section 35(3) defines a photograph or film as “sexual” if:

(a) it shows all or part of an individual’s exposed genitals or pubic area,

(b) it shows something that a reasonable person would consider to be sexual because of its nature, or

(c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

6.20 The Crown Prosecution Service (“CPS”) prosecution guidelines state that images of an individual’s exposed genitals or pubic area were included as a separate category because: “this part of the body is considered to be so intimate that an image showing it should automatically be regarded as sexual”. Images of other exposed body parts, for example female breasts, would only be captured if the image was sexual by nature or the context made it sexual.

6.21 The voyeurism offence makes it an offence for A to record another person (B) “doing a private act”, where A intends to look at the image for the purpose of obtaining sexual gratification and A knows that B does not consent to A taking the recording for the purpose of obtaining sexual gratification. Section 68(1) defines “doing a private act”, stating that:

…a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy, and—

(a) the person’s genitals, buttocks or breasts are exposed or covered only with underwear,

(b) the person is using a lavatory, or

(c) the person is doing a sexual act that is not of a kind ordinarily done in public.

6.22 This offence was designed to protect sexual and bodily privacy, meaning that the focus of the offence is the circumstances in which the image was taken. This makes the offence in some sense narrower than the disclosure offence, because the recording must be made in a place which, in the circumstances, would reasonably be expected to provide privacy. However, the offence also captures a wider range of images than the disclosure offence: images of an individual’s genitals covered with underwear, an individual’s buttocks or breasts (exposed or covered with underwear) and an individual using a lavatory.

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11 Sexual Offences Act 2003, s 67(3).

12 We discuss this element of the voyeurism offence in detail in Chapter 11.
Finally, the “upskirting” offence makes it an offence for A to record an image beneath the clothing of another person (B) without B’s consent, where A does not reasonably believe that B consents and A intends to obtain sexual gratification or humiliate, alarm or distress B. The image must be of:

(a) B’s genitals or buttocks (whether exposed or covered with underwear), or
(b) the underwear covering B’s genitals or buttocks,

taken in circumstances where the genitals, buttocks or underwear would not otherwise be visible.

This offence does not apply to the act of “downblousing” (capturing images of female breasts, whether exposed or covered in underwear), a lacuna which has attracted criticism.\(^{13}\)

**Approaches in other jurisdictions**

This section will discuss what kinds of images are captured by intimate image offences in other jurisdictions. It will show that the images captured are broadly similar to those captured in England and Wales.

**Scotland**

Section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 covers photographs or films which show, or appear to show, someone in an “intimate situation”. Section 3 defines “intimate situation” as follows:

For the purposes of section 2, a person is in an “intimate situation” if—

(a) the person is engaging or participating in, or present during, an act which—

(i) a reasonable person would consider to be a sexual act, and

(ii) is not of a kind ordinarily done in public, or

(b) the person’s genitals, buttocks or breasts are exposed or covered only with underwear.

This definition is similar to the definition of the image under the disclosure offence in England and Wales.\(^{14}\) However, it also includes images of a person’s genitals covered with underwear, and a person’s buttocks or breasts exposed or covered with underwear. In this way, it mirrors the voyeurism offence.\(^{15}\)

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\(^{14}\) Criminal Justice and Courts Act 2015, s 33.

\(^{15}\) Sexual Offences Act 2003, s 67(3).
All Australian jurisdictions have intimate image offences, covering (all or some of) taking, making, sharing and threatening to share an intimate image without consent. New South Wales, Queensland and South Australia all have offences of recording and threatening to distribute an intimate image without consent. Victoria, Western Australia and the Northern Territory all have offences of distributing and threatening to distribute an intimate image without consent. The Australian Capital Territory has offences of recording and distributing an intimate image without consent and threatening to record or distribute an intimate image without consent. Tasmania has offences of observing or recording someone in breach of privacy, and possessing or sharing a recording made in breach of privacy.

The recording offences in New South Wales, Queensland and South Australia apply to an almost identical range of images. Broadly, they apply to images of people, in circumstances where they could reasonably expect privacy, that depict them:

1. engaging in a sex act not ordinarily done in public; 
2. in a state of undress; 
3. using the toilet, showering or bathing; or 
4. with their genitals, anal region or breasts (if female, transgender or intersex) exposed or covered only with underwear.

The distributing and threatening to distribute offences across all Australian jurisdictions also apply to a similar range of images. These all include images of an individual:

1. engaging in a sex act not ordinarily done in public;

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16 Crimes Act 1900, s 91P, s 91Q and s 91R.  
17 Criminal Code 1899, s 223, s 227A, s 227B and s 229A.  
18 Summary Offences Act 1953, s 26C, s 26D and s 26DA.  
19 Summary Offences Act 1966, s 41DA and s 41DB.  
20 Criminal Code Act Compilation Act 1913, s 221BD, s 338A, s 338B and s 338C.  
21 Criminal Code Act 1983, s 208AB and s 208AC.  
22 Crimes Act 1900, s 61B, s 72C and s 72E.  
23 Police Offences Act 1935, s 13A, s 13B and s 13C.  
24 We will not consider Tasmania further in this chapter because these offences only specify that the depicted individual must be in a private place engaging in a “private act”. They do not define “private act”.  
25 South Australia’s offence also applies to “an act carried out in a sexual manner or context”.  
26 South Australia’s offence only includes using the toilet.  
27 Queensland’s offence does not apply to male breasts.  
28 Victoria and Western Australia’s offences do not specify that the sex act must be a kind not ordinarily done in public.
(2) in a manner or context that is sexual;\textsuperscript{29} or

(3) with their genitals, anal region or breasts (if female, transgender or intersex) exposed or covered only with underwear.\textsuperscript{30}

6.31 The distribution offences in New South Wales, Western Australia and the Australian Capital Territory also include images of an individual:

(1) in a state of undress; or

(2) using the toilet,\textsuperscript{31} showering or bathing.

6.32 The key difference between the Australian distribution offences is that some only capture images taken when the person in the image had a reasonable expectation of privacy, whereas others do not. New South Wales adopts exactly the same definition of “intimate image” for its recording, distribution and threatening to distribute offences. Western Australia also limits its distribution and threatening to distribute offences to images taken when the person in the image had a reasonable expectation of privacy. Finally, South Australia has two distribution offences: distributing an “indecent filming” and distributing an “invasive image”. The kinds of images captured by both offences are the same, but the “indecent filming” offence applies where the person in the image had a reasonable expectation of privacy, whereas the “invasive image” offence applies to images taken when the victim was not in a public place.

6.33 By contrast, the distribution offences in Queensland, Victoria, the Northern Territory and the Australian Capital Territory are not limited to images where the person in the image had a reasonable expectation of privacy. We discuss reasonable expectation of privacy in detail in Chapter 11.

New Zealand

6.34 New Zealand criminalises recording, possessing and distributing an “intimate visual recording”. An “intimate visual recording” is defined as:

an image of someone, in a place where they could reasonably expect privacy, that depicts them:

(a) with their genitals, pubic area, buttocks or breasts (female) exposed or covered only with underwear;

(b) engaging in a sexual act;

(c) undressing, showering or using the toilet; or

an image of someone’s genitals, pubic area, buttocks of breasts (female) taken:

\textsuperscript{29} The offences in New South Wales, Queensland and Western Australia do not include this.

\textsuperscript{30} The offences in Victoria, South Australia and the Australian Capital Territory only apply when the genitals, anal region or breasts are exposed. The offences in Victoria and South Australia also only apply to the female breast.

\textsuperscript{31} The offence in South Australia also includes this.
(d) from beneath their clothing; or
(e) through their outer clothing.32

6.35 This definition amalgamates the images captured under the voyeurism, “upskirting” and disclosure offences in England and Wales. It also captures images of people undressing or showering.

Canada

6.36 Canada has enacted taking and sharing offences. Both offences define the image narrowly. Under Canada’s taking offence, the victim must be:

(1) in a place where it is reasonable to expect they will be nude, have their genitals, anal region or breasts exposed or be engaged in a sex act; and
(2) in fact nude, have their genitals, anal region or breasts exposed or be engaged in a sex act.33

6.37 Under Canada’s sharing offence, the victim must:

(1) be nude, have their genitals, anal region or breasts exposed or be engaged in a sex act;
(2) have had a reasonable expectation of privacy when the image was taken; and
(3) have retained a reasonable expectation of privacy when the image was shared.34

What types of images should be captured?

Sexual images

6.38 The current voyeurism and disclosure offences in England and Wales both capture sexual images. The “upskirting” offence does not, but it is a specific offence which targets the exposure of an individual’s genitals or buttocks in circumstances in which they would not otherwise be exposed.

6.39 Any definition of the image should include sexual images. There is considerable evidence that victims experience intimate image abuse involving sexual images as a gross violation of their sexual autonomy and privacy,35 and this often causes victims substantial harm.36

33 Criminal Code, RSC 1985, c C-46, s 162.
34 Criminal Code, RSC 1985, c C-46, s 162.1.
36 See Chapter 5 for an exploration of the harms caused by intimate image abuse involving sexual images.
But how should “sexual” be defined? As outlined above, section 35(3) of the CJCA 2015 defines a photograph or film as “sexual” if:

(a) it shows all or part of an individual’s exposed genitals or pubic area,

(b) it shows something that a reasonable person would consider to be sexual because of its nature, or

(c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

Images falling into category (a) will be considered in the next section. Do categories (b) and (c) capture all of the images we would want “sexual” to capture? Category (b) captures images which a reasonable person would deem sexual by nature. This includes, chiefly, images of people engaging in sexual acts. Category (c) includes images which are not sexual by nature but, when the content of the image is taken as a whole, a reasonable person would deem it sexual. The Explanatory Note to section 35(3)(c) gives the example of someone posing provocatively in underwear. We would certainly want to capture images that are sexual by nature or sexual when taken as a whole, but perhaps this definition is too narrow.

A few stakeholders suggested to us that what counts as sexual differs from individual to individual and were in favour of a test with a subjective element. For instance, David Canham told us that some members of the gay community view images of people taking or injecting drugs as sexual. Other stakeholders argued that the context in which an image is shared could make it sexual. Georgina Calvert-Lee from McAllister Olivarius gave the example of images which are not in themselves sexual becoming sexual because they are shared on, for example, a website where sex workers advertise their services.

Is it desirable to widen the definition of “sexual” to include any image that the victim deems sexual (or that the victim believes will be deemed sexual by the likely audience) and images made sexual by the context in which they are shared? Our provisional view is no. First, it is possible for people to be sexually aroused by anything, so this would in theory allow any image to fall within the definition. Secondly, while we recognise the harm caused by having one’s image posted on a sex work website, our focus is images which are themselves sexual, rather than images which appear sexual in certain contexts. This does not necessarily mean that someone whose image (which is not in itself intimate) is posted on a sex worker website or pornographic website would have no recourse under the criminal law.

It could be that the poster has committed a communications offence, under section 127 of the Communications Act 2003 (“CA 2003”) or section 1 of the Malicious Communications Act 1988 (“MCA 1988”). We discuss these offences in detail in Chapter 3. Here, it is worth noting that posting someone’s picture on a sex worker website when they are not a sex worker would most likely be caught by section 127(2)(a) CA 2003 (sending a false communication using a public electronic

37 David Canham (victim of intimate image abuse).
38 Georgina Lee Calvert (McAllister Olivarius).
communications network to cause annoyance, inconvenience or needless anxiety) or section 1(1)(a)(iii) of the MCA 1988 (sending a communication which conveys false information in order to cause distress or anxiety).

6.45 In our Harmful Online Communications Consultation Paper, we provisionally proposed that section 127(1) of the CA 2003 and section 1 of the MCA 1988 be replaced with a harm-based offence and section 127(2) of the CA 2003 be replaced with an offence of sending a communication known to be false with the intention of causing non-trivial harm and without reasonable excuse.\(^{39}\) Posting a picture of someone who is not a sex worker on a sex worker website may also be caught by both of these offences.

**Consultation Question 1.**

6.46 We provisionally propose that an image which:

(1) shows something that a reasonable person would consider to be sexual because of its nature; or

(2) taken as a whole, is such that a reasonable person would consider it to be sexual,

should be included within the definition of an intimate image.

Do consultees agree?

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**Nude and semi-nude images**

**Separating nude from sexual**

6.47 The current voyeurism and disclosure offences also capture nude images. The voyeurism offence includes images where “the person's genitals, buttocks or breasts are exposed or covered only with underwear”\(^{40}\) and the disclosure offence includes images which show “all or part of an individual’s exposed genitals or pubic area”.\(^{41}\)

6.48 In the disclosure offence, images of an individual’s exposed genitals or pubic area fall under the definition of “sexual”. As highlighted above, the CPS prosecution guidelines state that: “this part of the body is considered to be so intimate that an image showing it should automatically be regarded as sexual”.\(^{42}\) However, Mark Bass from British Naturism told us that equating nude and sexual images sends an incorrect and harmful message about naturism. For naturists, we were told, the nude body is not inherently sexual: being nude is about liberating oneself and fostering a positive body

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\(^{40}\) Sexual Offences Act 2003, s 68(1).

\(^{41}\) Criminal Justice and Courts Act 2015, s 35(3).

image. Another example is an image of someone sunbathing nude on a beach. This is certainly a nude image, but it is unlikely that the individual depicted would be comfortable with their image being categorised as sexual.43

6.49 Therefore, we provisionally propose that nude and sexual images be categorised separately.

**Taking and sharing nude or semi-nude images**

6.50 A further issue is whether the kinds of nude images captured should differ depending on whether the image is taken or disclosed without consent. Currently, only images of an individual’s exposed genitals or pubic area are always captured by the disclosure offence. (Images depicting other forms or levels of nudity are only captured if they are sexual by nature or sexual when the image is taken as a whole.) By contrast, the voyeurism offence also captures images depicting an individual’s buttocks or breasts, and images of an individual’s genitals, buttocks or breasts covered with underwear. Should disclosing these kinds of images without consent also be criminalised?

6.51 First, the fact that different kinds of images are captured by the voyeurism and disclosure offences can have counterintuitive and undesirable consequences. For example:

Sean lives on the same street as his co-worker, Beth. Yesterday, Sean was walking to work when he spotted Beth through her bedroom window. She was getting dressed for work and wearing only underwear. Sean has always been attracted to Beth, so he quickly took a picture of her, before she noticed him, to look at later. Later at work, Sean asked Beth if she wanted to go for a drink with him after work. Beth said she was flattered, but she was not interested in him romantically. Sean felt humiliated and angry, so he sent the picture he had taken of Beth that morning to a few of their co-workers.

6.52 In this scenario, Sean committed a voyeurism offence. He took a picture of Beth in her underwear without her consent and in order to obtain sexual gratification, when she was in a place where she could reasonably expect privacy. However, when he sent the image to their co-workers he did not commit a disclosure offence, because Beth’s genitals and pubic area were not exposed.44 This is counterintuitive. Arguably, Sean has committed two wrongs worthy of criminalisation: taking the image of Beth without consent and then disclosing the image to their co-workers.

6.53 Relatedly, we heard from several stakeholders that the disclosure of semi-nude or "provocative" images (for instance an individual posing provocatively in underwear) without consent can cause substantial harm. For example, we heard from Sophie Mortimer that the Revenge Porn Helpline worked on a case involving 150 provocative

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43 We will discuss what protection should be afforded to people who are nude in public spaces in Chapter 11.

44 Criminal Justice and Courts Act 2015, s 35(3). It is very unlikely that this image would be deemed sexual by nature or sexual when taken as a whole.
images of one victim being shared over a six-year period, causing her significant harm. There was very little that the Helpline could do.

6.54 Additionally, Marilyn Selwood told us that young people tend to disclose more “low-level” or “suggestive” images, which may then be shared further without their consent. They may not report this, either because they do not perceive it as wrong or because they do not think others will. Carmel Glassbrook gave us the example of young people sharing images where emojis are covering their nipples and/or genitalia.46 We are also aware of a recent trend on social media called the “silhouette challenge” where people film and share short videos of themselves dancing or posing using a specific editing feature known as a “filter” so that their body appears in silhouette only against a red backdrop. The purpose is to show off the shape of the body so the person depicted may wear tight fitting clothes, underwear or no clothes, but the filter “blacks out” the details of their body.46 It is not always possible for a viewer to determine if they actually are nude, semi-nude or dressed in very tight clothing.47 Finally, Frances Ridout told us that while many of the images Queen Mary University of London’s SPITE (Sharing and Publishing Images to Embarrass) project sees are of people engaging in sexual acts, some are sexually provocative. They also get reports relating to images of people sunbathing topless on the beach.48

6.55 One final consideration is that, while the voyeurism offence captures a wider range of images than the disclosure offence, it does not capture “upskirting” or “downblousing” images. This is partially because of the “reasonable expectation of privacy” element, discussed in Chapter 11. But it is also because nude or semi-nude images are only captured when “the person’s genitals, buttocks or breasts are exposed or covered only with underwear”.49 This fails to capture “upskirting” and “downblousing” images for slightly different reasons. “Upskirting” images are not captured because the depicted person’s genitals or buttocks were not exposed or covered only with underwear. Their genitals or buttocks, or the underwear covering their genitals or buttocks, are only visible in the image because someone took a picture underneath their clothing.50 “Downblousing” images are not covered because, while someone who is “downbloused” may have their breasts partially exposed, or their underwear partially visible, their breasts or the underwear covering their breasts will not be fully exposed.

45 Carmel Glassbrook (Professionals Online Safety Helpline (POSH)).
47 A worrying trend has emerged of editing original videos of others so that more of the victim’s body was visible, and reposting them without consent. Videos even appeared on YouTube providing instructions on how to edit other people’s videos in this way, see Lauren Strapagiel, “Women are warning creators about the TikTok silhouette challenge” (1 February 2021) Buzzfeed News, https://www.buzzfeednews.com/article/laurenstrapagiel/tiktok-silhouette-challenge-editing (last visited 23 February 2021). We discuss the behaviour of altering images to make them appear more intimate in Chapter 7.
48 Frances Ridout (Queen Mary Legal Advice Centre).
49 Sexual Offences Act 2003, s 68(1)(a).
6.56 Our provisional view is that both “upskirting” and “downblousing” images could be caught if section 68(1)(a) of the SOA 2003 were departed from in two ways. First, “upskirting” images could be covered if the focus were moved from the depicted person to the image. That is, from enquiring whether the depicted person had their genitals or buttocks exposed or covered only with underwear, to enquiring whether the image shows their genitals or buttocks, either exposed or covered with underwear. Secondly, “downblousing” images could be caught if the definition were widened to include images of partially exposed breasts, whether covered by underwear or not, taken down the depicted person’s top (it could not simply include partially exposed breasts, because this would include an image of someone who is wearing a low-cut top and as a result their cleavage is visible).

6.57 Bringing these arguments together, our provisional view is that the same kinds of nude and semi-nude images should be captured regardless of whether an image is taken or shared without consent. We are of the view that the kinds of images captured by the voyeurism offence should also apply to a sharing offence. We are also of the view that “upskirting” images should be caught by the definition of nude or semi-nude, both for a taking and a sharing offence.

6.58 On this basis, we provisionally propose that images of a person’s genitals, buttocks or breasts, whether exposed or covered with underwear, should be included within the definition of an intimate image, including partially exposed breasts, taken down the depicted person’s top.

Consultation Question 2.

6.59 We provisionally propose that the definition of an intimate image should include nude and semi-nude images, defined as images of a person’s genitals, buttocks or breasts, whether exposed or covered with underwear, including partially exposed breasts, whether covered by underwear or not, taken down the depicted person’s top.

Do consultees agree?

Breasts

6.60 Female breasts are generally treated differently from the male chest. If we think of traditional underwear for men, it usually covers only their genitals whereas traditional underwear for women is intended to cover genitals and breasts. The same is true for traditional swimwear for both sexes. It is not uncommon to see the naked male chest in public areas; on hot days, at the beach or in swimming pools. Female breasts are usually covered in all public places. This suggests that female breasts require different treatment when defining nude and semi-nude. Indeed, the definition of “breasts” in current voyeurism offence under section 67 of the SOA 2003 does not extend to the naked male chest.51 Intimate image offences in jurisdictions including Victoria, South Australia and New Zealand only apply to female breasts. We agree that in most

circumstances the naked male chest does not require the same protection as female breasts. We discuss this further in paragraph 6.130, below when considering images that are of a kind usually seen in public.

6.61 We have looked more holistically at how to define breasts. There are some circumstances where the chest area of people who identify as female does not have substantial breast tissue. This may be because it has not yet fully developed (for example girls undergoing puberty) or because it has been surgically removed (for example women who have undergone a mastectomy). Trans women may have breasts that have been surgically developed or enhanced, or they may not. In these scenarios, we consider that these women and girls retain the same expectation of privacy of the chest area and should have the same protection against violations of that privacy. We provisionally propose that any definition of nude or semi-nude should include the chest area of trans women, women who have undergone a mastectomy and girls who have started puberty and are developing breast tissue.

Consultation Question 3.

6.62 We provisionally propose that the chest area of trans women, women who have undergone a mastectomy and girls who have started puberty and are developing breast tissue should be included in a definition of a nude or semi-nude image.

Do consultees agree? Do consultees think there are additional examples that should be included in a definition of nude or semi-nude?

The meaning of underwear

6.63 One important question is what is captured by the term “underwear”. It clearly captures anything that is purchased and consistently worn as underwear. Does it capture anything that is not typically purchased to serve the purpose of, or worn as, underwear?

6.64 In Police Service for Northern Ireland v MacRitchie,52 the Court of Appeal in Northern Ireland considered if swimwear could be underwear for the purpose of section 67 of the SOA 2003 (the voyeurism offence). In this case, the defendant had put his phone under the wall of his changing room cubicle, in an attempt to capture nude or semi-nude images of the woman changing next door. He managed to capture images of the woman in her bikini bottoms, but not in her underwear (which she changed into a few moments later). In the magistrates’ court, it was held that the woman whose image was captured had not been doing a “private act” within the meaning of section 67 of the SOA 2003, because her genitals, buttocks or breasts were not exposed or covered with underwear.

6.65 One of the questions for the Court of Appeal was whether swimwear can constitute underwear. The Court held:

In its ordinary connotation underwear means clothing worn next to the skin under outer clothes. Swimwear is not in its normal function underwear. But it seems to us clear that some items of swimwear could be worn as underwear. A woman may choose to wear, for instance, bikini bottoms as underpants. While wearing them for this purpose we are satisfied that if a woman were to be filmed in circumstances where she was entitled to expect privacy, this would constitute an offence under section 67.53

The Court went on to conclude that because the woman was wearing bikini bottoms as swimwear, before changing into her underwear, the image was not caught by section 67 of the SOA 2003.

6.66 Alisdair Gillespie has criticised this ruling, arguing that the Court interpreted “underwear” too narrowly. He gives the example of a woman who is in her holiday home, preparing to go to the beach. She has put a skirt on over her bikini bottoms and intends to discard the skirt when she gets to the beach. When she is bending over packing her bag, someone takes a picture of her exposed bikini bottoms without her consent. Gillespie argues that because the woman is not wearing swimwear as underwear, this image would not be criminalised under the Court’s interpretation of “underwear”.54

6.67 While Police Service for Northern Ireland v MacRitchie55 is a useful interpretation on those facts, the extent to which swimwear, or other garments, could be considered “underwear” has not been decided by the courts in England and Wales. We agree that the woman who bends down, exposing her bikini bottoms in the above example should be protected. When swimwear is worn as swimwear it is usually exposed, whereas underwear is typically covered by other items of clothing. Because the woman is wearing the bikini bottoms underneath her skirt, she is wearing them as underwear.

6.68 Another example is where a woman is lying on a beach reading with a sarong covering her bikini bottoms. She is arguably wearing the bikini bottoms as underwear despite being on a beach. This because she has chosen to cover her bikini bottoms, in the way that we typically cover underwear. If someone lay in the sand to take a picture up her sarong without her consent, this should arguably be caught by a taking offence.

6.69 A further example is a woman who is in her house getting ready to meet some friends for lunch. She forgot to do her laundry yesterday, so is having to wear micro shorts and a bralette top (crop top) as underwear. Her partner takes a picture of her without consent. In this example, her underwear are the micro shorts and bralette top, and she should be protected by a taking offence. However, if the woman instead chooses to wear only her micro-shorts and bralette top to the shops, they would not be worn as underwear.

53 [2008] NICA 26 at [14].


55 [2008] NICA 26
6.70 On this basis, our provisional view is that any garment that is being worn as underwear should be considered to be underwear for the purpose of an intimate image offence.

**Consultation Question 4.**

6.71 We provisionally propose that any garment which is being worn as underwear should be treated as underwear for the purpose of an intimate image offence. Do consultees agree?

*Images edited to appear not nude (or semi-nude)*

6.72 Another issue to which we have been alerted is images which were originally nude or semi-nude being edited or altered so that the depicted individual’s genitals, buttocks or breasts are no longer exposed (or covered only with underwear).

6.73 This sometimes happens when intimate images are shared as part of a news article. For example, when nude images of US congresswoman Katie Hill were published, the newspaper covered Hill’s breasts with black boxes and her genitals with digital black marker pen. Alternatively, the editing may be done by the person depicted. As we mentioned above at paragraph 6.54, young people will sometimes take and share nude or semi-nude images where they have covered their breasts and/or genitals with emojis or applied a “filter” to their image which disguises parts of their bodies and gives the impression of nudity without detail.

6.74 We have considered whether these images should be categorised as nude or semi-nude images, and whether they should therefore fall within the definition of an intimate image. Our provisional view is that there will be a point at which a nude or semi-nude image has been altered so significantly that it ceases to be nude or semi-nude. For example, if an individual’s entire body has been blurred out, or it has been made to look like they are wearing clothes, then we do not think this should fall within the category “nude or semi-nude”. However, we are sympathetic to the idea that where an image has been altered slightly, but it is still clear that the depicted individual is nude or semi-nude, there is an argument for categorising this as a nude or semi-nude image. For instance, where an individual’s breasts or genitals have been covered with a black strip, the extent to which they are exposed is likely to be comparable to if their breasts or genitals were covered with underwear. Following the approach of the voyeurism and upskirting offences, we have provisionally proposed that where an individual’s breasts or genitals are covered with underwear this should fall within the definition of an intimate image, and our provisional view is that a similar argument


57 Carmel Glassbrook (Professionals Online Safety Helpline (POSH)).
could be made for including images which have been altered but leave the depicted individual similarly exposed.

**Consultation Question 5.**

6.75 We provisionally propose that the definition of “nude or semi-nude” should include images which have been altered but leave the victim similarly exposed as they would be if they were wearing underwear.

Do consultees agree?

*Images where the victim is not identifiable*

6.76 Intimate images can include clear identifying features such as the face or a tattoo of the person depicted, be in a specific location such as their bedroom or accompanied by information such as their name or place of work. Other images may just be of the body, or specific body parts, such as “upskirting” images. A national survey on image-based abuse by the eSafety Commissioner of Australia found that 50% of victims considered they would be recognisable to others in the image that was distributed. Images would be classified as intimate for the purposes of an offence if the body parts visible satisfy the description we discuss in this chapter. Images can be sexual, nude, semi-nude or private regardless of whether the victim is identifiable.

6.77 We recognise that there may be prosecutorial difficulties when a victim is not immediately identifiable from an intimate image taken or shared without consent. However, we do not consider it is appropriate to exclude such images from the definition of an intimate image. We are aware of a type of editing where identifying features are removed from an intimate image before it is shared without consent of the person depicted. This could include simple cropping to remove the face or a recognisable background, or editing to blur or remove distinguishing features such as tattoos. It may be that this is done to anonymise the person depicted to avoid causing them harm; it may also be done in an attempt to avoid civil or criminal liability. Where editing has the effect of removing or concealing the identity of the person depicted, such images should still be considered intimate if what remains of the image falls within the definitions discussed in this chapter.

6.78 We consider that proving the identity of the person depicted, if in question, is an evidential matter for the police and prosecutors, as victim identification is in many other offences. Our provisional view is that images where the victim is not readily identifiable from the image itself should not automatically be excluded from our offences and will be dealt with as an evidential matter.

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59 We discuss this possibility in the context of taking and sharing intimate images for a genuine medical, scientific or educational purpose at 13.96-13.100.
Consultation Question 6.

6.79 We consider that images where the victim is not readily identifiable should not be excluded from our offences.

Do consultees agree?

Private images

6.80 The final category of images to explore we have termed “private” images. By “private”, we mean images of people that are not sexual, nude or semi-nude, but where the depicted person is engaged in an act which is in some sense private.

6.81 For the purposes of this discussion, this category can also be divided into two:

(1) images which are already captured by intimate image offences in England and Wales or other jurisdictions; and

(2) images which, to our knowledge, are not captured by intimate image offences in any jurisdiction, but were brought to our attention by stakeholders.

We will consider these images separately.

Images covered by existing offences

6.82 The voyeurism and disclosure offences in England and Wales both include the word “private”. The voyeurism offence covers images of individuals “doing a private act”, defined as images of individuals in a private place either engaging in a sexual act, using the toilet or with their genitals, buttocks or breasts exposed or covered only with underwear. The disclosure offence, by contrast, defines “private” and “sexual” separately, but to be caught by the offence an image must be both private and sexual. “Private” is defined as “something that is not of a kind ordinarily seen in public”.

6.83 As well as being private, almost all of the images captured by the voyeurism and disclosure offences are also sexual, nude or semi-nude. The only remaining kind of image, which is private but not sexual, nude or semi-nude, is an image of someone using the toilet (captured by the voyeurism offence). An image of someone using the toilet is therefore an example of what we are terming a “private” image.

6.84 Intimate image offences in other jurisdictions include other images which are best described as “private”. As discussed above, the majority of Australian jurisdictions include images of individuals in a state of undress, showering or bathing (as well as using the toilet) in their taking offence, disclosure offence or both.

6.85 We have considered whether these additional categories of private images ought to be included. If a picture is taken of someone undressing, showering or bathing, it

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60 Sexual Offences Act 2003, s 68(1).
61 Criminal Justice and Courts Act 2015, s 35(2).
might be thought that their genitals, buttocks or breasts will always be exposed or covered only with underwear, so the picture would be caught within the nude and semi-nude category of images. However, this may not always be the case. There could be images which are not nude or semi-nude (i.e. the depicted person is not naked and their underwear is not exposed) but that nevertheless depict someone undressing, showering or bathing. Consider these two examples:

**Clare is getting changed in a shared hostel dormitory. Peter is staying in the same room as Clare, and he notices her getting changed. He tries to take a picture of Clare in her underwear, but Clare notices and quickly covers herself with the t-shirt she was about to put on.**

**Melissa is showering in a festival shower block. The shower cubicles are frosted glass, so anyone outside the cubicle can only make out the outline of Melissa's body, but the glass stops at her neck so her head is fully visible. Alessandro takes a picture of Melissa from outside the cubicle.**

6.86 In these examples, it will be clear that Clare and Melissa are undressing and showering respectively. However, their genitals, buttocks and breasts are not exposed or covered only with underwear. It could be that Peter and Alessandro are caught by section 1 of the Criminal Attempts Act 1981 (“CAA 1981”), if their actions are “more than merely preparatory” to the taking of a nude or semi-nude image of Clare and Melissa. This certainly seems to be the case for Peter, who was attempting to take a picture of Clare in her underwear. This issue aside, should images of people undressing, showering or bathing, where their genitals, buttocks or breasts are not exposed or covered only with underwear, be included within the definition of the image?

6.87 Arguably, because the voyeurism offence covers images of individuals using the toilet regardless of whether their genitals or buttocks are exposed, there is a strong case for also capturing images like this. However, is this behaviour serious and harmful enough to warrant criminalisation? During pre-consultation stakeholder engagement, no examples of images depicting individuals in a state of undress, showering or bathing, but not nude or semi-nude, were raised with us. Therefore, it is possible that we do not have a full picture of this behaviour and the harms it can cause. We would value consultees' input on this point.

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62 Criminal Attempts Act 1981, s 1 could only be used if the taking offence was an indictable offence (see CAA 1981, s 1(4)). The current voyeurism and “upskirting” offences are both “either way” offences, meaning that they can be tried as summary or indictable offences. This means that they fall within CAA 1981, s 1. Whether this avenue was available for our provisionally proposed taking offence would depend upon how it was categorised.
Consultation Question 7.

6.88 Can consultees provide us with examples of images depicting individuals in a state of undress, showering or bathing, where their genitals, buttocks and breasts are not exposed or covered only with underwear? Can consultees provide insight into the harm caused by the non-consensual taking or sharing of these kinds of images?

Consultation Question 8.

6.89 Do consultees think that images depicting individuals in a state of undress, showering or bathing, where their genitals, buttocks and breasts are not exposed or covered only with underwear, should be included within the definition of an intimate image?

6.90 A second question is whether “private” images should be captured by a sharing offence, as well as a taking offence. In Australia, every jurisdiction with a taking offence includes images of individuals using the toilet, in a state of undress, showering and bathing within that offence. By contrast, seven Australian jurisdictions have enacted distribution offences, and only four of those offences include some or all of these images.

6.91 It could be argued that the voyeurism offence was designed to protect privacy, so it is right that where an image is taken without consent a wider range of private images should be included. However, we are of the view that this is a mischaracterisation, because these kinds of images are private regardless of whether they are taken or shared. What is the justification for criminalising the non-consensual taking of an image of someone using the toilet (under the voyeurism offence), but not the non-consensual sharing of that image? In fact, it could be argued that the latter is a greater violation of the victim’s privacy, because more people are likely to see the image. On this basis, we provisionally propose that “private” images should be captured by a sharing offence as well as a taking offence.

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63 To be caught by the voyeurism offence, the person in the image must have been “doing a private act”. See Sexual Offences Act 2003, s 67(3)(a).

Consultation Question 9.

6.92 We provisionally propose that “private” images should be captured by a sharing offence as well as a taking offence.

Do consultees agree?

Images not covered under the current law

6.93 Some other images, which may be considered to be “private” images, were brought to our attention by stakeholders. To our knowledge, these images are not included in an intimate image offence in any jurisdiction.

6.94 The images are:

(1) A gay person, whose family, friends or community either do not know that they are gay or do not accept them, pictured kissing, hugging or holding hands with someone of the same sex.

(2) A fully clothed picture of a trans person taken before they transitioned.

6.95 As we expanded upon in Chapter 5, LGBT+ individuals can suffer unique and extremely serious harms when images “outing” them are shared (or they are threatened with those images being shared). These harms include being ostracised from their family and community, stalked, harassed and physically assaulted. Some victims have taken their own lives.65

6.96 When developing Scotland’s disclosure offence, the Scottish Government consulted on whether an image should fall within the definition of “intimate” if “the person featured in the image and the person sharing the image considered it to be so”.66 We discuss this below in the context of images which are deemed intimate by members of a particular religion.67 But this definition of “intimate” was also understood to cover images which are considered private because of the “particular circumstances” of the person in the image, and “an image of a transgender person prior to that change” was given as an example. Again, there was considerable support for this proposal amongst consultees (79% were in favour of this broad definition). However, the Scottish Government decided against the proposal, arguing that it would make the law too ambiguous.68

65 Josh Bradlow (Stonewall); Catherine Bewley (Galop); and Elena Sharratt (PhD Candidate, University of Exeter).


67 See para 6.105 below.

6.97 By contrast, several stakeholders were supportive of these kinds of images being captured. First, Jonathan Bambro and Karen Morgan Reed from the CPS argued in favour of a broad understanding of “intimate”, suggesting that images the depicted person perceives as intimate should be captured, taking into account the context, so long as the perpetrator was aware that the victim would perceive the image as intimate in that context. Secondly, Thomas Crofts argued that there is no principled reason for prioritising sexual images over private images which “humiliate” the victim, particularly as the taking and sharing of private images disproportionately affects marginalised communities.

6.98 Thirdly, Carrie Myers and Holly Powell-Jones emphasised recent societal changes in what is deemed private or intimate. They told us that what is important is people having control over what kinds of images of them are taken and disclosed, when they are disclosed, and to whom. Erika Rackley made a similar argument, and suggested that our understanding of what is “private” could be broadened to include these kinds of images.

6.99 Two stakeholders were in favour of “private” capturing an even wider range of images. Tsachi Keren-Paz told us that the test for whether an image is covered should be whether the victim had a reasonable expectation of privacy. He argued that where someone has taken steps to hide or conceal something, and someone has “stripped them of their fencing”, this warrants criminal punishment. Wider still, Jeff Hearn suggested that we should consider consulting on the inclusion of all images of people taken without their consent. He gave the example of someone photographing an individual they deem attractive in public without their consent.

6.100 Other stakeholders were of the view that these kinds of images should not be included. For instance, Marilyn Selwood felt that an image of a gay couple kissing, hugging or holding hands is not an intimate image. She argued that, at most, this would be an abusive image if it were used to “out” the couple. Additionally, Alex Dymock made the point that the harm caused when these kinds of images are shared is based upon prejudice towards LGBT+ people, rather than the images being in themselves private. To see this, consider that if an image of a man and a woman kissing was shared, this would very rarely cause them any harm. Therefore, it is not clear that the person who took or shared the image of the gay couple kissing or the trans person before they transitioned should be liable. Finally, Tim Thompson from Mishcon de Reya was concerned that if “privacy” became a subjective concept, which

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69 Jonathan Bambro and Karen Morgan Reed (CPS).
70 Prof Thomas Crofts (City University, Hong Kong).
71 Dr Carrie-Anne Myers (City, University of London) and Dr Holly Powell-Jones (Online Media Law UK).
72 Prof Erika Rackley (University of Kent).
73 Prof Tsachi Keren-Paz (University of Sheffield).
74 Prof Jeff Hearn (Hanken School of Economics).
75 Marilyn Selwood (ManKind).
76 Dr Alex Dymock (Goldsmiths University).
responded to the characteristics and circumstances of the individual in the image, then the law would become unworkably ambiguous.

6.101 We recognise that these kinds of images, when taken or shared without consent, can cause significant harm to the individuals depicted in them. However, our provisional view is that these images should not fall within an intimate image offence. This is because they are qualitatively different from the other images discussed in this chapter. They are not harmful to the depicted person because they infringe upon their sexual or bodily privacy and autonomy. Rather, they are harmful because of what they communicate about the depicted person (i.e. that they are LGBT+).

6.102 To see this, consider that the harm to a gay person will be the same regardless of how their sexuality is “outed”. It could be a picture of them kissing, hugging, holding hands with or looking intimately at someone of the same sex. While kissing could be deemed sexual, hugging, holding hands and looking intimately at someone are not. Similarly, they could be “outed” through something that is not an image. It could be a voice recording where they are having an intimate conversation with their same sex partner, or a screenshot of them revealing their sexuality in a tweet on Twitter, believing that their family or community would not see it. Therefore, while we acknowledge that images of LGBT+ people that “out” them expose them to verbal, emotional and physical abuse from family, friends, members of their community and strangers online, and that they deserve protection from this abuse, we do not think that intimate image offences are an appropriate way of providing that protection. This stance should be qualified in two ways.

6.103 First, if the image is sexual (either by nature or circumstance) or the individual(s) in the image are nude or semi-nude, then the image will fall into one of the other two categories. For instance, if an image was shared of a trans person wearing only underwear before they transitioned, then the image would fall into the “nude or semi-nude” category. The same is true if a gay couple was pictured kissing while partially nude.

6.104 Secondly, sharing or threatening to share these kinds of images without consent may be caught by another offence. For instance, if someone threatened to share an image of a gay person kissing their same sex partner with the depicted person's family to coerce them into sending money, or to make some other gain, this would be caught by the blackmail offence in section 21 of the Theft Act 1968. Additionally, some of this behaviour may be caught by a communications offence, under section 127(1) CA 2003 or section 1 MCA 1988 (although it is unlikely that much of this behaviour would meet the threshold of “grossly offensive”, “indecent”, “obscene” or “menacing”). It may also be caught by the harm-based communications offence we propose in our Harmful Online Communications Consultation Paper. The current communications

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77 See para 6.127 below for discussion of images of people kissing.

78 We discuss these terms in detail in our Harmful Online Communications Consultation Paper. We argue that they are vague, and that they contribute towards the current communications offences being both overinclusive and underinclusive. See Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 248 p 54-60.

79 Indeed, we suggest in our Harmful Online Communications Consultation Paper that digital communications “outing” someone are likely to be caught by our proposed harm-based offence, provided that the individual
Images that are intimate within particular religious groups

6.105 As we discussed in Chapters 2 and 5, we have heard evidence that people from some religious groups have been or may be seriously harmed by the disclosure of intimate images which are not considered private or sexual under the current law. Three examples were brought to our attention by several stakeholders:

1. A Muslim woman who wears a hijab in public pictured not wearing a hijab while in an intimate setting, for instance with a man who is not her husband, hugging or kissing, or with her shoulders and upper chest exposed.

2. A Muslim woman attending a celebration, pictured dancing, eating and singing with her stomach exposed.

3. A Hasidic Jewish woman pictured with the lower half of her legs or her ankles exposed.

6.106 The nature of the images in the examples provided to us primarily involved victims from religious groups, who were not wearing attire that they would usually wear in public for the purpose of modesty (based on religious beliefs) and were exposing body parts that they would not usually expose in public for the same reasons.

6.107 We discussed the experiences of and harms caused to these women in Chapters 2 and 5. In brief, the non-consensual taking or sharing of such images is wrongful because it violates the victim’s bodily privacy, personal integrity and her dignity, and in some cases, her sexual privacy, autonomy and freedom, similarly to the non-consensual taking or sharing of images already protected by the criminal law. Women victimised in these ways report feeling violated, exposed and humiliated. Where the image is shared, or the victim is threatened that the image will be shared with the victim’s family, friends or community, victims report being shamed, ostracised, harassed, and sometimes physically harmed. As such, victims suffer similar levels and forms of harm to those experienced when images which are intimate by “Western” standards are taken or shared without consent.

6.108 These kinds of images are not captured by any intimate image offence in England and Wales. There was no discussion in Parliament of including these kinds of images in either the voyeurism or disclosure offences. By contrast, when developing Scotland’s disclosure offence, the Scottish Government consulted on whether an image should fall within the definition of “intimate” if “the person featured in the image and the person sharing the image considered it to be so”. They stated that this would include images which are private “because of the particular circumstances or cultural beliefs being “outed” is part of the “likely audience”. See Harmful Online Communications: The Criminal Offences (2020) Law Commission Consultation Paper No 248 p 112.

See Chapter 2 paras 2.79, 2.80 and 2.114 and Chapter 5 paras 5.79 to 5.86.

Nazmin Akthar (Muslim Women’s Network); and Elena Sharratt (PhD Candidate, University of Exeter).

Carmel Glassbrook (Professionals Online Safety Helpline (POSH)); Zabaida Anwar (Victim Support); and Nazmin Akthar (Muslim Women’s Network Group).
of the person featured in it” but not necessarily sexual, including images of someone not wearing the headscarf they usually wear in public. Although there was considerable support for this amongst consultees (79% of consultees favoured this broad definition), the Government concluded that:

such an approach risked perpetuating the very ambiguity in the law which a specific offence is seeking to address, and that it may be very difficult for police and prosecutors to establish that such a shared understanding, that a particular image was “intimate”, actually existed between the person featured in the image and the person sharing the image.83

6.109 In fact, to our knowledge these kinds of images are not captured by an intimate image offence in any jurisdiction. The only legislation we found that could capture these images is Australia’s civil penalty regime. Section 44B of the Enhancing Online Safety Act 201584 prohibits “posting an intimate image”, which is defined in section 9B to include images where:

because of the person’s religious or cultural background, the person consistently wears particular attire of religious or cultural significance whenever the person is in public; and the material depicts, or appears to depict, the person:

(a) without that attire; and
(b) in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy.

There is an exception if the defendant did not know that the person consistently wears that attire whenever they are in public.85

6.110 The Australian eSafety Commission told us that this definition was developed by Parliamentary drafters. They said that the Government had made an active decision to include these kinds of images in the civil regime but not the criminal regime, because both regimes were amended at the same time.86 They suggested that it was deemed “safer” and “more appropriate” to include these images in the civil regime.87

6.111 Despite this, the majority of stakeholders were in favour of these images being captured by the criminal law. For example, Andrew Lord from Leigh Day told us that “culturally considerate images” should be included, and that whether an image is

84 Inserted by the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018.
85 Enhancing Online Safety Act 2015, s 44B(3).
86 As well as adding the intimate image abuse civil penalties regime to the Enhancing Online Safety Act 2015, the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018 inserted a new aggravated offence into the Commonwealth Criminal Code Act 1995. That offence, contained in s 474.17A of the Criminal Code Act 1995, prohibits using a carriage service to menace, harass or cause offence by sharing “private sexual material”. It covers sexual, nude and semi-nude images, but not the religiously and culturally sensitive images contained in the civil penalty regime.
87 Kelly Tallon, Jessica Di Blasio and Ella Serry (Australian eSafety Commission).
sexually inappropriate must be assessed on a case-by-case basis, taking into account the context. Moreover, Jonathan Bambro and Karen Morgan-Read from the CPS were in favour of a broad definition which captures images the victim views as intimate, taking into account the social and cultural context in which the image was taken, made or shared, so long as the perpetrator was aware of that context.

6.112 Some stakeholders commented specifically on the image of a Muslim woman who wears a hijab when in public, pictured not wearing a hijab with, for example, her bare shoulders and upper chest exposed. Danielle Citron was very supportive of this being covered, arguing that images like this target the victim's intimate life, her control over how her body is represented to the world and her cultural and religious beliefs. Additionally, Marilyn Selwood from ManKind argued that if such an image is shared without her consent that should be criminalised, because the effects can be “devastating”. Karen Morgan-Read, Violence Against Women and Girls Strategy Manager and Senior Policy Advisor at the CPS, also agreed that such an image should fall within the scope of the criminal law because, to the victim, it is an intimate image.

6.113 A few stakeholders had reservations about these kinds of images being captured. For instance, Alisdair Gillespie argued that having control over sexual and nude images of ourselves goes to the heart of our autonomy, and because of this criminal liability is much easier to justify. He was concerned that broadening the definition of the images captured would widen the scope of the offence(s) in a substantial, and potentially problematic, way. Jonathan Bambro, CPS Senior Policy Adviser, also raised concerns about the prosecution of such an offence, observing that an image of a Muslim woman without her hijab exposing her bare shoulders and upper chest would not generally be considered as intimate or sexual.

6.114 We also discussed with stakeholders how best to describe these kinds of images. Frances Ridout suggested that these images should be categorised as “intimate”, which would have a more expansive definition than “sexual”. Other stakeholders suggested that these are “private” images. Thomas Crofts, for example, argued that there is no reason to include sexual images taken in (often abusive) heterosexual relationships, but not private images taken of people from marginalised religious and cultural communities. Additionally, Erika Rackley was in favour of retaining the focus on private and sexual images (as in the disclosure offence) but expanding the definition of “private” to include these kinds of images.

6.115 However, the majority of stakeholders were in favour of these images falling within the category “sexual”. Sophie Gallagher from the Independent told us that, while these images cannot be classed as sexual by Western standards, to the women in the images, their families and their communities, these are often viewed as sexual.

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88 One of the examples referred to at 1.105(1) above.
89 Prof Danielle Citron (Boston University).
90 Prof Alisdair Gillespie (Lancaster University).
91 Frances Ridout (Queen Mary Legal Advice Centre).
92 Prof Thomas Crofts (City University, Hong Kong).
93 Prof Erika Rackley (University of Kent).
images. Adrian Scott agreed, arguing that the cultural and religious context makes these images sexual.94

6.116 Additionally, Clare McGlynn argued that images of Muslim women not wearing their hijabs and Hasidic Jewish women with their legs or ankles exposed are tied up in misogyny and the exposure of intimate parts of a woman’s body. She told us that these images are deemed sexual within some religious and cultural groups and that they form part of the sexual double standard, which is the backdrop to intimate image abuse.95 Finally, we heard from Kelly Johnson that when the disclosure offence was introduced it was not the right time to advocate for a broader understanding of “sexual”, because the focus had to be on convincing Parliamentarians and the public of the severity of harm that is caused by disclosing intimate images without consent. However, she believes the time has come to move away from Western conceptions of what is sexual, to include images deemed sexual in other religions and cultures.96

6.117 While there was broad support from stakeholders for including these kinds of images in intimate image offences, we acknowledge that there are difficulties with this. It will be difficult to draw the boundaries of “intimate” in this context. Our provisional view is that unlike the Scottish proposal and Australian civil penalty regime discussed above, an image of a Muslim woman not wearing her hijab would not meet this threshold. The examples brought to our attention as causing harm97 involve images that depict greater intimacy than this, analogous either to sexual or semi-nude images. We have not heard evidence that sharing or threatening to share images of a woman not wearing her hijab, where no part of her body that she usually covers in public other than her hair is exposed, causes the level and types of harms we set out in the previous chapter.

6.118 A further difficulty with the inclusion of these kinds of images is that while many stakeholders were aware that these images are intimate within certain religious groups, this may not be widely understood. The stakeholders we engaged with are experts in intimate image abuse. As a result, their knowledge of how this behaviour operates, including how it differs across and within religious groups, far surpasses what most people can be expected to understand about this behaviour. This is a difficulty, because the justification for criminalising certain behaviours is often said to be that people as a whole, within that society, believe that behaviour warrants sufficient condemnation to make it criminal.98 If it is not widely understood that these images are intimate within certain religious groups, then there may not be broad enough societal condemnation of this behaviour to justify criminalisation.

94 Dr Adrian Scott (Goldsmiths, University of London).
95 Prof Clare McGlynn QC (Hon) (Durham University).
96 Dr Kelly Johnson (Durham University).
97 See above, at 6.105.
98 See for example A Duff, Answering for Crime: Responsibility and Liability in the Criminal Law (91st ed 2007) who states “a justification of criminalisation will need to begin by specifying some value(s) that can be claimed to be public” at p 143.
6.119 A related difficulty with including these kinds of images in the definition of an intimate image is that someone may take or share an image of this kind without realising the harm it could cause to the depicted person. Here is an example:

Olivia attends her friend Sameera’s wedding. The wedding is segregated. Some of the women attending the wedding wear a hijab when in public, but have chosen not to wear it at the venue, because no men will be around. The female wedding guests all engage in singing and dancing and some of the women, who usually wear a hijab, are exposing both their hair and stomachs (as they are wearing lenghas and saris). Olivia takes a picture of the group. She later posts the image on Facebook, with the caption: “Had an amazing time at Sameera’s wedding. Thank you for being so welcoming!” She also tags some of the women who were attending. They see the post and are very distressed by the prospect of members of their community seeing them with their hair uncovered and stomachs exposed.

6.120 In this example, Olivia did not intend to distress the group of women depicted. In fact, her intention was to show her appreciation for how welcoming they had been. It is clear that Olivia did not foresee the possibility that sharing the image would distress them. She may have been unaware that the women cover their hair and do not expose certain body parts when in a public place. Alternatively, she may have been aware that they cover their hair and certain body parts when in a public place, but did not recognise the significance of that and the harm that the image could cause.

6.121 This example demonstrates that an offence which includes images which are intimate to members of a particular religious group risks overcriminalising if the intentions or level of awareness of the person who takes or sends the image are not taken into account.

6.122 However, as we outlined in the Introduction, in Chapter 10 we will provisionally propose two “additional” taking and sharing offences: one where the perpetrator intended to obtain sexual gratification (for themselves or someone else) and another where they intended to cause the victim distress, alarm or humiliation. If someone takes or shares an image considered sexual or semi-nude for religious reasons without consent in order to obtain sexual gratification, they clearly understand that the image is intimate. If their intention is to cause the victim distress, alarm or humiliation, they clearly appreciate the harm that taking or sharing such images can cause. Therefore, in our view including such images in the additional taking and sharing offences (but not in the base offences) would limit criminalisation to cases where sufficient culpability could be demonstrated.

6.123 Equally, these kinds of images could be included in the threatening to share offence we provisionally propose in Chapter 12. To commit this offence, the perpetrator must intend to cause the victim to fear that the threat will be carried out or be reckless as to whether the victim will fear that the threat will be carried out. In other words, they must intend their threat to be perceived as a threat, or foresee the risk that it will be
perceived as a threat. This means that if someone threatens to share such an image, they must appreciate the harm that sharing it could cause.

6.124 While we recognise that there are strong arguments in favour of including images that are intimate to particular religious groups, we also recognise the difficulties with defining the scope of these images. It would also be unusual for a criminal offence to be defined differently according to the beliefs of particular groups within society. As a result, we do not feel that we have sufficient information, or a sufficient sense of public opinion, to make a provisional proposal on this issue. We would therefore welcome consultees’ views on the inclusion of these images.

Consultation Question 10.

6.125 We welcome consultees’ views on whether and to what extent images which are considered intimate within particular religious groups should be included in intimate image offences, when the perpetrator is aware that the image is considered intimate by the person depicted.

“Not of a kind ordinarily done [or seen] in public”

6.126 In the voyeurism offence, images of individuals engaging in sexual acts are included. However, “sexual act” is qualified by “not of a kind ordinarily done in public”.99 Similarly, to be caught by the current sharing offence an image must be “private” as well as “sexual”, where “private” is defined as showing something “that is not of a kind ordinarily seen in public”.100 We have considered whether a similar element should qualify sexual, or the whole definition of the image, in our proposed offences.

6.127 The Explanatory Note to section 35(2) of the CJCA 2015 states:

The effect of subsection (2) is to exclude from the ambit of the offence a photograph or film that shows something that is of a kind ordinarily seen in public. This means that a photograph or film of something sexual (such as people kissing) would not fall within the ambit of the offence if what was shown was the kind of thing that might ordinarily take place in public.

This means that while Parliamentarians deemed kissing sexual, images of people kissing are not captured by the disclosure offence because kissing is something that is ordinarily seen in public.

6.128 Some stakeholders expressed support for the “not of a kind ordinarily seen in public” element in the disclosure offence. For example, Frances Ridout described it as “all encompassing, nice and clear” and suggested that people can easily understand it.101 Others worried that it excluded too many images from the scope of the offence. Ksenia Bakina suggested that some spaces, such as beaches, are public but also

100 Criminal Justice and Courts Act 2015, 35(2).
101 Frances Ridout (Queen Mary Legal Advice Centre).
private, and so the test needs to be more context dependent than what is ordinarily seen in those spaces.\textsuperscript{102}

6.129 We acknowledge that certain kinds of sexual, nude, semi-nude and private images should not be captured by our proposed offences. For instance, we are compelled by the example given in the Explanatory Note to section 35(2) of the CJCA 2015. We agree that while an image of people kissing could be deemed sexual, this is not something that should be caught by intimate image offences.

6.130 We have explored above when images of breasts would be considered sexual, nude, semi-nude or private for the purposes of an intimate image offence. Post-pubertal female breasts (whether natural or medically or cosmetically altered) are considered sexual in a way that the male chest area is not. Bare male chests and bare chests of young children of both genders are often seen in public, in parks in the summer and beaches for example. We would therefore not wish to criminalise images of male or prepubertal children’s chests unless they are otherwise sexual.\textsuperscript{103} Other jurisdictions\textsuperscript{104} have excluded such images by limiting the definition of “breasts” to female breasts. Another option would be to exclude male or prepubertal children’s chests from an offence by using one of the methods considered below, in the same way that we would exclude images of kissing.

6.131 What is the best approach to excluding these images? The two options we have considered are:

(1) Incorporating a “not ordinarily seen in public test” in a new offence; and

(2) Not incorporating such a test and instead providing a closed list of images that should be excluded from the offence.

Incorporating a “not ordinarily seen in public” test

6.132 As described above, this test is usefully employed in the current voyeurism offence to exclude images that would otherwise meet the criteria, if they are of things that are normally seen in public, such as kissing. There is some stakeholder support for this test, and it would exclude the images we describe above that we agree should be excluded including kissing and bare male chests.

6.133 However, it is possible that this test would be too broad. We have identified three types of image that such a test would exclude that we do not want to exclude. First, this test would exclude images of people breastfeeding, where their breasts are exposed, partially exposed or covered only with underwear. This is because people breastfeeding is something that is commonly seen in public. As we discuss in Chapter 11, we do not think that images of people breastfeeding should be excluded from intimate image offences, even when they are breastfeeding in a public place.

\textsuperscript{102} Dr Ksenia Bakina (Privacy International).

\textsuperscript{103} Indecent images of children would be captured by the Protection of Children Act 1978; these provisions are outside of the scope of this project.

\textsuperscript{104} Including South Australia and Victoria.
6.134 Secondly, this test would exclude many “downblousing” images, which we provisionally propose in Chapter 7 should be caught by our proposed “taking” offence. Many people choose to wear low cut tops, and as a result exposed cleavage and partially exposed bras are often seen in public. If this test were applied, “downblousing” images would only be covered if the victim were exposed to a greater degree than is ordinarily seen in public. This is illogical. “Downblousing” victims should be protected regardless of whether the image exposes more of their breasts or underwear than is ordinarily seen in public. The question is how much they have chosen to expose. If an image is taken down an individual’s top without consent and exposes more than they have chosen to expose, then they should be protected.

6.135 Finally, this test would exclude images which are intimate to members of particular religious groups. We are seeking consultees’ views on whether these images should be included (if the person taking or sharing the image is aware that the image is considered intimate by the person depicted). The difficulty is that these images are ordinarily seen in public. Therefore, adding this test to the definition of the image would exclude these images from its scope.

Closed list of excluded images

6.136 The advantage of excluding specific images, rather than having a broader test, is that images we do not want to exclude will not be excluded, including breastfeeding and downblousing.

6.137 The disadvantage of this approach is that it is inflexible. It is at least possible that the list would fail to exclude all of the images that should be excluded, especially given that what is ordinarily seen in public may change in the future. This approach could not adapt as societal norms about what it is appropriate to do, and how it is appropriate to be seen, in public change. It may also exclude some kinds of images entirely, when a more nuanced approach is needed. We would still also be left with the difficult task of defining “breasts” so that it only includes female breasts in an offence, and does not exclude the chest area of young females who have started puberty, women who have undergone mastectomies and transwomen.

6.138 In sum, there are arguments for and against including a “not of a kind ordinarily seen in public” test within the definition of the image. At present, our view is that the arguments against including this test are stronger. However, we have not identified many examples of images that this test could usefully be used to exclude from the scope of our proposed offences. Therefore, before we reach a view on whether this test should be included within the definition of the image, we would value consultees’ views on whether this test could be used to exclude any other kinds of images.

**Consultation Question 11.**

6.139 Are consultees aware of any images “of a kind ordinarily seen in public” that should be excluded from the scope of intimate image offences (other than images of people kissing)?
**Consultation Question 12.**

6.140 Do consultees think that there should be:

1. a “not ordinarily seen in public” element to intimate image offences; or

2. a list of images that should be excluded from intimate image offences, for example images of people kissing?

**CONCLUSION**

6.141 This chapter has considered both how “image” should be defined and the types of images that should be included within intimate image offences. We provisionally proposed that intimate images include images that are sexual (by nature or when taken as a whole), nude or semi-nude and private. We also noted that if altered images were included within a sharing offence, the provision that excludes altered images from the definition of the image in the disclosure offence could not be replicated in a new definition of the image.

6.142 We have suggested broadening the images captured by the current intimate image offences in two ways. First, by adding to the sharing offence images caught by the current voyeurism offence. These are images of:

1. buttocks or breasts (exposed or covered with underwear);

2. genitals (covered with underwear); and

3. private images.

Secondly, by capturing “upskirting” and “downblousing” images, whether taken or shared.

6.143 We have also asked for consultees’ views on whether the concept of “intimate” should be broadened to include images that are intimate to members of particular religious groups.
Chapter 7: The acts

INTRODUCTION

7.1 This chapter considers which actions or behaviours should be criminalised as part of an intimate image offence, or a collection of intimate image offences. Certain forms of taking and sharing intimate images without consent are already criminalised in England and Wales.1 We will therefore consider whether offences of taking and sharing should be expanded to cover a wider range of behaviours, namely “downblousing”, sharing images which have been altered to appear sexual or nude and sharing an intimate image with the person in the image. We also consider what “taking” or “sharing” an image means and how these terms should be defined.

7.2 In addition, we will consider whether making an intimate image without consent (without sharing or threatening to share the image) and possessing or retaining an intimate image without consent should be criminalised. Neither of these behaviours are currently criminalised in England and Wales, so we set out the arguments for and against introducing such offences.

7.3 The final form of intimate image abuse we will discuss in this consultation paper, threatening to take, make or share an intimate image, is considered in Chapter 12.

TAKING AN INTIMATE IMAGE WITHOUT CONSENT

7.4 In this section we will consider four issues:

(1) which behaviours are criminal under the current taking offences;

(2) what it means to “take” an intimate image;

(3) whether the current voyeurism and “upskirting” offences could be combined into one taking offence; and

(4) whether “downblousing” images should be covered by a taking offence.

The current taking offences

7.5 As we discussed in Chapter 3, there are currently two offences that specifically cover the taking of an intimate image without consent.

(1) Recording someone “doing a private act” without consent, knowing that the victim does not consent, so that the person recording or someone else can look at the image for the purpose of obtaining sexual gratification, is an offence under section 67(3) of the Sexual Offences Act 2003 (“SOA 2003”). We refer to this as the voyeurism offence.

1 The offences are set out in detail in Chapter 3 and outlined below at paragraphs 7.7 and 7.111.
(2) Recording an image beneath someone’s clothing of their genitals or buttocks, or the underwear covering their genitals or buttocks, in circumstances where their genitals, buttocks or underwear would not otherwise be visible,

(a) without consent and without reasonably believing that the victim consents; and

(b) with the intention of obtaining sexual gratification for oneself or someone else, or humiliating, alarming or distressing the victim,

is an offence under section 67A(2) of the SOA 2003. We refer to this as the “upskirting” offence.

7.6 In our pre-consultation stakeholder meetings, it was made clear that these behaviours are still prevalent and warrant criminalisation. The behaviours captured by both of these offences would remain criminal under our new provisionally proposed offences. Importantly, this is not to say that the motivations prescribed by the offences (i.e. to obtain sexual gratification or to humiliate, alarm or distress the victim) must be retained; whether this is desirable will be considered in Chapter 10.

“Taking”

“Taking” in England and Wales

7.7 As outlined above, section 67(3) of the SOA 2003 makes it an offence to “record” another person doing a private act without their consent. The “upskirting” offence in section 67A(2) of the SOA 2003 also uses the word “record”. “Record” is not defined, but the Explanatory Note to section 67(3) gives the example of someone secretly filming someone else masturbating in their bedroom. Presumably, both offences were intended to capture still images (or pictures) as well as videos.2

7.8 The same approach was taken in relation to indecent images of children. Under section 1 of the Protection of Children Act 1978 (“PCA 1978”): “it is an offence for a person—

(a) to take, or permit to be taken, or to make, any indecent photograph or pseudo-photograph of a child”.

“Take” was not defined in the Act, and the CPS guidance on the offence specifies that “take” should be given its “natural and ordinary meaning”.3

2 “Video” and “picture” were used interchangeably during the Parliamentary debates on the “upskirting” Bill. See, for instance, Hansard (HC) 5 September 2018, vol 646. Additionally, people who have taken pictures rather than videos have been found guilty of voyeurism and “upskirting”. See, for example, Crown Prosecution Service, CPS secures first upskirting convictions (25 September 2019) https://www.cps.gov.uk/cps/news/cps-secures-first-upskirting-convictions (last visited 23 February 2021).

“Taking” in other jurisdictions

7.9 The majority of Australian jurisdictions have offences of taking an intimate image without consent. Therefore, it is worth considering how they define taking.

7.10 To look at three examples, in New South Wales it is an offence to “record” an intimate image without consent.\(^4\) In Queensland it is an offence to “visually record” someone who is in a private place, or engaging in a private act, in circumstances where they could expect privacy.\(^5\) In South Australia it is an offence to “engage in indecent filming”.\(^6\) For the purposes of these offences, “record”, “visually record” and “film” are given short (and in two cases circular) definitions.

7.11 In New South Wales’ offence, to “record” an image means to “record, take or capture an image, by any means”.\(^7\) In Queensland’s taking offence, to “visually record” a person is to “record, or transmit, by any means, moving or still images of the person or part of the person”.\(^8\) Both of these definitions are to some extent circular, using the word “record” to define “record”. The definition of “film” in South Australia is not circular, but it is very limited: “film” means “take images by any means”.\(^9\) In sum, these definitions shed little more light on what recording (or filming) means than do sections 67(3) and 67A(2) of the SOA 2003, where “record” is not defined at all.

Defining “taking”

7.12 During our pre-consultation discussions with stakeholders, we were not made aware of any issues with the legislative term “record” in the voyeurism and “upskirting” offences. Nor were we told that the absence of a definition for the term “record” has created problems, or made the law unclear, in practice.

7.13 The selection of appropriate legislative language and the need for a statutory definition are matters for those drafting the legislation. However, we do invite consultees’ views on whether the current voyeurism or “upskirting” offences, or the taking offence in section 1 of the PCA 1978, fail to capture any forms of “taking” that ought to be criminalised.

Consultation Question 13.

7.14 Are there any forms of “taking” that the current voyeurism or “upskirting” offences, or the taking offence in section 1 of the PCA 1978, fail to capture?

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\(^4\) Crimes Act 1900, s 91P.
\(^5\) Criminal Code 1899, s 227A.
\(^6\) Summary Offences Act 1953, s 26D.
\(^7\) Crimes Act 1900, s 91N.
\(^8\) Criminal Code 1899, s 207A.
\(^9\) Summary Offences Act 1953, s 26A.
In Chapter 6 we have proposed that “images” for the purpose of an offence include photographs and videos, but not artwork such as drawings or sculptures. While we do not consider it is necessary to define taking, we do think that “taking” should include any means by which such an image could be captured and produced. This would include taking a photo or video with a camera whether digital or analogue and using a mobile phone or computer to capture a photograph or video, whether using the camera function or an app. “Taking” is the act by which a relevant image is produced. It is distinct from “making”, explored further below, as an image is “taken” where the individual captured by the photograph or video is in fact nude, semi-nude, or engaged in a sexual or private act.

**Copying as a form of taking**

Copying is a specific form of capturing an image that requires further exploration. Copying can be described as producing a likeness of an image that already exists. A large amount of copying is done digitally; for example, taking a screenshot of an image that appears on a phone or computer or downloading an existing image and saving it in another location. An image can also be copied using a photocopy machine. We consider that there is a spectrum of copying behaviour, with some types of copying akin to taking, and some which are more like retaining an image. We set out below four examples of common types of copying and consider whether they should constitute “taking” for an offence. In this section we are concerned with the nature of the copying act itself, not the level of harm that each may cause.

**Screenshot of a videocall**

During the recent COVID-19 pandemic, many communications have moved online, including social interactions that involve nudity or sexual activity. Videocall software has become part of people’s lives like never before. Videocalls capture thousands of images of one user in real time and make them available to the other user also in real time, as a moving video. Let us consider a couple who are unable to meet in person and decide to use a videocall system such as Skype, Teams or Zoom to hold a virtual date. The date becomes sexual in nature and partner A decides to strip naked for B. Unknown to A, and without their consent, B uses the “screenshot” function on their computer to take a still of the videocall where A can be seen to be naked. By using the screenshot function B has copied the image that was visible on their screen. This image is then stored on B’s computer. We consider this is very similar to non-virtual examples of non-consensual taking. A only consented to being naked on a videocall which is interactive and not intended to be recorded or a lasting image. By taking a screenshot, B has created a lasting intimate image of something that was intended to be fleeting. We consider that this scenario should be included in “taking” as it is so similar to other forms of taking a photo. The same effect would be created if B had used their mobile phone camera to take a photo of the computer screen at the moment that A was nude; it is not the fact it is a “screenshot” and therefore copying that makes it harmful behaviour, it is the effect of capturing a photo or video without consent of something that was “live”.

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10 In the same way that the exposure offence in SOA 2003, s 66 can be committed via videocall, see R v Alderton [2014] EWCA Crim 2204.
Screenshot of a Snapchat photo

7.18 There are a number of mobile apps such as Snapchat or Instagram that allow users to send photos to another person that are time limited. The photo, once sent, is only available to the recipient for a set period of time, such as 60 seconds, before it expires and can no longer be viewed by the recipient. A copy is not stored on the recipient’s phone; it is usually only viewable inside the app. Some app users will “screenshot” the image so they can view it again after the original has expired. On some apps, such as Snapchat, the original sender is alerted to the fact a screenshot has been taken, but there are ways to circumvent this, and webpages dedicated to teaching people how.\footnote{For example, Cassandra, “How to screenshot on Snapchat without them knowing” (22 December 2020) Alphr, \url{https://www.alphr.com/social-media/1007983/how-to-screenshot-on-snapchat-without-them-knowing/} (last visited 23 February 2021).} By taking a screenshot, one can create a copy of the original image.

7.19 Let us consider again a couple who are in the early stages of dating but unable to see each other in person. A sends B a nude photo via Snapchat, A chooses Snapchat as they know the photo will not be stored indefinitely and can only be viewed by B for a short period of time. B takes a screenshot of the image without A knowing. B has copied the original image and saved the copy on their device. In a way, it is similar to the videocall example as the image was only available momentarily and the copying has created a permanent image for the recipient. However, unlike the videocall, the image does already exist as a static, permanent image for the person depicted. They have taken the photo, capturing themselves in an intimate way and made it available as an image to the recipient who then copied it. In the videocall example the person depicted in the resultant image did not “take” or “record” themselves in the same way; they made themselves visible to the recipient as they would have done were they in person. The depicted person has significantly more agency over the ultimate image when they have taken it themselves and sent it; they will have seen it before it was shared, they can alter it and approve it before a lasting image is made.

7.20 By contrast, in the videocall example, while the person made themselves visible on a screen as it is “live”, they do not have the same control over every still image that could possibly be captured by a screenshot. To highlight this, let us consider instead that on the videocall, A remained fully clothed and unaware, her shirt buttons came undone so that her naked breast was visible. On seeing this, B took a screenshot of the videocall capturing that intimate image without consent. This is very similar behaviour to taking an intimate image without consent when A is in front of B, whether in the bedroom or a train carriage. Screenshoting an image that already exists, whether a recorded video or still photo, is a less similar act of “taking” in this way. For this reason, without comment on the wrongfulness of the copying behaviour, we do not consider that taking a screenshot of a photo or video that was made available on Snapchat should be considered as taking. Instead, we consider that this is more akin to retaining an image. The recipient was given access to an image then had that access revoked. The revocation was set at the outset by the sender choosing to share in a way that ensures the image would expire after a set time and the recipient would lose access to that image. We therefore consider this type of behaviour should be considered as retention, which is discussed further below.
**Downloading a photo or video from a website**

7.21 If a photo or video exists on a website, it is often quite a simple task to download it and save it in a different location, for example on a personal computer drive. This is a form of copying, as by downloading, one is copying the original document and creating a second version of it which can then be saved in a different location. Sexual or nude images that are available to the public on pornographic websites could be copied in this way. We consider that this act of downloading and saving is distinctly different from the type of acts intended to be captured by current taking offences. It does not involve recording or capturing a live person who is in fact nude, semi-nude or engaged in a sexual or private act; instead it is duplicating an image that already shows that. The original image would still remain accessible to the person doing the copying whether they copy it or not. Where the original image, or access to the image, is later removed, this makes this behaviour more akin to retaining or possessing an intimate image rather than “taking”. We discuss retention further below.

**Photocopying a photo**

7.22 Using a photocopy machine or a scanner and printer, it is simple and inexpensive to make copies of photos for a variety of purposes. This is the most obvious form of physical copying and happens routinely in offices or photo printing shops. It can only be done with a photo print to which one has access. In a similar way to downloading, we consider that this is distinct in nature from the acts currently covered by taking offences. The image already exists in the exact, or very similar, form in which it is then duplicated. We do not consider that such forms of copying should be included as “taking”. In a similar way to the above two examples, this behaviour is more akin to retaining or possessing an image rather than taking one. Where the copying involves altering the original image some way, this would be considered under the definition of “making”, which we discuss below.

**Limitation on “taking”**

7.23 In the examples above we look at whether the copying behaviour can be defined as “taking”. We conclude that taking a screenshot of a videocall being shown in real time should fall under the definition of taking, but that copying an image or video that was already “taken” then made available to a recipient, should not. We consider those behaviours below, as either retaining or possessing an image, or in some instances, making an image. Copying therefore includes some behaviour that is taking, and some that should be excluded from a definition of taking. We propose that “taking” should be limited to situations where, but for the acts of the perpetrator, the image would not otherwise exist. This would include the videocall example as the image only exists because B took it; the videocall from which the image was captured is a real time moving image or stream, that was not otherwise recorded or taken by A or anyone else. Taking would not include any of the other examples, as those images existed in their original form at the time of the copying; the acts of the copier only served to produce a second version of the image. It does not matter whether the original image continued to exist, just that it did exist at the time of copying.
Consultation Question 14.

7.24 We provisionally propose that a taking offence should only include such behaviour where, but for the acts of the perpetrator, the image would not otherwise exist.

Do consultees agree?

“Installing”

7.25 Under section 67(4) of the SOA 2003, it is an offence to install equipment, construct or adapt a structure to enable oneself or another to commit an offence under section 67(1), the observation offence. This offence applies even if the subsequent observation offence is not carried out. The “installing” provision of section 67(1) therefore only applies when the equipment that is installed is able to show live images of a private or sexual act. That section was not extended to apply to the recording offence. Let us consider an example: A secretly installs a video camera in the bathroom of B to record B showering without their consent. A intends to watch the recording later for their own sexual gratification, but B discovers the camera before a recording is made. A has not committed an offence under the voyeurism provisions. If A had instead installed a camera which live-streamed the images to his mobile phone, A would have committed a voyeurism offence even if B discovered it before any image was caught. This limitation of the installing offence was debated in 2003, when the Sexual Offences Bill was in the House of Lords. When advising the House that the installing offence would not apply to the recording or operating equipment offences under subsections (2) and (3), the then Lord Chancellor Lord Falconer said:

We consider that an offence of this nature would be too complicated. A jury would have to consider whether a person installed equipment with the intention of enabling another person to record a third person doing a private act with the intention of enabling a fourth person to obtain sexual gratification from looking at the image. However, if a person installs equipment in such circumstances, he may still be guilty of conspiring to commit a subsection (2) or (3) offence or of aiding and abetting such an offence.12

7.26 The intent was that installing equipment for the purposes of committing the recording offence could still be caught by existing criminal law concepts such as aiding and abetting or conspiracy, although these would only apply if more than one person were involved in the conduct. If an individual D were to install equipment, construct or adapt a structure to enable D subsequently to commit a recording offence, no offence would be committed.13

12 Hansard (HL) 19 May 2003, vol 648, col 571.

13 Unless recording had begun, this would not likely amount to attempted voyeurism because it would not be “more than merely preparatory”. Criminal Attempts Act 1981, s 1.
7.27 We do not currently have evidence of installing behaviour where the taking did not subsequently occur. We invite consultees to share evidence of behaviour where equipment was installed to enable taking, but the taking itself did not occur.

Consultation Question 15.

7.28 Do consultees have evidence of, or a comment on the prevalence of, installing equipment in order to take an intimate image without consent, where the taking did not then occur?

Combining the voyeurism and “upskirting” offences

7.29 The third issue we are concerned with in relation to “taking” is whether there should continue to be two separate taking offences, or whether combining these offences into a single offence would be preferable.

7.30 As we explained above at paragraph 7.5, voyeurism and “upskirting” are currently two separate offences. The “upskirting” offence was added to the SOA 2003 through the Voyeurism (Offences) Act 2019. It was introduced because the voyeurism offence was not able to capture cases of “upskirting” for two reasons. First, the definition of the image in the voyeurism offence requires that “the person’s genitals, buttocks or breasts are exposed or covered only with underwear”. As we explained in Chapter 6, this cannot capture “upskirting” images because the depicted person’s genitals or buttocks were not exposed or covered only with underwear, they were also covered with clothing.14 Secondly, the voyeurism offence includes a requirement that the victim was “doing a private act”. This requires them to have been in “a place which, in the circumstances, would reasonably be expected to provide privacy”.15 Clearly, someone who is “upskirted” in a public place is not in a place where they could reasonably expect privacy.

7.31 These limitations of the voyeurism offence aside, we are concerned with whether, in principle, it would be desirable to combine the voyeurism and “upskirting” offences into one taking offence. Our view is that combining these two offences would be desirable. It would simplify and consolidate the law, so that police and prosecutors would no longer have to consider two offences (alongside a myriad of other offences not designed to target image abuse) when faced with a case of non-consensual taking. To date, intimate image offences in England and Wales have been introduced in response to public pressure to target isolated forms of image abuse – the “upskirting” offence is perhaps the best example of this.16 Our view is that this piecemeal approach to enacting intimate image laws is undesirable, because it makes the law

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15 Sexual Offences Act 2003, s 68(1).
unnecessarily complex and can leave gaps in the law (see the “downblousing” section beginning at paragraph 7.35 below).

7.32 In Chapter 6 we considered what kinds of images should be captured by intimate image offences. We provisionally proposed that the same kinds of images should be caught by taking and sharing offences, and that this should include “semi-nude” images, defined as an image of a person’s genitals, buttocks or breasts, exposed or covered with underwear.\(^{17}\) We suggested that the focus should be on what the image depicts, rather than whether the depicted person is semi-nude, which ensures that “upskirting” images could be caught. Therefore, there is scope for a single definition of the image to include images currently captured by both the voyeurism and “upskirting” offences.

7.33 On this basis, our provisional view is that the behaviours caught by the current voyeurism and “upskirting” offences should be caught by a single taking offence.

**Consultation Question 16.**

7.34 We provisionally propose that the behaviour prohibited by the current voyeurism and “upskirting” offences should be combined in a single taking offence. Do consultees agree?

“Downblousing”

The Voyeurism (Offences) Act 2019

7.35 As we highlighted above at paragraph 7.30, “upskirting” was added to the SOA 2003 through the Voyeurism (Offences) Act 2019. This legislation raced through Parliament, in response to campaigning and lobbying efforts headed by Gina Martin, who was “upskirted” at a music festival and the police failed to charge the perpetrators.\(^{18}\)

7.36 As Gina Martin repeatedly stated when giving evidence to the Public Bill Committee, this legislation was specifically designed to target “upskirting”:

> I think it has to be focused, it has to be simple and it has to focus on this one issue. We all know there are other broader issues that we want to focus on, but this is an upskirting Bill and it has to focus on just that.\(^{19}\)

7.37 Some Parliamentarians questioned whether the legislation was too narrow, or whether it should be used to address further gaps in intimate image abuse legislation. During

\(^{17}\) In Chapter 6 at para 6.56 we also consider how this definition would need to be adapted to accommodate downblousing.

\(^{18}\) Because there were “two or more persons” present at the festival, and it was held in a public place, the police could have charged the perpetrators with the common law offence of outraging public decency. See Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com No 358 p 2-3.

\(^{19}\) *Hansard* (HC) Public Bill Committee for the Voyeurism (Offences) (No. 2) Bill (First sitting), 10 July 2018, col 3.
the First Sitting of the Public Bill Committee, Stella Creasy MP raised the issue of taking pictures down someone’s top of their breasts, or “downblousing”. Responding to Assistant Commissioner Martin Hewitt, then Deputy Chair of the National Police Chiefs’ Council, she said:

You have made a powerful case for the impact on victims of these kinds of offence. Do you think that impact is any less if it is a picture of somebody’s breasts, rather than their buttocks or genitals?\(^{20}\)

Assistant Commissioner Hewitt replied:

I am not sure that I can answer that question, but I understand the point you are making. It feels to me that the intrusion of going in and under a garment—the skirt; I know you don’t have to physically—takes it to a slightly further stage than an image of somebody that is taken clearly outside their clothing. You are in the same territory, but I do think there is something particularly invasive about somebody being able to take an image up a skirt. But I understand the point you are making.\(^{21}\)

Assistant Commissioner Hewitt later added:

To my knowledge, the phenomenon we are facing, particularly at the moment, is this phenomenon of upskirting, and it would be really good for us to be able to send a very clear message. I get that someone taking a photograph of someone’s breasts or backside from other angles is offensive, but I am not sure—I think it might confuse.\(^{22}\)

7.38 Assistant Commissioner Hewitt seems to have been making two arguments. First, that “upskirting” is “particularly invasive” and so requires special attention. Secondly, that “upskirting” was the most common phenomenon at the time. We consider the validity of both of these arguments below.

The prevalence and harms

7.39 Those working in the field of image-based abuse have long argued that “downblousing” causes the same kinds of harms, and is just as much a violation of privacy, as “upskirting”. For example, in 2015 Professor Clare McGlynn QC (Hon) wrote:

Upskirting and downblousing are gross invasions of privacy and a form of street harassment that leaves women feeling vulnerable in public spaces, impacting on their quality of life, access to public space and feelings of security.\(^{23}\)

\(^{20}\) Above, col 16.  
\(^{21}\) Above, col 16.  
\(^{22}\) Hansard (HC) Public Bill Committee for the Voyeurism (Offences) (No. 2) Bill (First sitting), 10 July 2018, col 16.  
Similarly, after the Voyeurism (Offences) Act 2019 was passed, Professor Alisdair Gillespie wrote an article discussing the Act’s shortcomings, including the failure to include “downblousing” images. He wrote:

Where someone is using equipment to see down the top of a woman to observe or record her breasts, this is as much an affront to her dignity as operating equipment up her skirt. As with genitalia, many women will exercise a conscious choice as to who sees their naked breasts. Whilst not a sexual organ, the female breast remains an intimate part of her body, and she alone should control who sees her breasts. It is notable that the original offence of voyeurism included the observation of the female breast, and it is not clear why the VOA 2019 did not do likewise.24

There is also evidence that “downblousing” happens frequently. As we outlined in Chapter 2, a study by the Australian eSafety Commission found that the most common form of intimate image abuse for women aged 18 and over was images of their cleavage (20%). Among all participants the figure was 14%, compared with 3% for “upskirting”.25 Websites hosting “downblousing” images, such as “OneClickChick” and “The Candid Board”, contain thousands of images.

The law in other jurisdictions

In Scotland, the law in this area is very similar to in England and Wales. Under section 9(4B) of the Sexual Offences (Scotland) Act 2009, it is an offence to record “upskirting” images for the purpose of looking at the image to obtain sexual gratification or humiliating, distressing or alarming the victim. “Downblousing” is not covered by this legislation.

However, other jurisdictions have criminalised “downblousing” alongside “upskirting”. In 2015, the Australian Capital Territory amended its voyeurism legislation to criminalise both “upskirting” and “downblousing”.26 Under section 61B(5) of the Crimes Act 1900:

A person (the offender) commits an offence if—

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<th>(a)</th>
<th>the offender observes with the aid of a device or captures visual data of—</th>
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<td>(i)</td>
<td>another person’s genital or anal region; or</td>
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<td>(ii)</td>
<td>for a female or a transgender or intersex person who identifies as a female—the breasts; and</td>
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(b) a reasonable person would, in all the circumstances, consider the observing or capturing of visual data to be an invasion of privacy.

7.44 Additionally, New South Wales has criminalised filming another person’s “private parts” without consent.

A person who, for the purpose of obtaining, or enabling another person to obtain, sexual arousal or sexual gratification, films another person’s private parts, in circumstances in which a reasonable person would reasonably expect the person’s private parts could not be filmed—

(a) without the consent of the person being filmed to being filmed for that purpose; and

(b) knowing that the person being filmed does not consent to being filmed for that purpose,

is guilty of an offence.27

7.45 “Private parts” includes a person’s genital or anal area (bare or covered by underwear) and the breasts of a female, transgender or intersex person.28 Therefore, this offence would cover “upskirting” and “downblousing”.

Criminalising “downblousing”

7.46 The evidence shows that “downblousing” can cause significant harm, and it is a form of abuse that specifically targets women. It also appears to be a common phenomenon, although it is near impossible to form an accurate picture of how common it is. Many women do not report the abuse, likely because it is not currently criminalised in England and Wales. It is also likely that many victims of “downblousing” do not learn that they have been targeted. Therefore, we are of the view that recording down someone’s top without consent should be a criminal offence, in the same way that recording up someone’s clothing is.

7.47 In Chapter 6, we provisionally proposed that three categories of images should be covered by intimate image offences: images that are sexual, nude or semi-nude and private. We also suggested that “downblousing” images could fall within the definition of “semi-nude”, if this category were expanded to include images of partially exposed breasts, taken down the depicted person’s top.

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27 Crimes Act 1900, s 91L.
28 Crimes Act 1900, s 91N.
Consultation Question 17.

7.48 We provisionally propose that taking or recording an image of someone’s breasts, or the underwear covering their breasts, down their top without consent (“downblousing”) should be a criminal offence.

Do consultees agree?

**POSSESSING AN INTIMATE IMAGE WITHOUT CONSENT**

7.49 The second behaviour we address in relation to intimate images is possession.\(^{29}\) In the previous section we discussed when taking intimate images without consent could be a criminal offence, and in subsequent sections we will discuss when making or sharing intimate images without consent could be a criminal offence. Once an image has been taken or made, and for an image to be shared, it is usually in the possession of the perpetrator. We now consider whether, and in what circumstances that mere possession of an intimate image without consent, without any element of taking, making or sharing, should be criminalised. At paragraph 7.16, above, we have discussed different forms of copying and identified ones that may feel more akin to taking action to maintain possession of an image. We will now consider these scenarios further.

**The current law**

**England and Wales**

7.50 Possession of an intimate image without consent is not currently a crime in England and Wales. Possession offences are limited to indecent images of children\(^ {30}\) and “extreme pornography”.\(^ {31}\)

**Other jurisdictions**

7.51 We are aware of three jurisdictions where possessing an intimate image is criminalised. Crucially, in at least two of these jurisdictions it is only an offence to possess an image which was originally taken without consent.\(^ {32}\)

7.52 First, in New Zealand, it is an offence to possess an “intimate visual recording”, defined as a recording “that is made in any medium using any device without the knowledge or consent of the person who is the subject of the recording”.\(^ {33}\) The two offences state:

\(^{29}\) The final behaviour we consider is threats, in Chapter 12.

\(^{30}\) Criminal Justice Act 1988, s 160.

\(^{31}\) Criminal Justice and Immigration Act 2008, s 63.

\(^{32}\) The possible exception is the Tasmanian offence. See below.

\(^{33}\) The recording must also depict 1) the subject of the recording with their genitals, pubic area, buttocks or breasts (female) exposed or covered only with underwear; engaging in a sexual act; or undressing,
(1) Everyone is liable to imprisonment for a term not exceeding 3 years who has in his or her possession an intimate visual recording —

(a) for the purpose of publishing, exporting or selling the intimate visual recording; and

(b) knowing it to be an intimate visual recording, or being reckless as to whether it is an intimate visual recording.

(2) Everyone is liable to imprisonment for a term not exceeding 1 year who, without reasonable excuse, has in his or her possession an intimate visual recording knowing it to be an intimate visual recording.\(^34\)

7.53 In sum, mere possession is criminalised where the defendant had actual knowledge that the image was an “intimate visual recording”. Where the defendant is only reckless as to whether it is an “intimate visual recording”, they must also possess the image for the purpose of publishing, exporting or selling it.

7.54 Secondly, Singapore’s possession offence reads as follows:

(1) Any person shall be guilty of an offence who has in his possession or has gained access to an image or recording of another person and —

(a) knows or has reason to believe that the image or recording was obtained through the commission of an offence under section 377BB;\(^35\) or

(b) knows or has reason to believe that —

(i) the image or recording is an intimate image or recording;

(ii) the possession of or access to the image or recording was without the consent of the person depicted in the image or recording; and

(iii) the possession of or access to the image or recording will or is likely to cause humiliation, alarm or distress to the person depicted in the image or recording.\(^36\)

7.55 To summarise, this offence covers the possession of images taken without consent, where the perpetrator knows or has reason to believe that:

(1) the image is an intimate image or recording;

(2) it was taken without consent; and

showering or using the toilet or 2) the subject of the recording’s genitals, pubic area, buttocks of breasts (female) taken from beneath their clothing or through their outer clothing.

\(^{34}\) Crimes Act 1961, s 216I.

\(^{35}\) Reference to s 377BB is to Singapore’s voyeurism offence.

\(^{36}\) Criminal Law Reform Act 2019, s 377BD.
possession of the image will or is likely to cause humiliation, alarm or distress to the person in the image.

7.56 Finally, in the Australian state of Tasmania it is an offence to be in possession of a "prohibited visual recording". The offence reads:

(1) A person who has in his or her possession a prohibited visual recording having reason to believe it to be a prohibited visual recording is guilty of an offence.37

A "prohibited visual recording" is defined as:

(a) a visual recording of the person in a private place or engaging in a private act made in circumstances where a reasonable adult would expect to be afforded privacy; or

(b) a visual recording of the person's genital or anal region, when it is covered only by underwear or bare, made in circumstances where a reasonable adult would expect to be afforded privacy in relation to that region.38

The offence does not state that the image must have been taken without consent. However, this offence and the distribution offence in section 13B are intended to link back to the taking offence in section 13A, where the image must be taken without consent.39 Therefore, presumably someone would not be charged with a possession offence where the image was taken with consent.

Stakeholders' views

7.57 A few stakeholders provided us with examples of individuals being in possession of intimate images without consent. These examples tended to focus on cases where someone took an intimate image of another person with consent, or was sent an intimate image by another person with consent, but then retained the image after they had been asked to delete it.40 Stakeholders suggested that this often happens when the person in possession of the image and the depicted person were in a relationship which ended acrimoniously, or during an abusive relationship.41

7.58 But this is not the only form of non-consensual intimate image possession. Emma Short informed us that intimate images are sometimes obtained by hacking the victim's device, for instance when they bring their phone to a phone repair shop. Kelly Johnson also indicated that some victims report being unsure how the person in possession of their intimate image obtained it.

7.59 Some stakeholders were in favour of a possession offence. For instance, Alisdair Gillespie suggested that a criminal offence would empower victims to force the

37 Police Offences Act 1935, s 13C.
38 Police Offences Act 1935, s 13B.
39 Police Offences Act 1935, s 13A.
40 Matthew Hardcastle (Kingsley Napley); and Dr Ksenia Bakina (Privacy International).
41 Dr Kelly Johnson and Dr Charlotte Bishop.
perpetrator to delete the image. He noted that civil remedies are prohibitively expensive, time-consuming and difficult to navigate, so it is vital for the criminal law adequately to protect victims.42

7.60 However, stakeholders also expressed reservations in relation to a possession offence. One key issue, also raised by Alisdair Gillespie, is circumstances where the person in possession of the image has forgotten that they have it or did not realise that it had been saved to their device. For example, where someone clicks on a picture or watches a video online and it goes into their downloads folder, or where they were sent a picture or video on WhatsApp and it was automatically saved to their gallery.

7.61 Any possession offence would need to contain at least one mental element: that the perpetrator was intentionally in possession of the image.43 This would ensure that anyone who did not realise they were in possession of an intimate image (which the person in the image did not consent to them having) would not be caught. What about individuals who know they are in possession of an intimate image, but they do not realise that the person in the image does not consent to them having the image?

7.62 Several elements could be added to a possession offence to increase the perpetrator’s culpability. These elements are that:

(1) the perpetrator knew that the victim did not consent;
(2) the perpetrator did not reasonably believe that the victim consented;
(3) the perpetrator intended, through their possession of the image, to:
   (a) obtain sexual gratification; or
   (b) cause the victim to suffer humiliation, alarm or distress.

7.63 Stakeholders agreed that one or more of these elements should be included within a possession offence. Stakeholders were also in agreement that proof of actual harm should not be an element of the offence.44

7.64 A related issue is what a possession offence would be intended to capture. As we mentioned above and discussed in Chapter 2, most of the examples raised with us by stakeholders were of individuals holding onto intimate images after consent had been revoked. On this basis, Dr Charlotte van der Westhuizen and Dr Alex Dymock suggested to us that “possession” is too broad, potentially capturing a number of people who should not be criminalised. It could capture, for instance, someone who downloads the image from the internet or is sent the image, but does not realise that the image was taken and/or shared without consent. They suggested that “retention” of an image without consent better captures the behaviour we are concerned with.

42 We discuss the approach to intimate image abuse in civil law in Appendix 1.
43 We discuss mental elements in more detail in Chapter 10.
44 Prof Clare McGlynn QC (Hons); Dr Samantha Pegg; and Prof Thomas Crofts. See also Chapter 9, where we provisionally propose that proof of actual harm should not be an element of the offence.
Finally, Dr Ksenia Bakina was not in favour of a possession offence. She argued that possession of an intimate image of an adult without consent should not be equated with possessing indecent images of children and “extreme pornography”.

**Categories of possession without consent and criminal culpability**

In addition to the examples provided by stakeholders, we have considered other ways in which someone could come to possess an intimate image without consent. There are intersections with the examples we discussed at paragraph 7.16 above when looking at types of copying. One way is by retaining an image that the depicted person only consented to them viewing for a very limited period. For example, as discussed at paragraph 7.18 above, images sent using the social media app Snapchat disappear after a set period (for pictures after a set number of seconds and for videos after the video has played). If someone sends an intimate image to someone else using Snapchat, they have consented to that person viewing that image briefly, but not to them retaining the image to look at in the future.

There are some online image sharing services, such as OnlyFans, where content creators choose the parameters within which they share their images. For example, they may choose to allow subscribers access to an image just for one week. If a subscriber downloads the image in order to retain possession of it, it is possession without consent. Another example would be where consent was given for a particular purpose, such as allowing a technology expert to download images from a phone to ensure there is a backup while a fault is fixed. The consent was for a particular purpose, and when that purpose expired, the phone was fixed and the backups were not needed, the consent expired. Any possession after that, is non-consensual.

Another form of non-consensual possession is downloading an intimate image from the internet, for example from social media or a porn website. Users of free to access commercial porn websites may download the images and videos they see to be able to retain access. While they may not seek the consent of the people in the images before doing so, they could argue there was reasonable belief in consent as the images were freely available and the perpetrator would be able to access the image online again even if they had not downloaded it. It could be reasonable to believe that the people depicted consented to the image being shared online, therefore the users had no reason to believe the people depicted would not consent to someone who is able to access it online, being in possession of it. However, some people may consent to sharing an image in a particular way, on a particular website (for example, they may have uploaded it themselves), but do not consent to people downloading and retaining the image.

For certain categories of porn, and so-called “revenge porn” websites, the image was originally uploaded to the internet clearly without the depicted person’s consent. This can be obvious from the description or commentary with the image or the type of website (such as “revenge porn” specific websites). In such circumstance, the people depicted in the images did not consent to anyone downloading the image from the internet and retaining it. For victims of “revenge porn” who have had their images uploaded to such a website, the fact that people may have downloaded the image to

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45 We discuss reasonable belief in consent relating to images uploaded to websites further in Chapter 11.
be able to access it even if the original is taken down, could prolong the harm they suffer as a result of the original sharing.

7.70 The final example we consider is where more direct action is taken to possess an image without consent. Above we considered the retained possession of images downloaded from a phone with consent for the purpose of fixing the phone. In contrast, if someone took their phone to a repair shop to have a cracked screen fixed, they were not advised it was necessary to create a back-up of the contents of the phone, but the person working in the repair shop accessed the phone while the customer was away and uploaded their images to their cloud, this is arguably the most clear-cut example of possession without consent.

7.71 We conclude that these different forms of possession can be divided into three categories:

(1) Consent to indeterminate possession. When the intimate image came into the individual’s possession, the depicted person consented to them possessing it for an indeterminate period. The depicted person later revoked their consent to the individual retaining it. This is often seen in a relationship context, where images were shared consensually in the course of a relationship but after a breakdown in relations, the partner depicted requests that the images are deleted by their ex-partner. This could also include images that are freely available on a porn website with no conditions, where the person depicted consented to their original upload.

(2) Consent to a defined possession. When the intimate image came into the individual’s possession, the depicted person consented to them possessing it for a short and fixed period. The individual then took steps to retain the image beyond that fixed period. This would include the examples described above where the person depicted chooses a time-limited method of sharing images such as Snapchat or a subscription service. It would also include where consent was given to possession for a specific purpose such as while a phone is being fixed.

(3) Never consent to possession. The depicted person never consented to the individual possessing the intimate image. This would include the “revenge porn” website example as the victim never consented to the images being available for possession. It would also include the example where a phone shop employee uploaded images from a customer’s phone without their knowledge and consent, and where it was not necessary for the purpose of fixing their phone.

7.72 We acknowledge that each of these examples has the potential to cause harm. The fact the possession is without consent involves some violation of the victim’s bodily privacy and dignity, and in many cases their sexual autonomy. The level of harm is likely to be different depending on the type of possession. Further, as explored above, some stakeholders told us it is not necessary to criminalise possession. We will now consider whether these different types of possession are sufficiently harmful to warrant a criminal offence.
A new possession offence?

7.73 There are some general concerns over introducing a possession offence that would apply to all three categories of non-consensual possession. There are other concerns, as well as arguments in favour of criminalisation, that are unique to specific forms of non-consensual possession. We will first set out the general concerns then consider each category in turn.

General concerns

7.74 We have concerns over whether criminalising possession, or retention, of an intimate image without consent is a proportionate response to the wrong. We are also concerned about how this offence would be implemented in practice. It is likely that the police would simply ask the suspect to delete the image (at which point the suspect could pretend that they had deleted it) or deliver a formal or informal caution. Finally, we can foresee the investigation of this offence placing a significant burden on already stretched police forces.

7.75 It is also possible that the person in possession of the intimate image will have committed another offence. If they repeatedly remind the depicted person that they have the image, it may be possible to charge them with harassment under section 2 of the PHA 1997, or a communications offence under section 127 of the CA 2003 or section 1 of the MCA 1988. If they threaten to share the image there are also a range of offences available, and we make specific proposals on threats to share intimate images in Chapter 12. Therefore, in many situations where the depicted person is caused harm by someone possessing, or retaining, their intimate image without consent, a possession offence will not be needed.

Category 1: Consent to indeterminate possession

7.76 An offence which targets retention after consent had been withdrawn would be very different from the possession offences in other jurisdictions which target the possession of images taken without consent. It is questionable whether such retention makes an individual sufficiently culpable to warrant criminal liability. Where consent is revoked, the perpetrator could commit an offence by omission if they do not take steps to delete an image on request. It is different to other examples which involve an act by the perpetrator to possess or retain possession of the image.

7.77 The two examples we discussed above of retaining images after consent is revoked and downloading images that are accessible online are common behaviours. A possession offence including such cases would therefore be a very broad offence leading to concerns of overcriminalisation and resource implications for police and prosecutors. While we accept that there is real harm for victims in knowing that an ex-partner still has an image of them that they have requested be deleted, there are other offences, explored above, that could cover examples where an ex-partner is using their retention of the image to threaten, harass or send harmful communications.

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46 We set out the communications offences in Chapter 5.

7.78 In the example of downloading an image from a website, to be caught by a possession offence there would have to be no consent. In some cases, such as commercial porn websites, it may be stated as part of the terms and conditions that downloading an image is prohibited. In such circumstances it is unlikely that one could argue there was consent or even reasonable belief in consent to the downloading which is the method by which one obtains possession. Where there is no such express condition, there may be a strong argument that there is reasonable belief in consent to the possession where the person depicted has consented to the original upload and to people accessing it. Downloading an image that is available on a website is simply an alternative way of accessing the same image. It is arguable that minimal harm is caused to a victim in such circumstances. Although they may not consent to the possession of their image via a download folder on a computer rather than by accessing a website, either way the image was available to be viewed in the same way. There is significantly less violation of the depicted person’s bodily privacy and sexual autonomy by such downloading than in the other examples considered below.

Category 2: Consent to a defined possession

7.79 A perpetrator who retains possession beyond the defined consent is arguably more culpable than when the consent was indeterminate. The boundaries of the person’s consent were clear from the outset and, in defiance of that, the perpetrator took steps to ensure they could possess the image beyond that. It is taking possession of an image, not merely passive retention.

7.80 In respect of taking screenshots of images on Snapchat, this behaviour is likely to be quite common. There are even articles online about how to avoid detection. While it may be immoral and a violation of the victim’s autonomy, it is unclear whether these acts are inherently sufficiently wrongful and harmful to be criminal. There was consent to the original possession of the image; the continued possession is not an act so wholly different from the original consensual behaviour that it is obviously criminal. Again, this has the potential to be a very broad offence capturing wide-ranging, and potentially very common behaviour. Where possession is used to cause harm including harassment or distress, other offences may apply as discussed above at paragraph 7.75. Where consent was for a specific purpose such as the phone shop example, offences under the Computer Misuse Act 1990 may also apply.

Category 3: Never consent to possession

7.81 Situations where there was never consent for the perpetrator to possess an intimate image are arguably the greatest violation of the victim’s sexual autonomy and bodily privacy. The victim never consented to that person possessing their intimate image in any capacity. We know that victims of “revenge porn” are greatly harmed by the idea that their intimate images could be “out there” indefinitely, even if they are successful in removing them from the site where they were first uploaded because people have

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48 We discuss images that have previously shared in public in more detail in Chapter 11 where we consider onwards sharing and secondary distribution.

downloaded them. This act also requires positive action to take possession in the absence of consent which makes it more culpable.

7.82 Let us consider another, possibly quite common, example. A is dating B and sends B an intimate image of herself on Snapchat. When B receives the Snapchat of A, he takes a screenshot and shows that screenshot to his friend C. C uses his phone to take a photo of B’s phone screen so that he can keep a copy of the screenshot. B has taken steps to retain possession of an image he only had consent to possess in a defined way and would fall under category 2 above. B has then shared the image with C, without consent, which may constitute a sharing offence, as discussed later in this chapter. By taking a copy of an image to which he was given access by B, C has taken steps to take possession of an image that A never consented to him possessing or indeed seeing. Putting aside the sharing offence, B’s and C’s acts of using their phones to take copies of the original image on Snapchat are, on the face of it, similar behaviours. The key difference in culpability of B and C, and harm caused to A, is that A had consented to B seeing the image. We acknowledge that it is difficult to draw a line between some taking and retaining behaviour. There is an argument that C’s actions are more akin to “taking” than retaining; that by taking a photo of someone else’s phone screen he has created a new image, so that one could argue that “but for the actions of the perpetrator the image would not exist.” However, we do think it is important for the term “taking” to be an accurate reflection of the act and result. Taking an intimate image is a different intrusion and violation to sharing, making or possessing. If we think of the main types of conduct the taking offence seeks to capture, it is the non-consensual recording of someone who is in an intimate situation. The act of taking itself when done without consent is harmful, separate from the harm caused by the resultant image. That is why we have decided to draw this line in the way we have and instead consider these possession type behaviours separately.

7.83 A possession offence that would only apply where there was never consent does have the potential to apply to images found on accessible porn websites where it is not clear if the person depicted consented to their images being available to download. This could widen the offence in the way we consider in category 1. However, a reasonable belief in consent element may help to distinguish cases where it was clear there was no consent, in which case the perpetrator would have sufficient culpability, from those where there was no indication of a lack of consent, in which case a perpetrator could argue they had reasonable belief in consent to possession.

7.84 Currently it is only an offence to possess extreme pornography or indecent images of children. The harms of the mere existence of such material are arguably more clear-cut. As stakeholders have told us, intimate images of adults should not be considered in the same category. Even where the possession was never consented to, we do not currently have sufficient evidence of the harm caused by mere possession of intimate images without consent. In the Snapchat example above, C having possession of the image is likely to cause harm to A. However, we do not have evidence that the level of harm caused by their possession is significantly different from the harm caused to A by C being able to see the image in the first place. That harm is caused by B’s actions in showing his phone to C and would be captured by a sharing offence. As we discuss at paragraph 7.75 above, if possession is taken of an image and that image is then shared, or is used to harass or threaten the person depicted, there are other offences that would apply.
7.85 Considering the difficulties identified with criminalising possession, we provisionally propose not to include an offence of possessing intimate images without consent. We are of the provisional view that if there were to be a possession offence, it would be very limited and only cover possession where there was never consent. While input from stakeholders has been extremely helpful, we would value further input on this issue. We invite consultees to share their views on:

(1) whether they agree there should not be a possession offence; and

(2) if they do consider a possession offence is required, whether they agree that any possession offence should be limited to apply only where there was never any consent to possession.

Consultation Question 18.

7.86 We provisionally propose that it should not be an offence to possess an intimate image without consent, even when there was never any consent to possession.

Do consultees agree?

MAKING AN INTIMATE IMAGE WITHOUT CONSENT

7.87 The third behaviour we consider in this chapter is the making of intimate images without consent. The difference between “taking” (considered in the first section of this chapter) and “making” an intimate image without consent is that “taking” involves recording an individual who is in fact nude, semi-nude, or engaged in a sexual or private act, while “making” involves altering an image to make it appear as though the depicted individual is nude, semi-nude, or engaged in a sexual or private act.

7.88 Our discussion of making will be split across this section and the following section, which considers sharing an intimate image without consent. In this section, we consider whether making an intimate image without consent, without sharing or threatening to share the image, should be criminalised. In other words, we consider whether making an intimate image without consent should in itself be an offence. In the sharing section, we consider whether sharing an image which has been altered to appear sexual, nude, semi-nude or private should be criminalised.

The current law

7.89 Making an indecent image of a child is an offence under section 1 of the PCA 1978. For the purposes of the PCA 1978, the term "making" has a very wide definition including intentional opening of an email attachment and simple copying. As we explore in more detail below, and in the discussion on "copying" at paragraphs 7.16 above, we define the term “making” for the purposes of intimate image offences more
narrowly, in the sense of creating. Making, as distinct from taking, an intimate image (of an adult) without consent is not currently criminalised in England and Wales. In fact, we have found no jurisdictions where making an intimate image (without sharing or threatening to share the image) is criminalised.

7.90 In New Zealand, anyone who “intentionally or recklessly makes an intimate visual recording of another person” is guilty of an offence, and in Virginia it is an offence to “knowingly and intentionally create” a nude or semi-nude image without consent in circumstances where the depicted person had a reasonable expectation of privacy. Although these offences contain the words “make” and “create”, they are in fact taking offences. In New Zealand, the “making” offence (along with two additional offences) was intended to implement recommendations made by New Zealand’s Law Commission, which said this of the offences they recommended:

Our proposed new offences are targeted at three different stages of the privacy invasion caused by intimate covert filming: recording of the image, distribution of the image, and possession of the image.

It is clear, therefore, that it was intended to be a taking offence.

7.91 The “creation” offence in Virginia only applies to images where the depicted person “is totally nude, clad in undergarments, or in a state of undress so as to expose the genitals, pubic area, buttocks or female breast” [emphasis added]. This indicates that it must be a genuine image, where the depicted person is in fact nude or semi-nude, rather than an altered image, where the depicted person appears to be nude. Additionally, Virginia recently amended its disclosure offence to capture the sharing of images which have been altered to appear intimate. There has been no discussion of Virginia also criminalising the making (without subsequent sharing) of intimate images.

Definition of “making”

7.92 As there are currently no offences that criminalise making, as distinct from taking, intimate images of adults, there is no ready definition of “making” to apply. The offences we are considering are wholly distinct from and much more limited than the criminal regime covering indecent images of children with different elements and considerations, we therefore do not consider it helpful to use that understanding of “making” for this purpose. In Chapter 6 we discussed the different types of images that would be considered an intimate image for the purposes of an offence. Those that are

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53 Lack of consent and reasonable expectation of privacy are built into the definition of “intimate visual recording”.

54 Crimes Act 1961, s 216H (New Zealand); and Code of Virginia, title 18.2, s 386.1.

55 See contribution of Dr Richard Worth during the First Reading of the Crimes (Intimate Covert Recordings) Amendment Bill. Hansard (New Zealand Parliament), 5 May 2005, vol 625, p 20321.


57 Code of Virginia, title 18.2, s 386.1.

58 Code of Virginia, title 18.2, s 386.1. This amendment is discussed further below.
photographs or videos of people who were in fact nude, semi-nude or doing a sexual or private act would be intimate images that were “taken”. Images which have been altered in some way and resultantly show a person nude, semi-nude or doing a sexual or private act have been “made”. Making can include digital methods such as photoshopping or using “deepfake” software.\(^{59}\) It could also include non-digital means such as manipulation through darkroom exposure techniques or collaging hard copy photographs.

**A simple making offence?**

7.93 We have considered whether making an intimate image, without sharing or threatening to share the image, should be criminalised. This could be termed a “simple making” offence.

7.94 In 2018 the Women and Equalities Committee, a select committee of the House of Commons, expressed support for criminalising making altered images without consent. In their report considering sexual harassment of women and girls in public places, they stated:

> The Government should introduce a new law on image-based sexual abuse which criminalises all non-consensual creation and distribution of intimate sexual images, including altered images, and threats to do so [emphasis added].\(^{60}\)

7.95 One stakeholder was supportive of a simple making offence. Henry Ajder, former Head of Communications and Research at Sensity (formerly Deeptrace), told us that making deepfake pornography in order to fulfil a private fantasy but without intending to share the image was set to become more common. He suggested that this behaviour should be criminalised. Other stakeholders were more hesitant about a simple making offence. One police officer we spoke to, for example, suggested that where someone creates a deepfake pornography video for “private use”, this should not be criminalised. They suggested that criminalising this behaviour risks infringing upon important values like artistic expression. Creating an altered intimate image solely for one’s own sexual gratification could be considered as akin to a sexual fantasy which the criminal law should be reluctant to police. If an intimate image is made only for the use of the person who created it, the question must be whether there is there any harm caused that requires criminalisation.

7.96 There is an argument that having a fantasy and creating a physical manifestation of it, can be experienced very differently by the subject of the fantasy, and by the impact on society. The intuition that making deepfake pornography is wrong, while having sexual fantasies is not, was explored by Carl Öhman in his paper: “Introducing the pervert’s dilemma: a contribution to the critique of Deepfake Pornography”.\(^{61}\) Öhman argued that deepfake pornography videos are morally impermissible even when they have not

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\(^{59}\) See Chapter 2 for further discussion of deepfake technology.

\(^{60}\) Sexual harassment of women and girls in public places, Report of the Women and Equalities Committee (2017-19) HC 701.

\(^{61}\) Carl Öhman, “Introducing the pervert’s dilemma: a contribution to the critique of Deepfake Pornography” (2020) 22 *Ethics and Information Technology* 133.
been shared. This is because, unlike sexual fantasies, deepfake pornography contributes to the systemic degrading and oppression of women. He writes:

As a societal phenomenon, Deepfakes are arguably enabled by a MAS\(^{62}\) of male consumers, producers, technology, and misogyny. Moreover, it arguably plays a role in the machinery which systematically reduces women (as a collective identity) to sexual objects, even if none of the individual instances can be held to cause this. So it should be fair to say that the phenomenon is highly gendered (indeed, one need not spend much time on one of the forums or websites devoted to Deepfakes to realise this). While each isolated video may not affect the women it stars as individuals, the phenomenon as such—the MAS—is, in its current form, inseparable from the systematic degrading of women as a collective identity.\(^{63}\)

7.97 The person depicted in these images has had their sexual autonomy violated. The person making the image has decided how the victim should be portrayed sexually without their consent. Like taking and sharing intimate images without consent, this act denies victims the right to decide for themselves how others see and use their body and sexuality. Öhman does not go as far as saying that making deepfake pornography should be criminalised. If we accept that making deepfake pornography videos without consent is immoral, the question remains whether this should be criminalised.

7.98 One potential argument against criminalising simple making is that, where the person whose image is used to make the video is not alerted to the fact that their image has been used, they are not caused any obvious harm. This can be contrasted with the sharing of deepfake pornography videos. Often, the depicted person will be harmed by people watching the video and by people sending them abusive messages after watching the video. If the deepfake is shared with the person depicted, they may be harmed by seeing how someone has chosen to portray them sexually.

7.99 One response to this argument is that taking an intimate image without consent is criminalised\(^{64}\) (and should be criminalised) even when the depicted person has not seen the image and is not aware that an image has been taken. An example is an abusive boyfriend recording himself having sex with his girlfriend without her consent, in order to watch the video later and obtain sexual gratification. We accept that this is wrongful, and in some sense causes the woman in the video harm, even if she never sees the video and is not made aware that it exists. The act itself violates the person depicted’s sexual autonomy and bodily privacy and could therefore be sufficiently harmful to require intervention of the criminal law. It is worth noting that unless the person depicted is made aware of the existence of the altered image, it is unlikely such images would come to the attention of prosecutors.

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63 Carl Öhman, “Introducing the pervert’s dilemma: a contribution to the critique of Deepfake Pornography” (2020) 22 Ethics and Information Technology 133, 137.

64 As voyeurism, SOA 2003, s 67(3).
7.100 It is easier to conceptualise harm to the victim when they have knowledge that an intimate image has been made of them without their consent. In such situations, it is not just the existence of the image, but the fact they are alerted to it, which can cause harm. A similar example is found in section 4 of the Public Order Act 1986. The existence of threatening, abusive or insulting material is not sufficient; it becomes an offence when that material is distributed or displayed to another. We consider below the harm caused when an altered image is shared without consent, including to the person depicted. If the image itself is not shared, but the fact of its existence is, a simple making offence could capture that.

7.101 Another argument against criminalising simple making is that where the depicted person is told that an intimate image of them has been made without their consent (and thus where there is the potential for this behaviour to cause them significant harm) several other offences may apply. Consider this example:

Carlos is secretly in love with a woman in his university lectures, Megan, but he cannot pluck up the courage to ask her out. One Friday evening, when he is scrolling through her Facebook pictures feeling upset, he decides to create a deepfake video of her so that he can imagine he is having sex with her. He uploads some of her Facebook pictures to a deepfake app, along with a video of a porn actress, to create the deepfake. He keeps the video for his private viewing and has no intention of sharing it. However, on the Friday night he messages Megan telling her he has made the video. He then messages her every night for a week, saying “I’m wanking over you. Great video!”

7.102 It is likely that Carlos’ behaviour would constitute harassment under section 2 of the Protection from Harassment Act 1997 (“PHA 1997”). His behaviour would likely constitute a “course of conduct”, because he has contacted Megan on seven occasions. It is also clear that Carlos’ behaviour was likely to alarm or distress Megan, and Carlos will have known, or ought to have known, this.

7.103 In addition, Carlos may have committed a communications offence, under section 127 of the Communications Act 2003 (“CA 2003”) or section 1 of the Malicious Communications Act 1988 (“MCA 1988”), if his messages met the threshold of “grossly offensive”, “indecent”, “obscene” or “menacing”. He may also have committed an offence under the harm-based offence provisionally proposed in our Harmful Online Communications consultation paper. This offence would replace section 127(1) of the CA 2003 and section 1 of the MCA 1988. We set out the current communications offences and our proposed harm-based offence in full in Chapter 3.

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65 Under Protection from Harassment Act 1997, s 7(3)(a), a “course of conduct” in relation to one person is “conduct on at least two occasions in relation to that person”.

66 Under Protection from Harassment Act 1997, s 7(2), “[r]eferences to harassing a person include alarming the person or causing the person distress”.

67 Protection from Harassment Act 1997, s 1(1)(b).
7.104 However, it should be noted that when someone is told that an intimate image of them has been made without their consent, there will be occasions when no offence can be used. For example, if Carlos had messaged Megan once saying, "I have made a deepfake video of you having sex", this would not constitute harassment because Carlos has not engaged in a "course of conduct" (by messaging Megan on two or more occasions). It is also unlikely that simply telling Megan he has made a deepfake video of her would be deemed "grossly offensive", "indecent", "obscene" or "menacing", so the communications offences would not apply either. Therefore, the fact that there is no simple making offence may leave some individuals unprotected.

7.105 That said, it is unclear how much harm is caused by Carlos informing Megan on one occasion that he has made a deepfake video of her. Further, similar types of behaviour where the subject is not an altered intimate image are not currently criminalised. If Carlos had taken Megan’s Facebook pictures, saved them in their original form and told Megan he had done so it would not be an offence. If he messaged Megan once to tell her that he had masturbated over her Facebook photo, it is unlikely that would be considered an offence of harassment or a communications offence. A simple making offence would criminalise this behaviour for altered images but not for similar behaviour using original images. While we do not doubt that this behaviour could cause Megan some harm, we have not been presented with evidence that this behaviour specific to the making of altered images is sufficiently wrongful or harmful to reach the criminal threshold.

7.106 In sum, we do not have sufficient evidence of how prevalent simple making is, what motivates individuals to make intimate images without consent and what harms simple making causes, to make a provisional proposal as to whether simple making should be criminalised. We would value consultees’ insights on these points.

**Consultation Question 19.**

7.107 We invite consultees’ views on the following three questions:

1. How prevalent is making intimate images without consent, without subsequently sharing or threatening to share the image?

2. What motivates individuals to make intimate images without consent, without sharing or threatening to share them?

3. How, and to what extent, does making intimate images without consent (without sharing or threatening to share them) harm the individuals in the images?

**SHARING AN INTIMATE IMAGE WITHOUT CONSENT**

7.108 In this section we will consider:

1. behaviour caught by section 33 of the Criminal Justice and Courts Act 2015 ("CJCA 2015");
(2) what it means to “share” an image;

(3) whether images which have been altered to appear sexual or nude should be caught by a sharing offence; and

(4) whether sharing an intimate image with the person in the image without consent should be caught by a sharing offence.

The current sharing offence

7.109 As we outlined in Chapter 3, sharing a “private sexual” image without consent, with the intention of causing the person in the image distress, is an offence under section 33 of the CJCA 2015. We refer to this offence as the “disclosure offence”.

7.110 As with the current taking offences, we heard from stakeholders that this behaviour is still prevalent and can cause substantial harm. Therefore, our provisional view is that this behaviour should remain criminal. Again, as with the current taking offences, whether the motivation element in the disclosure offence (i.e. to cause the victim distress) should be retained will be considered in Chapter 10.

“Sharing”

The current disclosure offence

7.111 We refer to section 33 of the CJCA 2015 as the “disclosure offence” because it makes it an offence to “disclose” an intimate image without consent (with the intention of causing distress to the person in the image). Section 34 of the CJCA 2015 defines “disclose”:

(1) A person “discloses” something to a person if, by any means, he or she gives or shows it to the person or makes it available to the person.

(2) Something that is given, shown or made available to a person is disclosed—

   (a) whether or not it is given, shown or made available for reward, and

   (b) whether or not it has previously been given, shown or made available to the person.

7.112 There was no discussion of what “disclose” should include in the committee stages in the House of Lords or after the offence was introduced in the House of Lords. However, the Explanatory Notes to section 34 give two examples: electronic disclosure, by posting the image on a website or sending it in an email, or disclosing a physical document, by printing the image and giving it to someone or leaving it in a place where people will see it.

7.113 But “disclose”, as defined, would also include other methods of disclosure, including someone showing the image to someone else on their phone, without sending it to them. It would also include live-streaming.

7.114 It also does not matter whether the person to whom the image is disclosed has previously seen the image or whether the person disclosing the image is doing so for money or some other gain.
Finally, the parameters of “makes it available” are not defined, nor has there been any case law clarifying its meaning. However, Alisdair Gillespie has suggested that the ruling in *R v Dooley* would be followed when interpreting “make it available” in the disclosure offence.  

*Dooley* concerned possession of indecent images of children "with a view to their being distributed", which is an offence under section 1(1)(c) of the PCA 1978. In this case, Dooley joined an internet-based peer to peer file sharing network and had several indecent images of children stored in a folder named “my shared folder” on his computer. The Court of Appeal held that Dooley would be in possession of indecent images of children with a view to their being distributed provided that one of the reasons why he left the images in the shared folder was so that other individuals could view them.

**“Sharing” in other jurisdictions**

Sharing offences in other jurisdictions use different words to describe the action, including “disclose”, “distribute” and “post”. But they broadly capture similar methods or forms of sharing as the disclosure offence in England and Wales. Mirroring the offence in England and Wales, in Scotland’s disclosure offence an intimate image is disclosed if it is “given, shown or made available”.

Australian jurisdictions with sharing offences have all opted for the term “distribute”. As examples, for the purposes of New South Wales’ offence “distribute” includes:

(a) send, supply, exhibit, transmit or communicate to another person; or

(b) make available for viewing or access by another person;

whether in person or by electronic, digital or any other means.

In Western Australia’s offence, distributing an intimate image means:

(a) communicating, exhibiting, selling, sending, supplying, offering or transmitting the image to a person other than themselves or the person depicted in the image; or

(b) making the image available for access by electronic or other means by a person other than themselves or the person depicted in the image; or

(c) entering into an agreement or arrangement to do anything referred to in paragraph (a) or (b).

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68 Alisdair Gillespie, “‘Trust me, it’s only for me”: “revenge porn” and the criminal law” (2015) 11 Criminal Law Review 868.


70 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(2).

71 Crimes Act 1900, s 91N.

72 Criminal Code Act Compilation Act 1913, s 221BC.
7.119 As a final example, for the purposes of Queensland’s offence “distribute” is defined as including:

(a) communicate, exhibit, send, supply or transmit to someone, whether to a particular person or not; and

(b) make available for access by someone, whether by a particular person or not; and

(c) enter into an agreement or arrangement to do something in paragraph (a) or (b); and

(d) attempt to distribute.\(^{73}\)

The inclusion of attempts to distribute in this definition is particularly interesting.

7.120 New Zealand has enacted two offences that apply to the sharing of intimate images. The first offence, in section 216J of the Crimes Act 1961, applies to the sharing of images that were originally taken without knowledge or consent. This offence prohibits “publishing, importing, exporting, or selling” an intimate image that was taken without knowledge or consent, when the perpetrator knows or is reckless as to whether the image was taken without knowledge or consent. “Publishes” is defined broadly, as meaning:

(a) displays by any means;

(b) sends to any person by any means;

(c) distributes by any means;

(d) conveys by electronic medium; or

(e) stores electronically in a way that is accessible by any other person or persons.

Interestingly, this offence also applies to importing or exporting an intimate image into or out of New Zealand.

7.121 New Zealand’s second sharing offence is in section 22 of the Harmful Digital Communications Act 2015. This offence applies to the “posting” of harmful digital communications (which includes intimate images taken with or without consent). “Posts” means: “transfers, sends, posts, publishes, disseminates, or otherwise communicates by means of a digital communication”.\(^{74}\) This offence, therefore, only applies when an image has been shared online. It would not apply to offline or in person sharing.

\(^{73}\) Criminal Code 1899, s 207A.

\(^{74}\) Harmful Digital Communications Act 2015, s 4.
Defining “sharing”

7.122 We did not hear evidence from stakeholders that the definition of “disclose” under the current disclosure offence is too limited. It captures images that are disclosed online, including on websites, via email or through private messaging services. It also captures images that are disclosed offline, for instance images that are printed out and sent in the post or distributed by hand. It even captures showing images, for instance showing someone an image on a device or a printed copy of an image, without sending or giving them the image so they cannot retain it.

7.123 We are of the view that all of these forms of disclosure should be captured under a new sharing offence. This would include, but is not limited to, posting or publishing images on websites, sending images via email or private messaging services such as WhatsApp, and live-streaming. It would also include offline acts such as sending an image to another by mail or by hand or showing an image to another in person whether stored on a phone or a hard copy. It would also include making an image available by storing it somewhere for others to access such as a joint filing system or a shared folder on a computer.

Consultation Question 20.

7.124 We provisionally propose that “sharing” an intimate image should capture:

(1) sharing intimate images online, including posting or publishing on websites, sending via email, sending through private messaging services, and live-streaming;

(2) sharing intimate images offline, including sending through the post or distribution by hand; and

(3) showing intimate images to someone else, including storing images on a device for another to access and showing printed copies to another.

Do consultees agree?

7.125 We invite consultees’ views on whether there any other forms of sharing, not outlined in the paragraph above, that should be included in the definition of “sharing”?

Altered images

7.126 As outlined in Chapter 3 at paragraph 3.13, sharing an image which has been altered to appear nude or sexual is not criminalised under the current disclosure offence. When introducing the disclosure offence in the House of Lords, Lord Faulks justified this exclusion by arguing: “Although such images can still be distressing to those
featured, we do not believe that they have the potential to cause as much harm as disclosure of photographs and films that record real sexual private events.”

7.127 Sharing without consent an image which has been altered to appear nude or sexual (most prominently “deepfakes”), has been criminalised in several jurisdictions. For instance, Scotland’s disclosure offence includes an image “which shows, or appears to show, another person (“B”) in an intimate situation.”

7.128 In Australia, the states of New South Wales and South Australia include images which have been altered within their definition of the image. Queensland, Western Australia, the Northern Territory and the Australian Capital Territory go one step further, explicitly including images which have been altered to appear intimate within their definition of the image. That said, Paul Fletcher, a spokesperson for the Australian Minister for Communications, Cyber Safety and the Arts, has suggested that all of these offences are broad enough to include deepfake pornography.

7.129 Finally, the US state of Virginia amended its disclosure offence in July 2019 to include deepfake pornography. It added to the offence:

> For purposes of this subsection, "another person" includes a person whose image was used in creating, adapting, or modifying a videographic or still image with the intent to depict an actual person and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic.

This amendment attracted a great deal of media attention and was hailed as one of the first to criminalise the sharing of deepfake pornography without consent.

7.130 There are very compelling reasons to follow the lead of these jurisdictions. As we explain in Chapter 2, the making and sharing of deepfake pornography without consent has exploded in recent years. In 2019, Deeptrace found that the four largest deepfake porn websites had attracted 134,364,438 video views. One online discussion board where deepfake porn videos are requested and posted also receives around 20,000 unique visitors every day. Because of this sudden increase in demand for deepfake porn, deepfake creation community websites and forums have

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75 Hansard (HL), 20 October 2014, vol 765, col 525.
76 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2 [emphasis added].
78 Code of Virginia, title 18.2, s 386.2.
been set up to enable experienced creators to enhance their skills and new creators to access tips and advice. This, coupled with advancements in the technology underpinning deepfake porn, means that videos are becoming more realistic and prevalent.\textsuperscript{82}

7.131 While the targets of this behaviour were originally almost exclusively female celebrities, members of the public are increasingly being affected. Women are still overwhelmingly the objects of pornographic images created in this way, and commentators have described the sharing of deepfake porn videos as a new means of degrading, humiliating, harassing and abusing women.\textsuperscript{83} Some women are particularly at risk. This includes female journalists, whose images are used in deepfake pornography to discredit, intimidate and silence them.\textsuperscript{84} Indeed, research indicates that the vast majority of those creating deepfake porn are men.\textsuperscript{85}

7.132 As we discussed in Chapter 5, the harms caused to those (predominantly women) whose images are used in deepfake pornography, or photoshopped to appear sexual, are often as significant as when a genuine image is shared. Victims describe feeling sexually objectified, and find the experience of losing control over how their bodies are portrayed to and perceived by the outside world extremely distressing.\textsuperscript{86} As Noelle Martin, an Australian law graduate and activist whose images were used in deepfake porn videos, put it: “I had spent my entire adult life watching helplessly as my image was used against me by men that I had never given permission to of any kind. And I was in so much pain.”\textsuperscript{87}

7.133 One stakeholder told us that deepfake pornography should only be criminalised when the image is realistic. Marthe Goudsmit suggested that intimate image abuse is harmful because it infringes upon the victim’s privacy, and an unrealistic deepfake does not infringe upon privacy.\textsuperscript{88} However, the consensus among stakeholders, and in the literature on deepfakes, is that images which have been altered to appear sexual may harm those depicted in the images regardless of whether they are realistic or clearly fake. As Henry Ajder told us: “realism isn’t a controlling factor for harm”.\textsuperscript{89} In

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{84} Rana Ayyub, “I Was The Victim Of A Deepfake Porn Plot Intended To Silence Me” (21 November 2018) Huffington Post, https://www.huffingtonpost.co.uk/entry/deepfake-porn_uk_5bf2c126e4b0f32bd58ba316 (last visited 23 February 2021).
\item \textsuperscript{85} Henry Ajder (Sensity, formerly known as Deeptrace).
\item \textsuperscript{88} Marthe Goudsmit (DPhil Candidate, University of Oxford).
\item \textsuperscript{89} Henry Ajder (Sensity, formerly known as Deeptrace).
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fact, Mary Anne Franks has suggested that these videos are harmful precisely because they are fake. They deprive women of their sexual autonomy by sexualising them against their will. In Franks’ words: “The problem of ‘face-swapped’ porn helps highlight the harm of sexual objectification without consent, a harm that everyone should care about.”90 In addition, Ksenia Bakina told us that where victims are from certain religious or cultural groups, family and community members are less likely to question whether it is a real image, even when it looks fake. Then, where they realise that it is a fake image they may still blame the victim, suggesting that she drew attention to herself by socialising with the “wrong” people, or wearing makeup and revealing clothing.91

7.134 Deepfakes are not the only example of harmful altering. We describe in Chapter 6 a recent social media trend called the “silhouette challenge” where people filmed and shared a short video of themselves dancing or posing using a filter that showed their body as a silhouette against a red backdrop. It then emerged that people were editing the original videos of others so that more of the victim’s body was visible, removing or reducing the “filter” that was originally applied to provide digital cover. The altered videos were then reposted without consent. Videos even appeared on YouTube providing instructions on how to edit other people’s videos in this way.92

7.135 The majority of examples we are currently aware of concern images altered to make them sexual, such as “deepfake” pornography. The “silhouette challenge” example suggests that images are also being altered to appear nude or semi-nude. We do not currently have any evidence of images altered to appear private such as an image depicting toileting, however we do not think it is necessary to exclude the possibility from an offence. In Chapter 6 we provisionally propose that “intimate” should include images that are sexual, nude, semi-nude or private for the purposes of an offence, therefore we think a provision for altered images should apply to all forms of intimate image.

7.136 In our digitally fluent world, most image altering is done digitally, using deepfake software or photoshopping. However, it is possible that altering images can be done in more analogue ways using darkroom or artistic skills or hard copies. As with digitally altered images, analogue altering can produce images of varying realism. As noted above, the harm is not a function of how realistic the resulting image is, therefore we do not exclude images based on the method used to alter.

7.137 We have reached the view that sharing an altered intimate image without consent may cause serious harm and is a significant violation of the individual’s bodily privacy, personal integrity and their dignity, and in some cases, their sexual privacy, autonomy and freedom. Therefore, we are of the view that this behaviour warrants

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91 Dr Ksenia Bakina (Privacy International).
criminalisation. We provisionally propose that altered images be included as part of the sharing offence.

**Consultation Question 21.**

7.138 We provisionally propose that a sharing offence should include images which have been altered to appear intimate (e.g. images which have been photoshopped to appear sexual or nude and images which have been used to create “deepfake” pornography).

Do consultees agree?

**Sharing with the person in the image**

**The current law**

7.139 By virtue of section 33(2) of the CJCA 2015, the disclosure offence does not cover sharing with the person in the image without consent. This exclusion was not discussed during debates in Parliament, but it can perhaps be explained by the mischief the offence was seeking to tackle.

7.140 When introducing the offence in the House of Lords, Lord Faulks defined “revenge porn” in this way: “perpetrators post sexual images of former lovers after the breakdown of their relationships in order to hurt their victims”.93 Baroness Brinton added: “Cyberstalking, cyberbullying, sexting and now revenge porn are all about abuse of power and spreading information widely on the net”.94 It is clear, therefore, that the mischief the offence was designed to tackle is the sharing of images with others, often online, in order to distress the victim. Sharing the image with the victim without consent, it might have been thought, cannot cause the same harm as sharing the image widely online.

**The law in other jurisdictions**

7.141 In Scotland, disclosing the image to the person in the image is excluded from the disclosure offence. The relevant provision states: “a photograph or film is disclosed if it, or any data or other thing which is capable of being converted into it, is given, shown or made available to a person other than B”.95

7.142 Several Australian jurisdictions also exclude disclosure to the person in the image. Like Scotland, Victoria specifies in their disclosure offence that the image must have been disclosed “to a person other than B”.96 Additionally, Western Australia excludes disclosure to the person in the image through the definition of “distributes”. The image must be distributed “to a person other than themselves or the person depicted in the

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93 Hansard (HL), 20 October 2014, vol 765, col 518.
95 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(2) [emphasis added].
96 Summary Offences Act 1966, s 41DA.
image”. The Northern Territory qualifies their distribution offence with: “Subsection (1) does not apply to the distribution of an intimate image… to only the person depicted in the image”.

7.143 Other Australian jurisdictions do not exclude disclosing the image to the person in the image from their disclosure offences. New South Wales’ offence requires only that the image be disclosed to “another person”. Queensland’s disclosure offence also does not include this exclusion (however, the application of their offence to circumstances where the disclosure is made to the person in the image is limited by the fact that the image must be disclosed “in a way that would cause the other person distress reasonably arising in all the circumstances”). South Australia’s disclosure offence also does not exclude this.

7.144 This demonstrates a lack of consensus between jurisdictions as to whether disclosing an intimate image without consent to the person in the image should be criminalised.

Potential gaps in the law this exclusion creates

7.145 Two stakeholders raised with us that disclosing the image to the person in the image can act as an implicit threat to share the image further. Alexandra Whiston-Dew and Tim Thompson, from the law firm Mishcon de Reya, suggested that abusive partners and ex-partners sometimes share intimate images with the individuals in them to remind them that they have the image and could share it with others, in order to blackmail or control them.

7.146 As threatening to share an intimate image is not currently an offence, this seems to be a gap in the law. However, this behaviour would perhaps be better dealt with through the introduction of a threats offence, which could cover implicit as well as explicit threats. We consider whether an offence of threatening to share an intimate image should be introduced in the next chapter.

7.147 However, we have identified three further situations that potentially warrant criminalisation. The first situation is images that depict someone being sexually assaulted (either by the person who disclosed the image to the person in the image or someone else). As noted at paragraph 7.139 above, it is likely that Parliamentarians were of the view that disclosing an intimate image to the person in the image would not cause them distress, or at least not the same degree of distress that sharing the image with others could. However, where an image depicts someone being sexually assaulted it is clear that viewing or receiving that image would cause the person in the image significant distress. This is not caught by the current disclosure offence.

7.148 The second situation is where the image was originally taken without consent, or the person who took it promised they had deleted it. In his article “Trust me it's only for

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97 Criminal Code Act Compilation Act 1913, s 221BC.
98 Criminal Code Act 1983, s 208AB(2).
99 Crimes Act 1900, s 91Q.
100 Criminal Code 1899, s 223.
101 Summary Offences Act 1953, s 26C.
me”: “revenge porn” and the criminal law”, Alisdair Gillespie gives the following example:

D and V decide "for a bit of fun" to record V performing a sex act on D. After watching it D promises V that he will delete the footage. In fact he does not. A week after V ends the relationship with D he contacts her and shows her the footage saying "look what I’ve got".

7.149 Gillespie argues that V in this example could be caused “considerable distress”. Some of this behaviour could be classified as a threat, either explicit or implicit, which would be covered by a threatening to share offence (see Chapter 12). However, in the above example it is not a clear threat; there is no evidence it was sent by D with the intention of making V think it will be shared elsewhere. The distress is caused simply by V being sent the image. Arguably, even greater distress could be caused where the image was originally taken without the victim’s knowledge or consent. Examples include images taken by a “peeping Tom” through the victim’s bedroom window or in a changing room, and images taken by abusive partners without the victim seeing when they are undressing or leaving the shower. The person who took the image in these examples would have committed a voyeurism offence (provided that they took the image for the purpose of obtaining sexual gratification). But they have arguably committed two wrongs worthy of criminalisation: taking the image without consent and disclosing it to the victim.

7.150 The third situation that potentially warrants criminalisation is where the image is disclosed to the person in the image by someone other than:

(1) the person who took it, with or without consent; and

(2) the person the image was originally disclosed to with consent.

Consider this example:

Jamie is in an open relationship with Alex. Jamie asks Alex if he can take pictures of them having sex. Alex says no, but Jamie takes a few pictures anyway. Jamie thinks he looks really attractive in one of the pictures, so he uploads it to his profile on the gay dating app “Grindr”. Elijah, who knows and dislikes Alex, sees the picture on Jamie’s Grindr profile. He sends it to Alex with the message: “Look what your sl*tty boyfriend put online. He looks SO much hotter than you!”. Alex is extremely distressed.

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102 Alisdair Gillespie, “Trust me, it’s only for me”: “revenge porn” and the criminal law” (2015) 11 Criminal Law Review 867.

103 Above.
7.151 In this example, Jamie has almost certainly committed a voyeurism offence.\textsuperscript{104} It is unlikely that he has committed a disclosure offence, because it would be difficult to establish that he put the picture on his Grindr profile in order to cause Alex distress.\textsuperscript{105} Turning now to Elijah, he has not committed a voyeurism or disclosure offence, because he did not take the picture and he only disclosed it to Alex. This despite the fact that Elijah intended to cause Alex distress by sending him the picture, and he did cause Alex distress. In this case, Elijah has intentionally caused harm to Alex by sending him an intimate image of himself without his consent. This behaviour is arguably both wrongful and harmful and Elijah's intention may make him sufficiently culpable to justify the intervention of the criminal law.

7.152 That said, we did not hear evidence of cases like this from stakeholders. In light of this, before we reach a view on whether sharing an image with the person in the image without consent should be covered by a sharing offence, we would value consultee input on the circumstances in which intimate images are shared with those in the images and the harm this causes.

**Consultation Question 22.**

7.153 Can consultees provide us with examples, or comment on the prevalence, of:

1. images depicting sexual assault being shared with the person in the image;
2. intimate images that were taken without consent, or where the person in the image was assured that the image had been deleted, being shared with the person in the image; and
3. intimate images being shared with the person in the image by someone who did not take the image and was not originally sent the image with consent?

7.154 We invite consultees' views as to whether there are there other examples of sharing an intimate image with the person in the image without consent, not included in the paragraph above, which should be criminalised?

7.155 Can consultees describe the harm that sharing an intimate image with the person in the image without consent can cause?

**CONCLUSION**

7.156 This chapter has considered the acts of taking, possessing, making and sharing an intimate image without consent. Two of these behaviours, taking and sharing an intimate image without consent, are already partially criminalised. We therefore considered whether the behaviours caught by the current taking and sharing offences should be expanded. We provisionally proposed that “downblousing” (recording

\textsuperscript{104} In Richards, it was established that filming a partner during (consensual) sex without consent can fall within the voyeurism offence. R v Richards (Tony) [2020] EWCA Crim 95, [2020] 1 WLR 3344.

\textsuperscript{105} This potential weakness in the disclosure offence will be discussed in Chapter 12.
someone’s breasts, or the underwear covering their breasts, down their top) without consent and sharing images which have been altered to appear sexual or nude (most notably deepfake pornography) without consent should be criminal offences. We also asked for consultees’ views on whether sharing an intimate image with the person in the image should be criminalised. Finally, we considered whether the current taking offences should be combined, and provisionally proposed that all “taking” behaviours should be caught by a single taking offence.

7.157 Making and possessing an intimate image without consent are not currently criminalised. We therefore considered whether the criminal law should be extended to cover these behaviours. We concluded that we have insufficient information about the behaviours, motivations and harms to reach a provisional view on a simple making offence and provisionally propose not to include a possession offence. We have asked for consultees’ views on these points.
Chapter 8: Without consent

INTRODUCTION

8.1 The central pillar of intimate image offences is lack of consent. Taking and sharing intimate images consensually is not and should not be a matter for the criminal law. When intimate images are taken or shared without consent, however, these behaviours are wrongful and cause significant harm to individuals and society at large.¹

8.2 As we set out in Chapter 3, all of the existing intimate image abuse offences (the disclosure offence, voyeurism and “upskirting”) require the prosecution to prove that the victim did not consent to the sharing or taking of the intimate image. A similar element will be needed for our provisionally proposed taking and sharing offences. Such an element of a criminal offence is a “circumstance element”:

A criminal offence can consist of one or more of three external elements: conduct, the circumstances in which the conduct takes place and the consequences of the conduct. However, although an offence can comprise all three elements, not all three elements are integral to the definition of every completed offence. Whether one, two or all three elements are part of the definition of an offence varies a great deal.²

The circumstance element is the set of conditions, state of affairs or factual matrix in which the conduct must occur if the conduct or consequence is to be wrongful. This may include the victim’s state of mind.³

8.3 In the case of rape, for example, the conduct element is penetration, and there is a circumstance element: the victim does not consent to the penetration.⁴ There is no consequence element. In Chapter 9 we consider whether there should be a consequence element for intimate image abuse offences, namely actual harm caused to the victim. In Chapter 11, we consider further circumstance elements relating to intimate images taken in public places, and intimate images previously shared in public places, whether offline or online. (Rape also contains two internal mental or fault elements: the penetration must be intentional, and the defendant must not reasonably believe that the victim consents to the penetration. We discuss the fault elements of our provisionally proposed intimate image offences in Chapter 10.)

8.4 In this chapter we explore when taking or sharing an intimate image is “without consent”. In many cases of intimate image abuse where there is no apparent consent

¹ See Chapter 5 for detailed discussion of the wrongs of and harms caused by intimate image abuse.
² Inchoate Liability for Assisting and Encouraging Crime (2006) Law Com No 303 at 5.23 (footnotes omitted).
⁴ Sexual Offences Act 2003, s 1.
from the victim, this question is easily answered.\textsuperscript{5} In other cases the defendant may rely on an apparent consent from the victim, which the prosecution argues was not a valid consent. We will therefore need to consider what makes a consent valid. To do so we draw on the existing sexual offences provisions relating to consent.

8.5 Much intimate image abuse is akin to sexual offending and sits on a continuum of sexual abuse. In Chapter 5 and Chapter 14 we describe how victims have likened their experiences of intimate image abuse to experiences of sexual assault. In Chapter 4 we explore how intimate image abuse, like sexual abuse, is often perpetrated for the purposes of sexual gratification and exertion of power through coercion and control. In Chapter 14 we explore types of intimate image abuse that should be regarded as sexual offences.

8.6 The Sexual Offences Act 2003 (“SOA 2003”) contains a number of non-consensual offences, including rape, assault by penetration and sexual assault,\textsuperscript{6} for which the prosecution must prove that the victim did not consent to the penetration or touching. As noted above, the voyeurism and “upskirting” offences contain similar elements. Sections 74 to 76 of the SOA 2003 set out a definition of consent, and a series of rebuttable and irrebuttable presumptions in relation to capacity, deception and voluntariness. In the following discussion of each of these issues, we consider whether these sections of the SOA 2003 would be useful in the context of our proposed intimate image abuse offences. We also discuss consent given by children.

\textbf{CAPACITY}

8.7 Section 74 of the SOA 2003 provides that a person consents if they agree by choice and have the freedom and capacity to make that choice. Capacity is not defined in the SOA 2003, but the Court of Appeal (Criminal Division) has recently approved an earlier decision of the Court of Appeal (Civil Division)\textsuperscript{7} holding that:

the civil and criminal jurisdictions should adopt the same test for capacity to consent to sexual relations … The approach should be the same necessarily informed by the definition and guidance contained in sections 2 and 3 of the Mental Capacity Act 2005.\textsuperscript{8}

8.8 In addition to the test for capacity contained in sections 2 and 3 of the Mental Capacity Act 2005 ("MCA 2005"), the first three principles set out in section 1 are also relevant to the test:

\textbf{Section 1: The principles}

(1) The following principles apply for the purposes of this Act.

\textsuperscript{5} See, for example, \textit{R v Richards (Tony)} [2020] EWCA Crim 95, [2020] 1 WLR 3344 and the Emily Hunt case discussed in Chapter 2.

\textsuperscript{6} Sexual Offences Act 2003, ss 1-3.

\textsuperscript{7} \textit{IM v LM, AB and Liverpool City Council} [2014] EWCA Civ 37, [2014] 3 WLR 409.

\textsuperscript{8} \textit{R v GA} [2014] EWCA Crim 299, [2014] 1 WLR 2469 at [18]-[19]. The burden of proof would be on the prosecution to prove to the criminal standard that the victim lacked capacity.
(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision …

Section 2: People who lack capacity

(5) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(6) It does not matter whether the impairment or disturbance is permanent or temporary.

(7) A lack of capacity cannot be established merely by reference to—
   (a) a person's age or appearance, or
   (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity. …

Section 3: Inability to make decisions

(8) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
   (a) to understand the information relevant to the decision,
   (b) to retain that information,
   (c) to use or weigh that information as part of the process of making the decision, or
   (d) to communicate his decision (whether by talking, using sign language or any other means).

(9) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(10) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(11) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
(a) deciding one way or another, or
(b) failing to make the decision. …

8.9 Under the MCA 2005, capacity is decision-specific and may fluctuate over time. An individual "may have capacity to make small decisions about everyday issues such as what to wear or what to eat, but lack capacity to make more complex decisions about financial matters."

8.10 There is some overlap between the elements of the MCA 2005 test for capacity and three of the rebuttable presumptions against both consent and the defendant’s reasonable belief in consent in section 75(2) of the SOA 2003, which operate in the following circumstances:

(d) the complainant was asleep or otherwise unconscious at the time of the relevant act;
(e) because of the complainant’s physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;
(f) any person had administered to or caused to be taken by the complainant, without the complainant’s consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

8.11 The absence of such rebuttable presumptions in other circumstances—for example voluntary intoxication which does not render the victim unconscious—does not determine the question of whether the victim had capacity at the time the decision was made. An intoxicated victim may or may not have had capacity. That will ultimately be a decision for the jury or magistrates, applying the provisions of the MCA 2005.

DECEPTION

8.12 Two kinds of deception trigger conclusive presumptions against both consent and the defendant’s belief in consent by virtue of the operation of section 76(2) of the SOA 2003. In effect, the complainant’s consent is vitiated if either of these circumstances apply:

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10 In these circumstances, the rebuttable presumption of capacity in the Mental Capacity Act 2005, s 1(2) would be displaced.
11 R v Kamki [2013] EWCA Crim 2335.
12 For a detailed discussion, see Rook & Ward on Sexual Offences, Law and Practice (5th ed 2016) 1.243-1.254.
(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

(b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

8.13 If the conduct does not fall within section 76 then reliance can still be placed on the general application of section 74.14 That is, deceptions other than those listed in section 76 may vitiate consent if the court finds that the victim did not agree by choice or did not have the freedom and capacity to make that choice.15

VOLUNTARINESS

8.14 We heard from a number of stakeholders that consent may be coerced by the perpetrators of intimate image abuse. This may be in the context of domestic abuse or in cases such as sextortion.

8.15 The use or threat of violence or unlawful detention are the remaining circumstances which trigger rebuttable presumptions against both consent and the defendant’s reasonable belief in consent in section 75(2):

(a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

(b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;

(c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;

8.16 In addition, coercion, duress, threats or intimidation other than those listed in section 75 may vitiate consent if, in applying section 74, the court finds that the victim did not agree by choice or did not have the freedom and capacity to make that choice.

CHILD VICTIMS

8.17 In this section we address two questions in relation to child victims of intimate image abuse. First, should the prosecution be required to prove that the child victim did not consent to the defendant’s conduct? Secondly, if so, how does the law relating to consent differ for child victims?


The relevance of a child's consent

8.18 The existing intimate image abuse offences—the disclosure offence, voyeurism and “upskirting”—do not differentiate between victims on the basis of age. The prosecution must prove that the victim did not consent, regardless of the age of the victim. In many cases involving a child victim who has not consented, the Crown Prosecution Service (“CPS”) will be faced with a choice between an intimate image abuse offence, or an indecent image of a child offence.

8.19 In contrast, if a child victim has provided valid consent, then none of the existing intimate image abuse offences has been committed (although the defendant may nonetheless have committed an indecent image of a child offence). The terms of reference of this project extend only to victims who have not consented; the consensual taking and sharing of intimate images is not within its scope, nor are the indecent images of children provisions.

8.20 The question before us is therefore whether our provisionally proposed offences should include cases involving child victims who do not consent. In the existing intimate image abuse offences, Parliament has chosen not to differentiate between victims on the basis of age. We agree. To do so would fail to protect child victims in some cases of intimate image abuse which do not fall within the indecent images of children provisions. We must therefore consider how the law relating to consent outlined above applies to child victims.

The validity of consent by a child

8.21 Where lack of consent is an element of the offence, sections 74 to-76 of the SOA 2003 apply to victims of all ages. As for an adult victim, a child victim’s consent will be valid if they consented by choice and had the freedom and capacity to make that choice. While the issues relating to deception and voluntariness canvassed above

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16 This is the case even if the victim is under 13, unlike the most serious sexual offences for which the consent of a child under 13 is irrelevant: see, for example, Sexual Offences Act 2003, s 5 (rape of a child under 13), s 6 (assault of a child under 13 by penetration), s 7 (sexual assault of a child under 13), s 8 (causing or inciting a child under 13 to engage in sexual activity).

17 For the disclosure offence under Criminal Justice and Courts Act 2015, ss 33(1)(a), for the voyeurism offence under Sexual Offences Act 2003, ss 67(1)(b), (2)(b) and (3)(c), for the “upskirting” offence under Sexual Offences Act 2003, ss 67A(1)(c) and (2)(d). The same is true for the Scottish disclosure offence which provides a defence if the victim consented to the disclosure of the image, regardless of the victim’s age. Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(3)(a). By contrast, in the Australian states of New South Wales (under of the Crimes Act 1900 (NSW), ss 91O(7)(a)) and Western Australia (under Criminal Code Act Compilation Act 1913, ss 221BB(6)), the consent of a victim under the age of 16 is irrelevant.

18 Protection of Children Act 1978, s 1 (taking, making or sharing an indecent photograph of a child); Criminal Justice Act 1988, s 160 (possessing an indecent photograph of a child).

19 For the indecent images of a child offences, the prosecution does not have to prove that the child did not consent to the defendant’s conduct, unless the defendant proves that the child was 16 or over and that the defendant and the child were married, in a civil partnership or “lived together as partners in an enduring family relationship”. Protection of Children Act 1978, s 1A; Criminal Justice Act 1988, s 160A.

20 For further detail on the terms of reference for this project see Chapter 1, paragraph 1.9

21 Sexual Offences Act 2003, s 74.
will apply to all victims, the law in relation to a child’s capacity to consent is more complex.

8.22 At paragraph 8.7 above, we noted that the criminal courts will use the Mental Capacity Act 2005 to assess the capacity of a victim of a sexual offence whose consent (or lack thereof) is in issue. The MCA 2005 applies to those who are 16 years old and over. Thus 16 and 17-year olds will, like, adults, be rebuttably presumed to have capacity. Their capacity can be assessed using the test set out in sections 2 and 3 of the MCA 2005, informed by the principles in section 1.

8.23 The approach of the common law to the capacity of individuals under the age of 16 remains based on the House of Lords decision in *Gillick*, which we provisionally proposed should be applied in the criminal context in our consultation paper on consent in the criminal law:

In relation to those matters in which a person under the age of 18 may give a valid consent under our proposals, such a person should be regarded as being unable to make a decision by reason of age or immaturity if at the time the decision needs to be made he or she does not have sufficient understanding and intelligence to understand the information relevant to the decision, including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision. …

In determining whether a person under the age of 18 has sufficient understanding and intelligence for these purposes, a court should take into account his or her age and maturity as well as the seriousness and implications of the matter to which the decision relates.

8.24 The civil courts are increasingly using the approach of the MCA 2005 in cases involving individuals under the age of 16. Given the desirability of a uniform approach to capacity across the civil and criminal jurisdictions, the MCA may also be used for under 16-year olds, albeit starting from a presumption that they do not have capacity.

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22 Mental Capacity Act 2005, s 2(5).
23 Mental Capacity Act 2005, s 1(2).
29 Mental Capacity Act 2005, ss 1(2) and 2(5).
CONCLUSION

8.25  We acknowledge the extensive criticism of sections 74-76 of the SOA 2003, but observe that while reform of these provisions may be desirable, it is outside the scope of this project. Moreover, much of the criticism relates to factual scenarios that are unlikely to occur in the context of intimate image abuse. In our view, given the sexual nature of much intimate image abuse, the creation of separate provisions governing consent in this context would risk causing confusion. We note that the substantial criticisms of the current consent regime for sexual offences suggest a more holistic review is required than one limited to the context of intimate image abuse. A comprehensive update to the Law Commission’s consultation paper on consent in the criminal law might be a more appropriate vehicle for such a review.

8.26  During our pre-consultation engagement, many stakeholders, including the CPS and police, endorsed the use of the consent provisions in sections 74-76 of the SOA 2003, arguing that they are readily understood and would work well for intimate image offences. We therefore provisionally propose that sections 74 to 76 of the SOA 2003 should apply to our provisionally proposed offences.

Consultation Question 23.

8.27  We provisionally propose that the consent provisions in sections 74 to 76 of the Sexual Offences Act 2003 should apply to intimate image offences. Do consultees agree?

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30  See, for example, D Ormerod and K Laird, Smith, Hogan & Ormerod’s Criminal Law (15th ed 2018), s 17.2.1; Jennifer Temkin and Andrew Ashworth, ‘Rape, Sexual Assaults and the Problems of Consent’ [2004] Criminal Law Review 328.

Chapter 9: Proof of harm

INTRODUCTION

9.1 In Chapter 5 we described the range of serious and lasting harms that victims of intimate image abuse suffer. In this chapter we consider whether the prosecution should be required to prove some degree or form of harm to the victim as part of any new intimate image offence.

CURRENT STATUS OF PROOF OF HARM

9.2 As we set out in Chapter 3, both the disclosure and “upskirting” offence include requirements that the perpetrator intended to cause the victim harm.1 However, neither offence includes a requirement to prove that the victim was actually harmed. The voyeurism offence also does not contain such a requirement.2

9.3 In other jurisdictions, proof of actual harm is rarely included in intimate image offences. A notable exception is the harmful digital communications offence in New Zealand. Under section 22 of the Harmful Digital Communications Act 2015:

A person commits an offence if—

(a) the person posts a digital communication with the intention that it cause harm to a victim; and

(b) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and

(c) posting the communication causes harm to the victim.

9.4 “Posts a digital communication” is defined as including two types of communication: any information (whether truthful or untruthful) about the victim and an “intimate visual recording” of someone else.3 Therefore, this offence will apply where someone posts an intimate image of someone else intending to cause the person in the image harm, so long as a reasonable person in the position of the person in the image would have been harmed and the person in the image was in fact harmed.

9.5 The proof of actual harm element in New Zealand’s offence has attracted criticism. For instance, Ang Jury, chief executive of Women’s Refuge New Zealand, has argued that the proof of actual harm element makes the threshold for prosecution too high. She believes that whether a victim can prove that they were harmed is “a subjective and arbitrary determination of whether an offence has occurred, and needs to be

1 Criminal Justice and Courts Act 2015, s 33 and Sexual Offences Act 2003, s 67A. In the “upskirting” offence this is one of two possible intentions: the other is to obtain sexual gratification, either for oneself or another.

2 Sexual Offences Act 2003, s 67.

3 Harmful Digital Communications Act 2015, s 4.
reviewed”. She added: “these offences need to be categorised as criminal regardless of impact”.4

STAKEHOLDERS’ VIEWS

9.6 The consistent message from stakeholders was that proof of actual harm should not be an element of intimate image offences. Clare McGlynn argued that no intimate image offence should include proof of actual harm, even if some forms of intimate image abuse require additional elements to increase culpability, such as a possession offence.5 Thomas Crofts echoed McGlynn’s view.6 Similarly, Samantha Pegg suggested to us that proof of actual harm is not necessary in intimate image offences because sufficient culpability can be ensured through other elements of the offence.7 Erika Rackley and Kelly Johnson agreed, arguing that harm to the victim can be taken into account at the sentencing stage.8

9.7 Stakeholders also emphasised that victims respond to intimate image abuse in different ways. Some may not exhibit classic signs of distress, but this does not mean that they have not been harmed. Maithreyi Rajeshkumar described cases where the police had failed to take cases forward because the victim did not, in their eyes, seem to be distressed – “she wasn’t crying”. She told us that requiring victims to prove harm would force victims to respond in a certain way, which could amplify their harm.9

9.8 Relatedly, stakeholders explained that requiring victims to give evidence of how, and the extent to which, they have been harmed could retraumatisethe them.10 Retraumatisation was highlighted as a particular issue if victims were required to explain in court how the abuse had harmed them.11

9.9 Finally, we were told that a requirement to demonstrate harm would perpetuate a victim narrative whereby victims are expected to suffer extreme distress, even when their abuse has been ongoing for some time or they have been re-victimised multiple times. As discussed in Chapter 5, paragraph 5.38, one victim (who is also a police officer) stressed that this narrative disempowers victims and marginalises those who have become immune to the abuse or developed coping strategies. She told us that intimate image abuse is wrong regardless of whether the victim demonstrates the "right" level of distress.

5 Prof Clare McGlynn QC (Hon) (Durham University).
6 Prof Thomas Crofts (City University of Hong Kong).
7 Dr Samantha Pegg (Nottingham Trent University).
8 Prof Erika Rackley (University of Kent) and Dr Kelly Johnson (Durham University).
9 Maithreyi Rajeshkumar (former Policy and Communications Manager at Childnet International).
10 Prof Danielle Citron (Boston University).
11 Dr Charlotte Bishop (University of Exeter).
9.10 The only stakeholder to argue in favour of a harm element was Charlotte Bishop.\textsuperscript{12} She argued that section 76 of the Serious Crime Act 2015 (which criminalises controlling or coercive behaviour in an intimate or family relationship) does not reflect the harm caused to victims. Perpetrators, she said, are often given “tiny sentences”, despite victims being retraumatised by giving evidence in court. She argued that the sentence available for intimate image offences needs to reflect the harm caused to victims, and this could be achieved by including an actual harm element in the offence. She suggested that two offences could be introduced, a lesser offence with no harm element and a more serious offence with a harm element. This would ensure that in cases where the victim felt unable to give evidence of the harm they have suffered, an offence would still be available.

CONCLUSION

9.11 While we share Bishop’s concerns over ensuring intimate image offences attract penalties that reflect the harm caused, our provisional view is that proof of actual harm should not be an element of any intimate image offences. We agree that a proof of actual harm element would act as an unnecessary barrier to prosecution. Culpability can be demonstrated through other elements of the offence which reduces the risk of causing unnecessary distress to the victim.\textsuperscript{13}

Consultation Question 24.

9.12 We provisionally propose that proof of actual harm should not be an element of intimate image offences. Do consultees agree?

\textsuperscript{12} Dr Charlotte Bishop (University of Exeter).

\textsuperscript{13} See Chapter 10 for discussion of the fault elements that should attach to an intimate image offence (or intimate image offences).
Chapter 10: Fault requirements

INTRODUCTION

10.1 In Chapter 7 we provisionally propose that a new offence (or offences) should cover the taking and sharing of intimate images without consent. This chapter will examine what the fault elements of our new offences should be.

The “mental element” (or “fault element”) [of an offence] is the state of mind which must be proved by the prosecution to show that [the defendant] is responsible for the[ir] actions. Examples of mental elements include intention, recklessness, knowledge or belief (or the lack of it).1

10.2 In reaching our provisional proposal for new offences of taking and sharing intimate images without consent, we considered the type of acts that should be criminal. For each such act, the culpability of the perpetrator must be sufficient to warrant criminalisation. Our provisional view is that to reach that threshold, someone who takes or sends an intimate image without consent must have intended to take or send the image. For example, someone who takes a photo unaware of someone nude in the background, or who presses the wrong button on their phone and accidentally records or sends an intimate image is less culpable than someone who intentionally does so, and should not be subject to a criminal offence. Therefore the offences that we provisionally propose require that the taking or sharing was intentional, and not merely accidental. This fault element is attached to the physical acts that are the subject of the offences. The rest of this chapter will look beyond the acts and will consider the defendant’s awareness of lack of consent and reasons for acting.

10.3 The first half of this chapter will focus on the defendant’s awareness of lack of consent. We consider:

(1) a test of actual knowledge as to lack of consent;

(2) knowledge or recklessness as to lack of consent; or

(3) no reasonable belief in consent.

10.4 The second half of this chapter focuses on additional intent: “[t]hat is to say, [whether the defendant] must intend some result over and above those required for the external elements of the offence.”2 We consider whether we should introduce a “base” offence with no additional intent and the need for any further offences with additional intents (and if so, in what form).

10.5 In relation to additional intent we consider a number of different options:

1  Reform of Offences Against the Person (2015) Law Com No 361 para 2.3(2).
an offence with no additional intent;

an offence with an additional intent, such as:

(a) one relating to distress of the victim (such as intent to cause distress currently contained in the disclosure offence in section 33 of the Criminal Justice and Courts Act 2015 (CJCA 2015)), or for the purposes of humiliating, alarming or distressing the victim as in the “upskirting” offence in section 67A of the Sexual Offences Act 2003 (SOA 2003);

(b) for the purpose of obtaining sexual gratification;

(c) for financial gain; and

(d) to coerce and control the victim.

10.6 Although this chapter deals with the awareness of lack of consent and the additional intent requirement separately, we recognise that the two are interdependent, particularly in relation to culpability.

AWARENESS OF LACK OF CONSENT

Should there be a fault requirement in relation to lack of consent?

10.7 The first question is whether an offence or offences of this kind should require a fault element as to lack of consent. That is, should there be a requirement that the defendant had some awareness that the victim did not consent to the taking or sharing? Or is it sufficient that the defendant took or shared the image without the victim’s consent?

10.8 Where a defendant reasonably believed that the depicted person consented to having their image taken or shared, they are less culpable. One such example could be: X sends Y a link to a new website advertising her lingerie shop and asks for his opinion. The website contains details of the shop location, opening hours and images of X modelling the underwear, some of which is see-through. Y sends the link to the website on to his friends for their opinions. Unbeknownst to Y, X had only set up the website as a prototype to show her photos to Y; it was not a publicly accessible website without the link. When Y visited the website there was nothing on it that would suggest it was anything other than a public website with the shop information and images. Y reasonably, but mistakenly, believed that his friends could access the website themselves via a search engine. It is our provisional view that Y is insufficiently culpable to warrant the intervention of the criminal law.

10.9 Greater culpability could be ensured (1) by including a fault requirement relating to lack of consent, (2) by including an additional intent element, or (3) both.

10.10 An indirect example of the first approach is the disclosure offence introduced into the Western Australia Criminal Code by the Criminal Law Amendment (Intimate Images) Act 2019. The offence requires that the defendant “distributes an image of another person (the depicted person)” and “the depicted person did not consent to the distribution”. However, there is a general defence in section 24 of the Western Australian Criminal Code available when the defendant held an honest and
reasonable belief, although mistaken, that the victim consented. This is consistent with the approach to other offences in which consent is in issue in Western Australia such as sexual assault or rape.  

10.11 An example of the second approach is the disclosure offence in England and Wales, contained in section 33 of the Criminal Justice and Courts Act 2015, which does not include a fault requirement as to the defendant's awareness of lack of consent, only that the victim did not consent. However, it also has an additional intent element, to cause distress, which arguably negates the need for this – if a defendant intended to cause the victim distress then they would no doubt be aware that they did not have the victim’s consent to share the image.

10.12 An example of the third approach is Scotland’s disclosure offence contained in section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. It is a defence that the person depicted consented to the disclosure, or that the defendant reasonably believed that the person depicted consented to the disclosure. The offence itself also has an additional intent element: “A intends to cause B fear, alarm or distress or A is reckless as to whether B will be caused fear, alarm or distress”.

10.13 In the second half of this chapter, we consider whether a base offence without an additional intent element should be introduced, and conclude that this is desirable. As a result, only the first approach – including a fault requirement relating to lack of consent – would ensure an appropriate level of culpability. We therefore consider in the next section how such a fault requirement should be formulated.

**What should the fault requirement as to lack of consent be?**

10.14 Now that we have concluded that there should be a fault requirement relating to the defendant’s awareness of lack of consent, there are three possibilities:

(1) the defendant had “actual knowledge” of the victim’s lack of consent;

(2) the defendant had *either* actual knowledge or was reckless as to whether the victim did not consent; or

(3) the defendant did not reasonably believe that the victim consented.

10.15 We consider these three options below.

**Actual knowledge**

10.16 The first option is to require that the defendant had actual knowledge that the victim did not consent to the taking or sharing.

10.17 Although most offences in the SOA 2003 require the prosecution to prove that the defendant had “no reasonable belief in consent”, voyeurism requires actual knowledge

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of lack of consent. Section 67(1)(b) of the SOA 2003 states that a person commits the
goal of consent. There is no element of recklessness and no defence where the
defendant reasonably believed that the victim consented. This is interesting given that
voyeurism was introduced by the SOA 2003 at the same time that the offence of rape
was reformed. Previously, the prosecution had been required to prove that the
defendant knew or was reckless as to lack of consent. Following reform, the offence of rape
requires the prosecution to prove that the defendant did not reasonably believe
that the victim consented (see further paragraph 10.28 below).

10.18 Introducing an actual knowledge of lack of consent requirement increases the level of
culpability to the most extreme cases; the defendant was not merely reckless as to
lack of consent. In cases of voyeurism, actual knowledge may be self-evident: by
intentionally taking an image of another person doing a private act in circumstances of
a reasonable expectation of privacy, the defendant must have known that the person
did not consent. Recall that the purpose of this offence was specifically to deal with
“peeping Toms” – taking images in particular contexts such as placing a camera in
toilets, peeping into changing rooms, and so forth.

10.19 In considering a new offence that would cover both taking and sharing an intimate
image without consent, we are seeking to deal with a much wider range of behaviours.
This includes behaviours where the defendant may claim not to know the victim did
not consent, merely because they did not think or care to ask for consent. This could
be quite easily claimed in instances of sharing and it could be difficult to prove actual
knowledge of lack of consent when images are sent online and the defendant is not in
close proximity to the person depicted. However, we should not seek to exclude these
equally harmful instances of taking and sharing intimate images without consent from
criminalisation, simply because the defendant did not care to seek consent or was
unaware that they should ask for consent before doing so.

10.20 In our provisional view, to require actual knowledge of lack of consent would
inappropriately exclude from criminalisation some harmful and wrongful instances of
taking and sharing intimate images without consent. We therefore move on to
consider the two broader fault elements as to lack of consent.

Actual knowledge or recklessness as to lack of consent

10.21 One way to deal with the challenges of actual knowledge provided there is no
additional intent (see the second half of this chapter) is to ensure the inclusion of both
actual knowledge and an alternative recklessness element as to lack of consent. A
number of other jurisdictions have taken this approach to offences covering taking
and/or sharing intimate images without consent, including New South Wales, Canada and New Zealand.

10.22 A defendant is reckless if he is aware of a risk that a consequence will occur and unreasonably (in the circumstances known to the defendant) takes that risk. Initially formulated in \textit{R v Cunningham}, the definition of “recklessness” in England and Wales has been subject to a long line of case law (including a point at which the test was considered to be an objective one in \textit{R v Caldwell}). \textit{R v G} reaffirmed the subjective nature of the test. In this case the Court defined “recklessness” with reference to the Law Commission’s draft Criminal Code Bill as part of its Report on Criminal Law: A Criminal Code for England and Wales and Draft Criminal Code Bill:

A person acts recklessly within the meaning of section 1 of the Criminal Damage Act 1971 with respect to—(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.

10.23 It was then confirmed in \textit{Attorney General’s Reference (No 3 of 2003)} that this definition was applicable to any offence.

10.24 As the test of recklessness is now subjective in England and Wales (as the defendant must be aware of the risk), it would not cover instances where the defendant was not aware of the risk at all. For example, if the defendant did not turn his mind to the risk in the first place, perhaps because he did not much care, he was not reckless. This is often the case in instances of sharing without consent; the defendant, in sharing the image instantly and without thinking, did not even turn his mind to the possibility that the victim did not consent to him sharing that image. This could certainly be the case in instances of secondary distribution. Consider the following two examples:

\textit{R v Cunningham} [1957] 2 QB 396; [1957] 3 WLR 76.


\textit{A Criminal Code for England and Wales: Vol 1 Report and Draft Criminal Code Bill (17 April 1989) Law Com No 177.}


Example 1: Tania posts a sexual image she has taken of herself on her Facebook account, which is set as private. Craig thinks this is hilarious, downloads the image from her Facebook account onto his phone, and sends it to all his friends who are not Facebook friends of Tania’s.

Example 2: Bob’s girlfriend Sonia sends a sexual selfie to him. He sends this image on to his mate Ted, who also shares it with a number of his friends.

10.25 In the above examples, if a sharing offence were to have a test of knowledge or recklessness as to lack of consent, Craig, Bob and Ted could each argue that they were not reckless as they could all say they simply did not turn their mind to the risk that Tania or Sonia did not consent to them sharing the image. In Craig’s case in particular, he could say that because Tania had posted her image onto social media, he thought she was consenting to everyone seeing that image. In fact, she was only consenting to her Facebook friends observing that image, and certainly not consenting to others sharing that image with people she did not know.

10.26 These instances of sharing nonetheless have the potential to cause significant harm, as we explained in Chapter 5.12

10.27 A test of knowledge or recklessness would not be consistent with current sexual offences in England and Wales. Although sexual offences such as rape used to have a knowledge or recklessness test in the SOA 1956,13 this was reformed with the introduction of the SOA 2003. Sexual offences such as rape and sexual assault now require that the prosecution prove that the defendant did not reasonably believe that the victim consented. We discuss this fault requirement further below.

No reasonable belief in consent

10.28 Prior to the introduction of the SOA 2003, the Government’s White Paper “Protecting the Public” was published in 2002 following a review into sexual offences. The White Paper proposed introducing into the offence of rape and sexual assault a requirement that the prosecution prove that the defendant did not reasonably believe that the victim consented, to replace the existing test of actual knowledge or recklessness. The White Paper stated:

This will make it clear that, where the prosecution can prove that there is reasonable room for uncertainty about whether someone was consenting and that the defendant did not take reasonable action in the circumstances to ensure that the other person was willing to take part in the sexual acts, he will commit an offence.14

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12 We further consider the scenario in Example 1 in Chapter 11 where we discuss images that have been previously shared on Facebook or similar websites.

13 Sexual Offences Act 1956, s1: “at the time he knows that the person does not consent to it or is reckless as to whether that person consents to it.”

10.29 This recommendation was reflected in the Sexual Offences Bill 2002, now the Sexual Offences Act 2003. A number of offences in the SOA 2003 now require that the prosecution prove that defendant, A, “does not reasonably believe that [the victim] B consents.” “Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.”15 This element is required for offences such as rape, sexual assault and “upskirting”.

10.30 Reflecting the aims of the test that were highlighted in the relevant reviews and governmental debates, the CPS guidelines state that “the defendant (A) has the responsibility to ensure that (B) consents to the sexual activity at the time in question”. The rationale behind this is that the defendant should take reasonable steps to ensure that the other person – in this case the depicted person – consents, before acting. As Mitchell Davies has noted, “The impact of these provisions is effectively to raise a presumption that D did not hold a reasonable belief that V consented where no specific steps to ascertain the existence of consent can be pointed to.”16

10.31 The CPS guidelines also state that:

The test of reasonable belief is a subjective test with an objective element. The best way of dealing with this issue is to ask two questions:

(1) Did the defendant believe the complainant consented? This relates to his or her personal capacity to evaluate consent (the subjective element of the test).

(2) If so, did the defendant reasonably believe it? It will be for the jury to decide if his or her belief was reasonable (the objective element).

10.32 The “upskirting” offences adopt the same approach. Section 67A of the SOA 2003 requires that the defendant (A) commits the act:

(a) without B’s consent, and

(b) without reasonably believing that B consents.

10.33 The reasonable belief in consent test avoids criminalising those defendants who had reasonable grounds for believing the victim consented. Let us return to the lingerie shop example at paragraph 10.8, above. The reasonable belief in consent test would avoid criminalising Y for sending the website with images of X to his friends in this example.

10.34 It would, however, capture those instances where the defendant was not aware of the risk that the victim did not consent because he did not turn his mind to the issue of consent, which we highlighted above at paragraph 10.24. For this reason, it is, in our view, to be preferred over a knowledge or recklessness approach, as it better reflects individuals' responsibility to satisfy themselves as to consent.

15 See, for example, Sexual Offences Act 2003, s 1(2).

10.35 In those examples, it would not be reasonable for Craig to believe that because Tania had posted her image onto her private Facebook, that she therefore consented to him downloading that image and sending it on to people she did not know. It would also not be reasonable for Ted to believe that, because the image of Sonia was sent to him by Bob, Sonia would have consented to him sharing that on to his mates. Lastly, Bob could not have reasonably believed that Sonia, in sending her sexual selfie to him in a private message, consented to him sending that onwards.

10.36 The no reasonable belief in consent test has been criticised. Temkin and Ashworth have argued that:

the broad reference to "all the circumstances"\(^{17}\) is an invitation to the jury to scrutinise the complainant's behaviour to determine whether there was anything about it which could have induced a reasonable belief in consent. In this respect the Act contains no real challenge to society's norms and stereotypes about either the relationship between men and women or other sexual situations, and leaves open the possibility that those stereotypes will determine assessments of reasonableness.\(^{18}\)

10.37 Similar views were reflected in our engagement with stakeholders on this issue. For example, at our academic roundtable, Clare McGlynn shared her view that reasonable belief was “often based on a masculine perception of reasonable belief”, whereby, for example, some women’s behaviour could be perceived as implied consent. This reflects the arguments around “male reasonableness” made by academics in relation to sexual assault. Burgin and Flynn, for example, have written about the way in which implied consent narratives are used in rape trials in Australia to shape a reasonable belief defence.\(^{19}\) Gore has argued that reasonable belief in consent applies notions of reasonableness “abstracted from the social context of women’s experience of sexual violence and disconnected from sociological insights which contextualise both the encounter and jury decisions”.\(^{20}\)

10.38 There is certainly some merit in this criticism, and a strong case for a reassessment of the “no reasonable belief” test. However, this is a much broader question which would need to be considered as part of a holistic review of the issue of consent in relation to sexual offences, rather than as part of our more limited review of intimate image offences.

10.39 This test has been used for existing sexual offences in England and Wales for almost two decades. Judges are experienced in directing juries on how to approach it. In a pre-consultation meeting with a CPS prosecutor we were told that this concept is a “well-trodden path” in relation to sexual offences in England and Wales and is “well understood”. It was her view that it is a well-balanced test that demonstrates fairness,

\(^{17}\) See, for example, Sexual Offences Act 2003, s 1(2).


\(^{19}\) Rachael Bergin and Asher Flynn “Women’s behaviour as implied consent: Male “reasonableness” in Australian law” [2019] Criminology and Criminal Justice.

particularly when faced with difficult cases involving young people where they reasonably thought there was consent. To use this test as the fault requirement for a new offence of this kind would therefore be consistent with the current law concerning consent in sexual offences. It would also reflect views that these behaviours are part of a continuum of sexual offending, in line with other sexual offences.

Consultation Question 25.

10.40 We provisionally propose that any new offences of taking or sharing intimate images without consent should have a fault requirement that the defendant intends to take or share an image or images without reasonably believing that the victim consents. Do consultees agree?

ADDITIONAL INTENT

Should there be a base offence with no additional intent element?

10.41 One option is to start with a “base” offence with no additional intent requirement. The focus would be on the lack of consent, the defendant’s mental state as to the lack of consent and the intentional act rather than the defendant’s purpose or motive. The rationale would be twofold:

(1) that taking or sharing an intimate image without consent is sufficiently harmful; and

(2) that a defendant with no reasonable belief in consent is sufficiently culpable to warrant criminalisation.

10.42 This is the approach taken in most Australian offences of this kind; the recording and distribution offences in New South Wales\(^{21}\) and the distribution offences in Western Australia\(^{22}\) and Victoria\(^{23}\) do not have an additional intent requirement.

The limitations of additional intent

10.43 One argument for a base offence is that it avoids the offence being too limited in scope. As discussed in Chapter 3 and further below, many stakeholders to whom we spoke in pre-consultation engagement criticised the disclosure offence for its additional intent element (intent to cause distress), highlighting that it was difficult to

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\(^{21}\) The Crimes Amendment (Intimate Images) Act 2017 introduced s 91Q into the Crimes Act 1900 – distribution of intimate images without consent. It is an offence intentionally to distribute, without the victim’s consent, if the defendant knows the person depicted did not consent to the distribution (or is reckless as to such).

\(^{22}\) The Criminal Law Amendment (Intimate Images) Act 2019 amended the Criminal Code to include an offence of distribution of an intimate image as s 221BD. There is also no mental element as to consent in this offence; it is an offence to distribute the image when the victim does not consent to the distribution.

\(^{23}\) In Victoria, the Summary Offences Act 1966 (Vic), s 41DA creates an offence where “(a) A intentionally distributes an intimate image of another person (B) to a person other than B; and (b) the distribution of the image is contrary to community standards of acceptable conduct.”
prove and meant that some behaviour which ought to be criminal fell outside of the
offence.

10.44 As we describe in Chapters 2 and 4, many acts of sharing an intimate image without
consent are not done to cause the depicted person distress, alarm or humiliation, nor
are they done for the other purpose specified in the existing offences, namely to
obtain sexual gratification.

10.45 For example, we have heard about instances where an intimate image is shared
because a group of people think it is humorous; for financial gain; to humiliate (short of
intending to cause distress); to control or coerce; for bravado or to gain social status
amongst a particular social group.

10.46 As we describe in Chapter 5, these acts are clearly harmful and can be just as or
more harmful than acts where the perpetrator intends to cause the victim distress. The
distribution can still cause damage to a person’s reputation, have employment and/or
financial consequences, result in exclusion from their family, friends and/or religious
community, and have significant psychological consequences, even if that was not the
perpetrator’s intention. The motivation may seem innocuous, but the act itself is still
damaging and arguably warrants criminal intervention. By only having an offence
requiring proof of intention to cause distress available in the context of sharing without
consent, the law excludes much of this range of behaviours.

10.47 As discussed in Chapter 3, there has been significant criticism of the limitations
imposed by an additional intent requirement of causing distress or similar. Many
stakeholders in pre-consultation engagement told us that the intent to cause distress
requirement in the disclosure offence did not cover some acts of distribution which
were similarly harmful. Senior District Judge (Chief Magistrate) Emma Arbuthnot and
District Judge Mike Fanning described the intent element of this offence as “far too
narrow”. Both Women’s Aid and the Revenge Porn Helpline described the intent
element of this offence as a “barrier” to providing victims with sufficient protection from
behaviour that should be criminalised. Carrie-Ann Myers and Hollie Powell-Jones said
that “the need to prove intent is failing victims”. Baroness Thornton raised similar
concerns in the House of Lords about the potential limitations of “distress” during
deliberations of the Criminal Justice and Courts Bill.24 Baroness Kennedy highlighted
the importance of drafting “widely without specifying the nature of the motivation”
because of the difficulties of “pinning down” a specific motivation.25

10.48 A similar argument can be made in relation to a requirement that the defendant’s
purpose was obtaining sexual gratification. As Selfe26 has stated:

> Whilst it is clear that the Court of Appeal has given a broad interpretation to the
> concept of “purpose of [obtaining] sexual gratification” [in the voyeurism provisions]
> it remains important to remember that there are still limitations on its scope. It
> remains incumbent upon the prosecution to prove the necessary purpose.

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Consequently, it is possible for a defendant to argue that he was acting with a different, non-relevant purpose.

Sarah Boland of the Crown Prosecution Service described the difficulties prosecutors face charging a suspect with voyeurism when they have not admitted that they took the image(s) in order to obtain sexual gratification. She said that inferring an intention to obtain sexual gratification is challenging because there are lots of reasons people may take intimate images of others without consent. From paragraph 10.74 below we consider why an offence with a purpose of obtaining sexual gratification element may be needed.

Focusing on lack of consent rather than the motive of the perpetrator

10.49 Not having an additional intent requirement allows the offence to focus on the lack of consent, rather than the motive of the perpetrator. Joint Association of Police and Crime Commissioners Victim’s Portfolio Lead and Police, Fire and Crime Commissioner for North Yorkshire Julia Mulligan and Deputy Commissioner Will Naylor emphasised the difficulties in proving this intent element and felt that the offence “doesn’t focus on the lack of consent, but focuses on the purpose of the perpetrator.”

10.50 During Parliamentary debates over the “upskirting” bill, there was considerable discussion over whether to remove the additional intent requirements. Stakeholders including Dame Vera Baird QC27 and Professor Clare McGlynn QC (Hon)28 provided evidence that the motive requirement would exclude some forms of “upskirting” and should be removed. Maria Miller MP tabled an amendment to remove the intent requirement. She questioned:

What message is Parliament sending to young men who are taking pictures up the skirts of their school mates for a laugh if this place excludes that from the law? What are we saying to those young women about the value we put on their right to be protected in law if we see this sort of non-consensual virtual sexual assault as a price worth paying?

10.51 Other Parliamentarians such as Wera Hobhouse MP,29 Christopher Chope MP and Sir Mike Penning MP, as well as Baroness Burt of Solihull and Baroness Gale, agreed that additional intent was not required for the offence. Christopher Chope MP said of this:

… there is a lot to be said for having the specific offence in the Bill cover all instances of upskirting … In all the correspondence I have received, people feel that


29 For example, Wera Hobhouse – see Hansard (HC), 5 September 2018, vol 646.
all upskirting offences should be subject to the criminal law and criminal sanctions, irrespective of motive.\(^{30}\)

10.52 Sir Mike Penning MP said:

it would be a crying shame if we missed the opportunity to send out a message that this House and this Government understand how abhorrent this offence is—if people do it, they will be convicted in a court ... There can be no argument that the person did it by mistake, that it was just a joke or anything like that. It is not a joke to the lady that it has happened to—my daughter, my wife, my constituent.\(^{31}\)

10.53 Baroness Burt expressed the following view:

… we need to concentrate instead on the harm caused to victims. And the harm is real: shame, humiliation, distress, fear and anxiety, paranoia, depression, trauma, panic attacks—the damage is endless. What does motivation matter when the outcome is one of the above?\(^{32}\)

10.54 Other sexual offences in the SOA 2003 – most notably rape and sexual assault – do not require additional intent. It could be argued that this acknowledges the seriousness of the behaviour itself – regardless of the purpose of the perpetrator, these behaviours are harmful and should be criminalised. The focus is on the lack of consent rather than the motive of the perpetrator. Some sexual offences that do not require physical contact – such as exposure and grooming offences – also do not have an additional intent requirement.

**The harm caused and the serious wrongdoing involved warrant criminalisation**

10.55 To ensure that a base offence of this kind would be appropriate, we consider whether this behaviour is sufficiently harmful and wrongful, regardless of the motive of the perpetrator.

10.56 A base offence of this kind would ensure that the full range of behaviour we described in Chapter 7 is captured. It would cover acts of upskirting, downblousing, non-consensual filming or taking an image of someone changing, taking a shower or using the toilet, or engaging in sexual activity, and sharing any of those images, regardless of intent or purpose. This would include taking any sexual image of another without their consent even if not for the purpose of obtaining of sexual gratification. An offence of this kind would ensure that all the gaps in the existing law we identified in Chapter 3 are plugged and all forms of intimate image abuse are appropriately captured in a clear and concise manner.

10.57 In Chapter 5, we considered the wrongfulness of these behaviours and the harm they cause. The core wrongdoing of this behaviour is serious: it is a violation of a victim’s bodily privacy, bodily autonomy and sexual autonomy; this behaviour has the potential to cause significant harm, regardless of the motive of the perpetrator.


\(^{31}\) Above at col 272.

\(^{32}\) *Hansard* (HL), 23 October 2018, vol 793, col 789.
10.58 Further, the offence we propose specifically requires the defendant to have some awareness as to lack of consent. If the defendant reasonably believed that the person depicted consented to the taking or sharing of such an image, this would not be caught by the base offence.

10.59 We acknowledge that there may be a narrow range of conduct that comes within the scope of such a base offence which ought not to be criminalised. Chapter 13 addresses this. We also acknowledge the role of the CPS in exercising its statutory functions in order to (i) determine whether a case ought to be prosecuted, (ii) determine the appropriate charges, (iii) advise the police during the various stages of the investigation; and (iv) continue to review the case so as to ensure that the right person is prosecuted for the right offence. In our view this combination is sufficient to avoid overcriminalisation, however, we would welcome views from consultees as to whether there are examples of this kind of behaviour that would be captured by this base offence that should not be criminalised.

Consultation Question 26.
10.60 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if —

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

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

Do consultees agree?

10.61 We invite consultees’ views as to whether there are examples of behaviours which would be captured by this provisionally proposed offence, taking into account our provisionally proposed defences, which should not be criminalised?

An offence with an additional intent requirement

Should there be any additional offences with additional intent elements?

10.62 In addition to the base offence, we also consider whether there should be an additional offence – or number of offences – with one or more additional intent requirements.

10.63 While the base offence would cover a range of behaviour, it does not provide for any specific, more serious forms of this behaviour.

10.64 There are a range of options for additional intent elements that could be included in a more serious offence, some of which have been included in existing offences in England and Wales and abroad. Below we outline these options and consider the advantages and disadvantages of including each form of additional intent element in a

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new additional offence of taking or sharing an intimate image without consent. To
reflect the more serious behaviour they aim to address, an offence that includes an
additional intent element would have a more serious penalty than a base offence,
including a longer maximum sentence.

10.65 We acknowledge that creating a hierarchy of offences can place an extra burden on
prosecutors. Where the circumstances of the criminal behaviour are borderline, or the
intent is not clear, prosecutors would need to consider whether to charge the
defendant with the base offence or a more serious additional intent offence. Below we
first consider the potential additional intent elements and then invite consultees’ views
on the impact on prosecution of having a base offence and more serious additional
intent offences.

An intent to cause distress

10.66 A number of existing offences relating to sharing or distributing intimate images
without consent include an additional intent requirement that the defendant intended
to distress the victim in some way.

10.67 In the disclosure offence in section 33 of the CJCA 2015, the defendant must have
made a disclosure “with the intention of causing that individual distress”. The
“upskirting” offence in section 67A of the SOA 2003 requires that “A does so with the
intention that A or another person (C) will look at the image for a purpose mentioned
in subsection (3)”, the purpose in (3)(b) being “humiliating, alarming or distressing B”.
A similar additional intent requirement appears in Scotland’s disclosure offence in
section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016: that the
defendant “intends to cause B fear, alarm or distress”.

10.68 In Ireland, section 2(1) of the Harassment, Harmful Communications and Related
Offences Act 2020 creates an offence of distributing, publishing or threatening to
distribute or publish intimate images without consent with intent to cause harm (or
being reckless as to whether harm is caused). Section 2(2) clarifies that for the
purposes of section 2(1) a person causes harm where he or she “intentionally or
recklessly seriously interferes with the other person’s peace and privacy or causes
alarm or distress to the other person”.

10.69 The disclosure offence was introduced as a means of combatting what was then
referred to as “revenge pornography”. The intent to cause distress element was
therefore designed to capture this type of revenge-seeking behaviour. When
considering an amendment that would have included recklessness within this intent
element, Baroness Williams of Trafford stated that “this malicious intent—the revenge
element of revenge porn, so to speak—is a key feature of the offence”.34

10.70 Indeed, this motive represents a specific and malicious type of behaviour, which
warrants separate and more serious treatment by the criminal law.

10.71 The intent to humiliate, alarm or distress the victim – one of the limbs of the
“upskirting” offence – is broader than that in the disclosure offence. When part of such
an intent element, “distress” is considered to impose the highest bar. Considering the

34 Hansard (HL), 16 November 2016, Vol 776, Col 1443.
similar intent element of causing harassment, alarm or distress in public order offences, it is established that, while often grouped together, they are alternatives and not interchangeable.\textsuperscript{35} Cases on public order offences that require an intent to cause humiliation, alarm or distress have clarified the difference between the terms. In \textit{R (on the application of R) v DPP},\textsuperscript{36} the High Court distinguished “distress” as requiring “emotional disturbance or upset”.\textsuperscript{37} In \textit{Southard v DPP},\textsuperscript{38} the court agreed with the analysis that distress requires real emotional disturbance or upset, but added that the same is not true for harassment (although harassment cannot be trivial).\textsuperscript{39} While distress may be considered the more serious, humiliation and alarm can still cause significant harm and be just as malicious. Following the approach of the “upskirting” offence we suggest this is a more comprehensive form of additional intent.

10.72 In this offence there would be no need for a no reasonable belief in consent element, as such a belief would be inconsistent with the purpose of humiliating, alarming or distressing the victim. We discuss this same principle in respect of the current disclosure offence at paragraph 10.11 above.

**Consultation Question 27.**

10.73 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if —

(a) V does not consent; and

(b) D does so with the intention of humiliating, alarming or distressing V or with the intention that D or another person will look at the image for the purpose of humiliating, alarming or distressing V.

Do consultees agree?

**Sexual gratification**

10.74 In England and Wales, voyeurism and the “upskirting” offences in the \textit{SOA 2003} both include a purpose that relates to the defendant obtaining sexual gratification. For voyeurism relating to recording another doing a private act without their consent, in section 67(3) of the \textit{SOA 2003}, the defendant must do so “with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act”. The “upskirting” offence in section 67A of the \textit{SOA 2003} requires that “A does so with the intention that A or another person (C) will look at the image for a

\textsuperscript{35}  D Ormerod and D Perry, \textit{Blackstone's Criminal Practice} (2020) B11.72.

\textsuperscript{36}  \[2006\] EWHC 1375 (Admin).

\textsuperscript{37}  Above at [12].

\textsuperscript{38}  \[2006\] EWHC 3449 (Admin).

\textsuperscript{39}  Above at [23].
purpose mentioned in subsection (3)”, the purpose in (3)(a) being “obtaining sexual gratification (whether for A or C)”.

10.75 The voyeurism offence, recommended by the Home Office in their White Paper “Setting the Boundaries: reforming the law on sex offences”, was initially designed to target “peeping tom behaviour” with a sexual motive. However, it must be noted that the recommendation in the White Paper did not include an additional intent of obtaining sexual gratification. The Home Office stated that:

The observation may well be for sexual gratification, but this was an element that could be difficult to prove. Nor did we think it was absolutely necessary – the observation in the circumstances of privacy was sufficient, and the fear and distress its discovery could cause was sufficient in itself to justify the offence.

10.76 The additional intent in the resulting Bill – with the intention that D or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act – targets a very specific type of behaviour. An offence of this kind can lead to very specific consequences relating to the sexual motive of the perpetrator, such as the triggering of notification requirements under Schedule 3 of the SOA 2003 and the availability of Sexual Harm Prevention Orders. There is no question that this behaviour is wrongful and conviction rates for voyeurism offences suggest that it continues to occur. We therefore provisionally propose that there should be an additional taking offence where the defendant’s purpose was obtaining sexual gratification.

10.77 The next question is whether this additional offence should extend to sharing as well as taking without consent. The existing voyeurism offence is limited to “taking”. So, if a person were to share a private sexual image, with the intent that they or others will look at the image for the purpose of obtaining sexual gratification, this would not be caught under the voyeurism offences (because they did not take the image without consent) nor the disclosure offence (which is limited to intent to cause distress). While we have not heard specific examples of this from stakeholders, we are aware that there are websites dedicated to sharing non-consensual images for the purpose that someone will look at those images and obtain sexual gratification. We have also heard of some examples where someone posts a sexual image of another to a pornographic website without their consent. While we can be unsure of their primary purpose, it is clear that doing so enables others to obtain sexual gratification from the image.

10.78 We think that this is enough provisionally to propose that the additional offence for the purpose of obtaining sexual gratification should apply both to taking and sharing without consent. However, we would welcome more evidence from consultees of examples of this behaviour and their views as to whether the offence should apply to sharing as well as taking.

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41 Above at p 123, para 8.3.9.
Consultation Question 28.

10.79 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if —

(a) V does not consent;
(b) D does not reasonably believe that V consents; and
(c) D does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at the image of V.

Do consultees agree?

10.80 We invite consultees to provide examples where D intentionally shares an intimate image of V without V’s consent for the purpose of obtaining sexual gratification (whether for themselves or another).

Financial gain

10.81 As we outlined in Chapter 3, currently the offence of blackmail in section 21 of the Theft Act 1968 deals with instances in which a threat is made “with a view to gain for himself or another”, most notably for money but it can be any form of property, such as more intimate images. As we discuss in that chapter, this could cover instances where someone threatens to disclose the intimate image of another provided they do so with a view to make a gain. This is a very serious offence, carrying a maximum sentence of fourteen years’ imprisonment, far higher than the sentences for the disclosure, voyeurism and “upskirting” offences.

10.82 In that chapter we made the argument that the blackmail offence could deal sufficiently with these specific forms of threats. However, there may also be instances where there is no threat, but rather actual taking or sharing an intimate image without consent with a view to making some sort of gain, most notably financial gain. The question is whether this increases culpability, which requires an additional offence where the additional intent element relates to the purpose of making a gain.

10.83 During Parliamentary debates over the “upskirting” bill, members raised the possibility that “upskirting” perpetrated for financial gain may not fall within the intent to humiliate, alarm or distress or for the purpose of obtaining sexual gratification. Sarah Champion MP said of this:

Much of this is being done for money. In Korea, that is what is happening. People are humiliating women not just for their personal gratification, but to make money, so it would be a grave omission if that were not included.\(^\text{42}\)

10.84 Lucy Frazer MP argued in the House of Commons that a motive of financial gain, which is often linked to taking images for the purposes of distributing those images on

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pornographic websites, could be covered under the notion of obtaining sexual gratification for another.\(^\text{43}\) It could therefore be unnecessary to have a specific offence where the intent is to make a gain. This continued to be questioned, both in the House of Commons and the House of Lords. Lord Marks of Henley on Thames was not convinced:

If the perpetrator’s purpose is financial gain from distributing images on websites, will the prosecution always be able prove that it follows that his purpose was the sexual gratification of another person or persons looking at the websites? That is apparently the Government’s argument, but I remain to be convinced that it is right, or, even if it is right, that it is necessary to import that somewhat complicated and convoluted logic into the Bill. If the purposes provision is to remain in the Bill, the question arises why financial gain and entertainment should not be added to the purposes specified in the Bill.\(^\text{44}\)

10.85 In some cases where the defendant’s primary purpose was financial gain, the jury may nonetheless infer that they intended to cause distress because they foresaw distress as a virtual certain consequence of their conduct.\(^\text{45}\)

10.86 However, we have only very limited evidence from stakeholders of cases where a perpetrator takes or shares an intimate image for the sole or primary purpose of financial gain. We seek more information on this particular form of behaviour.

**Consultation Question 29.**

10.87 We invite consultees’ views as to whether there should be an additional offence where the intent is to make a gain.

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**To coerce and/or control**

10.88 As discussed in Chapter 2, we heard from a number of stakeholders of the devastating impact intimate image abuse can have in the context of controlling or coercive behaviour. It was made clear to us from stakeholders that perpetrators take, share or threaten to share intimate images without consent with this motive, both inside and outside domestic relationships.

10.89 The current Domestic Abuse Bill has highlighted the way in which domestic abuse can be perpetrated in ways other than physical abuse. During early Parliamentary debate over the Bill in 2019, the Justice Secretary Robert Buckland emphasised that “we must continue to reinforce the message that abuse is not just about violence,

\(^{43}\) Above at col 281.

\(^{44}\) *Hansard* (HL), 23 October 2018, vol 793, col 796.

\(^{45}\) See *Woollin* [1999] 1 AC 82; [1998] 4 All ER 103. In proving such foresight, the prosecution may not rely “merely” on the fact that distress “was a natural and probable consequence” of the defendant’s conduct. *CJCA 2015*, s 33(8).
important though that is, and that its collective impacts can change the lives of far too many victims”.

10.90 Section 76 of the Serious Crime Act 2015, the offence of controlling or coercive behaviour in an intimate or family relationship, also targets this type of behaviour in a domestic setting that is not limited to physical contact. However, as we discussed in Chapter 3, this offence would not necessarily cover all forms of taking and sharing intimate images without consent in this context. It is limited to those in an intimate or family relationship. It also only applies where the perpetrator “repeatedly or continuously engages” in this type of behaviour. This would not cover instances, where, for example, someone is being controlled or coerced by a stranger – often the case in experiences of sextortion – or when the acts are committed after a relationship has broken down. It would also not apply to one-off incidents or where repeated or continuous behaviour could not be established.

10.91 These gaps in the law raise the possibility of a new offence of taking or sharing an intimate image without consent for the purpose of coercing or controlling another. For example, we could have an additional offence where the intent is to control or coerce the victim. This could be used to cover some instances of sextortion (involving taking or sharing – threats are dealt with in Chapter 12), and specific, serious examples where the perpetrator takes or shares an intimate image either as part of domestic abuse, or to seek to isolate or control the victim who may have ended their relationship. Further, the offence could apply to one-off incidents, rather than having to establish a pattern of behaviour that is required for the offence of controlling or coercive behaviour in an intimate or family relationship. As such an offence would include an additional intent element, it would have a more serious penalty than the base offence attached, including a longer maximum sentence.

10.92 However, would an offence of this kind be substantially different to an offence where the intent is to humiliate, alarm or distress the victim? We invite consultees to share their views on this.

**Consultation Question 30.**

10.93 We invite consultees’ views as to whether there should be an additional offence of intentionally taking or sharing an intimate image without consent with the intent to control or coerce the person depicted.

**The impact on prosecution**

10.94 As noted at paragraph 10.65 above, we acknowledge that creating a base offence and additional intent offences could prove complex for prosecutors. We have outlined in detail above why we consider that additional intent offences are required to address the particular harms of certain forms of intimate image abuse. We now invite
consultees to share their views on whether such a hierarchy of offences could impact on the ability to prosecute intimate image offences effectively, and if so, how.

Consultation Question 31.
10.95 We invite consultees’ views as to whether having a separate base offence and more serious additional intent offences risks impeding the effective prosecution of intimate image abuse.

CONCLUSION

10.96 In this chapter, we have provisionally proposed three new offences covering taking and sharing an intimate image without consent:

(1) a “base offence”, which has no additional intent requirement, where D did not reasonably believe that V consented.

(2) Two more serious offences with an additional intent requirement:

(a) where the taking or sharing is done with intent to cause the victim humiliation, alarm or distress (but with no fault requirement as to the lack of consent); and

(b) where the taking or sharing is done for the purpose of obtaining sexual gratification (for D or another) and D did not reasonably believe that V consented.

10.97 These provisional proposals have the advantage of ensuring that the wide range of behaviours are captured in law, while also allowing for specific consequences in relation to more culpable acts. This approach would ensure that the different forms of behaviour are appropriately labelled. It maintains some consistency with the current law, meaning that specific offences – such as voyeurism – remain intact and are appropriately dealt with in law.
Chapter 11: Intimate images taken or previously shared in public

INTRODUCTION

11.1 We have now looked at the type of images that should be classified as “intimate”, the acts that should be criminalised and what the fault requirements relating to those acts should be. In this chapter we consider behaviour that would presumptively fall under the offences as so far described, but which does not reach the level of wrongfulness that warrants criminalisation. We then explore how those behaviours could be excluded from our offences, so they are not criminalised.

11.2 In Chapter 5 we describe how intimate image abuse can cause harm to the victim as it violates their dignity, bodily privacy and sexual autonomy. In practice, there is a private element to most intimate images, often they are taken or shared between identified individuals in a private context. When consensual, they are often taken in bedrooms or studios, during intimate moments. They are shared privately between friends or partners. Often the harm (discussed in more detail in Chapter 5) of non-consensual sharing and taking of intimate images comes from a violation of that sexual and bodily privacy. Therefore when there is a public element to the circumstances in which the image was taken or shared, we must look further at whether those integral qualities are violated in the same way.

11.3 In this chapter we look at two ways in which a public element affects the extent to which behaviour should be criminalised. First, as a preliminary matter, we look at how the civil law deals with privacy. Secondly, we discuss images taken in a place that could be considered public, whether their taking and subsequent sharing should be criminalised, and how to exclude from our proposed offences behaviour which should not be criminalised. Finally, we discuss images that have previously been shared in a place that could be considered public, whether subsequent sharing should be criminalised and how to exclude from our proposed offences behaviour which should not be criminalised.

PRIVACY IN CIVIL LAW

11.4 It is useful first to look at how the concept of privacy has developed in civil case law, particularly in relation to images taken in public places. The concept of privacy is far better developed, and has greater application, in civil law than in criminal law.\(^1\) However, this is not to suggest that civil remedies adequately protect victims of intimate image abuse.\(^2\)

11.5 In England and Wales, there is no overarching action for “invasion of privacy”. Instead, when a state body is responsible for the invasion of privacy, Article 8 of the European

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\(^1\) Very few offences in England and Wales incorporate the concept of privacy. Offences in the Data Protection Act 2018 and the voyeurism offence are notable exceptions.

\(^2\) We discuss the limitations of the civil law as it relates to intimate image abuse in Appendix 1.
Convention on Human Rights ("ECHR") provides that: "everyone has the right to respect for his private and family life, his home and his correspondence". When anyone else is responsible, an action can be brought in the tort (civil wrong) of misuse of private information.3

11.6 The leading case on misuse of private information is Campbell v MGN.4 This case established that when ascertaining whether the disclosure of private information infringes the claimant's Article 8 rights, the first question to ask is whether the claimant had a reasonable expectation of privacy.5 Importantly, the case also established that images taken in a public place can give rise to a reasonable expectation of privacy depending on the context, for instance whether the image was taken surreptitiously.6

11.7 The factors for a court to consider when assessing whether the claimant had a reasonable expectation of privacy were set out in Murray v Big Pictures (UK).7 The test is largely objective. The key question is what a reasonable person of ordinary sensibilities would feel if they were placed in the same position as the claimant and faced with the same publicity. Factors for the court to consider include:

(1) the attributes of the claimant;
(2) the nature of the activity in which the claimant was engaged;
(3) the place at which it was happening;
(4) the nature and purpose of the intrusion;
(5) the absence of consent and whether it was known or could be inferred; and
(6) the effect on the claimant, and the circumstances in which and the purposes for which the information came into the hands of the publisher.

Arguably, all of these factors could be relevant where an intimate image has been taken or shared without consent.

11.8 Some cases have involved the publication of intimate images without consent. The leading case is arguably Mosley v News Group Newspapers ("NGN"). In this case, the claimant sought damages for a video which had been published on NGN's website, in connection with a News of the World article entitled "F1 boss has sick Nazi orgy with 5 hookers". The video showed the claimant engaging in sado-masochistic activities with five sex workers. The case established that adults have a reasonable expectation of privacy in relation to sexual activities which take place on private property (regardless

4 Above.
5 Above at [21].
6 Above at [75]. The European Court of Human Rights ("ECtHR") has also held that images taken in a public place can infringe upon the private life of the individuals in them. See Peck v United Kingdom (2003) 36 EHRR 41 (App No 44647/98); and López Ribalda and Others v Spain App Nos 1874/13 and 8567/13.
of how unconventional) and that publication of such activities would be extremely difficult to justify.  

11.9 Another case involved a threat to share. In *JPH v XYZ*, the claimant (a celebrity) was awarded an interim non-disclosure order restraining his former partner from publishing images of them engaging in sexual activity, on the grounds that the claimant had a reasonable expectation of privacy in relation to those images. Mr Justice Popplewell stated:

> There is cogent, credible and as yet uncontradicted evidence that the photographs and videos were taken in circumstances where JPH has a strong case for asserting that he had a reasonable expectation of privacy… The images and information involve intimate, graphic and sexually explicit material of a highly sensitive and personal nature.

11.10 A further case concerned images of sexual activity in a public place. In *Jagger v Darling*, Elizabeth Jagger was awarded an injunction against the owner of Kabaret nightclub (and anyone else in possession of the CCTV footage that was the subject of the injunction) prohibiting them from publishing CCTV footage of Jagger and her boyfriend, Calum Best, engaged in sexual activities inside the closed front door of the club. Mr Justice Bell held:

> On present material the balance is against the claimant having realised that her conduct would be observed clearly, or electronically recorded at all. To that extent, she had a legitimate expectation of privacy. Although the claimant may be said to have been guilty of misconduct in the most general sense, she was not in my view, on the present information, guilty of such immoral behaviour as to prevent her seeking a remedy from the court.

11.11 Finally, it is established that someone can have a reasonable expectation of privacy over information which has already been shared in public. In *PJS v News Group Newspapers* the Court of Appeal lifted an injunction on the publication of details of PJS’s extramarital sexual activities after the details were widely published in the US, Canada and Scotland, because the Court considered that PJS’s Article 8 right no longer outweighed NGN’s Article 10 rights to freedom of expression. This decision was reversed by the Supreme Court, which held that someone can have a reasonable expectation of privacy over something which is in the public domain, and an injunction can be warranted, if further publication would cause further significant distress, intrusion or harassment to the subject of the information. The Court contrasted this with breach of confidentiality, where previous publication of the information will make it more difficult to obtain an injunction.

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10 *Jagger v Darling* [2005] EWHC 683 (Ch) at [14].
11.12 More recently, in *Soriano v Forensic News LLC*, in relation to photographs sourced from the claimant’s family members’ social media accounts, the High Court held that:

… information which is technically available to the public online can still be information in which an individual enjoys a reasonable expectation of privacy against mass dissemination. For example, in *Green Corns Ltd v Claverley Group Ltd* [2005] EWHC 958 (QB), [2005] EMLR 31 Tugendhat J concluded that there was such a reasonable expectation in relation to addresses which were available on HM Land Registry.13

11.13 This suggests that in civil law, where an intimate image of someone has been shared without consent to a limited extent, they could still claim a reasonable expectation of privacy over that image. Similarly, if someone has consensually shared intimate images of themselves with a closed group of people, they may still have a reasonable expectation of privacy in relation to those images. Below we will consider how this can be framed in the context of the criminal law in relation to intimate image abuse. We consider the problem first in the context of intimate images taken in a public place without consent before moving on to the issue of sharing intimate images without consent where the original sharing was in some sense public.

**INTIMATE IMAGES TAKEN IN PUBLIC**

11.14 As we describe above, in the majority of cases where an intimate image is taken or shared without consent, the image will have been taken in a private setting. Usually, these images are taken in the privacy of one’s home. For example, a couple may film themselves engaging in sexual activity in bed, or someone may take a nude picture of themselves bathing to send to their partner. In these circumstances the intimate image offences will apply as intended. The privacy in which the image was taken is sufficient to attract the protection of the criminal law. However, when the image is depicting something that occurred in public there is less or no such privacy in relation to the taking of the image. In such circumstances there is a question about the extent to which those images requires the same protection.

11.15 In every jurisdiction we have considered, including England and Wales, to commit a voyeurism offence it is not enough for an individual to have taken an intimate image of someone else without consent, the image must have been taken in certain circumstances.14 For instance, in England and Wales to have committed a voyeurism offence the victim must have been “in a place which, in the circumstances, would reasonably be expected to provide privacy”.15 This is referred to as the “reasonable expectation of privacy” test. It is intended to exclude some images taken in public spaces.

11.16 This section considers whether a similar test should apply to the intimate image offences we propose. It will explore the circumstances in which someone who is

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13 [2021] EWHC 56 (QB) at [106].

14 We note that the other “taking” offence in England and Wales, the “upskirting” offence, does not have such an element because there is always a reasonable expectation of privacy in relation to such takings. See further at para 11.58 below.

15 Sexual Offences Act 2003, s 68(1).
engaging in a sexual or private act, or is nude or semi-nude, can expect to be protected by the criminal law from images of them being taken (and subsequently shared). The “reasonable expectation of privacy” test is concerned with intimate images taken in public spaces, so this section will focus on those images only. If the image was taken without consent in a private place, it is clear that the person depicted could reasonably expect that an image would not be taken of them without consent.

11.17 We will first set out examples where someone is engaged in a sexual or private act, or is nude or semi-nude, in a public space and we do not think they can reasonably expect that an image will not be taken of them without consent. We will then set out examples where someone is engaged in a sexual or private act, or is nude or semi-nude, in a public space and we do think they can reasonably expect that an image will not be taken of them without consent. We will then describe how the current intimate image offences in England and Wales and in other jurisdictions deal with this issue before considering how a “reasonable expectation of privacy” test could apply.

Examples where an intimate image can be taken without consent

11.18 There are some circumstances in which we believe that taking an intimate image of someone (and even subsequently sharing that image) without their consent should not be criminalised. We first describe the examples and then set out our rationales for reaching our conclusions in the analysis section below.

Streaker at a public event

11.19 The first example is someone streaking at a public event, for instance at a football match. Streakers are nude or semi-nude, therefore if someone at the event took a photo or video of them, that image would be an intimate image, as defined in the previous chapter. However, we do not believe that taking a picture of a streaker who does not consent to their picture being taken should be a criminal offence. If the person who took the image were to share it without the streaker's consent, we also do not believe that this should be criminalised. Crucially, we do not believe that there are any elements that could be added to the offence that would warrant criminalisation in these cases. If the person who took the picture knew that the streaker did not consent (for example because they were carrying a sign that stated: DO NOT TAKE PICTURES OF ME!) we still do not believe this should be criminalised. Equally, even if the person who took the image sought to cause the streaker distress or obtain sexual gratification, we do not believe that this warrants criminalisation.

Naked protestor

11.20 The second example is someone participating in a naked protest. Again, a naked protestor would be nude or semi-nude and therefore if a picture was taken of them it would be an intimate image. But we are of the view that taking and even sharing an image of them without their consent should not be criminalised. As with the streaker, we think this even if the person taking the picture knows the naked protestor does not consent, or they sought to cause the protestor distress or to obtain sexual gratification.

Naked rambler in a heavily populated place

11.21 The final example which we think does not warrant criminalisation is taking a picture without consent of someone who is voluntarily walking nude or semi-nude in a heavily
populated place, for instance a town or city centre. As with the streaker and the naked protestor, we do not believe that there are any elements that could be added to this offence that would justify criminalisation.

Analysis

11.22 We do not think that taking a picture without consent of someone streaking at a public event, a naked protestor or someone walking naked in a heavily populated place should be criminalised for two reasons. First, our provisional view is that this behaviour is not sufficiently wrongful or harmful to warrant criminalisation. In the vast majority of cases where an intimate image is taken without consent, this behaviour is both wrongful and harmful. It is wrongful because it violates the victim’s sexual and bodily privacy, sexual autonomy and dignity. In addition, the harms caused by taking (and subsequently) sharing an intimate image without consent are well-documented.\(^\text{16}\) By contrast, in these examples, the streaker, the naked protestor and the rambler are all voluntarily naked in public places, where anyone is able to see them. They not only expect to be observed but want to be observed. They could be said to be inviting attention to their nakedness through their actions. Therefore, it does not seem as though their bodily privacy or dignity are being violated in the same way. Additionally, we heard no evidence from stakeholders that taking a picture without consent of a streaker, a naked protestor or a naked rambler causes them harm. Therefore, while this may cause some level of harm in some cases, it is unlikely that the harm would be sufficient to warrant criminalisation.

11.23 It could be argued that even if the streaker, the naked protestor and the naked rambler expect (and perhaps even want) to be observed, taking a picture or video of them without their consent is wrongful and harmful enough to warrant criminalisation. Pictures and videos are arguably far more invasive than prolonged staring because they capture the depicted individual nude or semi-nude in minute detail, and can be zoomed to expose more than the naked eye can see. They can also be kept and looked at indefinitely, whereas prolonged staring is invariably finite. Finally, only so many people can see a naked individual in the flesh. When a picture is taken there is the potential for it to be shared with others, amplifying the harm to the depicted person. As Kelley Burton has argued:

> A photograph is very different to an observation because it is a more permanent record that may be viewed on subsequent occasions. A picture (photograph) paints a thousand words as compared to a naked eye that is likely to miss details in a transitory observation.\(^\text{17}\)

11.24 We acknowledge that a picture is permanent, more invasive than observation and can be distributed, meaning there is more potential to cause the depicted person harm. However, in our view this does not justify criminalisation in cases where the depicted person consented to (and perhaps encouraged) prolonged observation while they were nude or semi-nude. We see these examples as sitting close to one end of a


scale. At the top of the scale is consent to recording, moving down one step is consent to prolonged observation, followed by consent to fleeting observation (whether intentional or unintentional), followed by no consent to observation. We will consider cases where the depicted person consents to fleeting observation below. For now, it is enough to point out that consent to prolonged observation sits just below consent to recording on the scale. For this reason, in our view, where someone is nude or semi-nude in a public place and has consented to being observed at length, the gap between this and recording is not wide enough to justify criminalising recording without consent.

11.25 The second argument against criminalisation is the need to balance the Article 8 rights of the person in the image against the Article 10 rights of the person who takes, and perhaps shares, the image. Article 8 of the ECHR states: "Everyone has the right to respect for his private and family life, his home and his correspondence". Article 8 is a qualified right, which means it can be interfered with in certain specified circumstances. One of those circumstances is in order to protect "the rights and freedoms of others". Article 10 of the ECHR states:

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Article 10 is also a qualified right. One of the circumstances in which it can be interfered with is to protect "the reputation or rights of others".

11.26 As we explained in the Introduction, in cases where an intimate image is taken or shared without consent, it is unlikely that a perpetrator could or would advance a strong argument on the basis of their Article 10 right to express themselves freely, especially when weighed against the violation of the victim’s right to privacy under Article 8. However, in the case of the streaker, naked protestor and naked walker, the depicted person’s Article 8 claim is weakened while the taker or sharer’s Article 10 claim may be strengthened. In some cases where the person naked in public is deliberately drawing attention to their nakedness, it could be argued that their Article 8 right in respect of their bodily privacy is so weakened that it is not necessary to consider the relative strength of the Article 10 rights of the person capturing the image. To reiterate, in relation to their right to private life protected by Article 8, the depicted person’s bodily privacy is not violated in the way that it is for most individuals who have an intimate image taken or shared without their consent. In addition, if someone were to share a picture they had taken without consent of a streaker, a naked protestor or a naked rambler, the taker and sharer’s Article 10 claim is relatively strong because they are arguably imparting information and ideas in a way that those who share intimate images without consent which were taken in private settings are not. Consider the following example:

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18 European Convention on Human Rights, Art 8(2).
19 European Convention on Human Rights, Art 10(2).
20 We note in the introduction, and explore further in Chapter 13, the very limited circumstances where there is a public interest in the taking or sharing of an intimate image without consent and how that impacts on consideration of competing Article 8 and Article 10 claims.
Elijah is walking through Trafalgar Square when he sees a group of environmental protestors. One is holding a large sign which reads: “THE NAKED TRUTH: WE ONLY HAVE ONE PLANET!” Five other protestors are nude, lying on the ground with their bodies painted like a world map. The map includes oil spills in the ocean, bushfires in Australia and melting polar ice caps. Elijah finds the protest extremely moving, so decides to take a picture and post it on Twitter with the caption: “Really thought-provoking protest in Trafalgar Square today. Time to start reducing my environmental footprint!” After he has posted the picture, one of the naked protestors approaches him and says: “Did you take a picture of us? We didn’t agree to that – delete it now!”

In this example, Elijah has shared information about, and his opinion on, the protest on Twitter. He also seems to be inviting discussion and debate on a topic of significant public interest. Therefore, Elijah’s Article 10 right to freedom of expression claim is strong. By contrast, the protestors have a relatively weak Article 8 claim, because they chose to appear naked in a public place, where anyone would be able to see and take pictures of them. Therefore, in this case, it is likely that Elijah’s Article 10 claim outweighs the protestors’ Article 8 claims.

Examples where an intimate image cannot be taken without consent

11.27 We have also identified circumstances in which we believe that taking an intimate image of someone without their consent in a place to which members of the public have access does warrant criminalisation.

11.28 In our view, criminalisation is clearly warranted in five examples. They may occur in a fully public place (a space that is open to all members of the public in an unrestricted way), or a semi-public space (where access is restricted in some way either by size of the space, membership or ticket).21 We first describe three of the examples and then set out our rationales for reaching our conclusions in the analysis section below. We then address the remaining two examples separately.

“Upskirting” or “downblousing”

11.29 The first is when someone is “upskirted” or “downbloused” in a public place. As we discussed in Chapter 3, “upskirting” is already a criminal offence under section 67A of the Sexual Offences Act 2003 (“SOA 2003”).22 In Chapter 7, we provisionally proposed that the law should be broadened to include “downblousing” (in public and private places).

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22 To be caught by the current “upskirting” offence, the perpetrator must have intended either to obtain sexual gratification (either for themselves or another) or to humiliate, alarm or distress the victim. We discuss whether including the perpetrator’s motivation in the offence is desirable in Chapter 10.
Sexual assault victims

11.30 The second example is recording or live-streaming someone who is being sexually assaulted in a public place. As we discussed in Chapter 2, this seems to happen less in the UK than it does in other jurisdictions, notably the US. In the majority of examples we have found of individuals being recorded while being sexually assaulted in the UK, the incident happened in a private setting. However, there is some evidence that this behaviour is on the rise. Given the under-reporting of sexual assaults more generally, it is also likely that this is happening more often than we realise, but victims are not reporting the abuse. Finally, we believe it is important that intimate image legislation is “futureproof”, so that it acts as a deterrent against serious forms of abuse that may not be prevalent now but could become more prevalent in the future.

Nude or semi-nude against their will

11.31 The third, related, example is taking a picture of someone who is nude or semi-nude in public against their will, where the person who took the picture knew that they were nude or semi-nude against their will. If the person who took the picture believed the depicted person was voluntarily nude or semi-nude, and their belief was reasonable, then the example is more akin to the example above of someone voluntarily walking naked in a public place. Arguably, the person who took the picture would not be sufficiently culpable to warrant criminalisation.

Analysis

11.32 In these examples, we believe that the arguments in favour of criminalising non-consensual image taking are clear. “Upskirting” is already a criminal offence. During Parliamentary debates, the reasons why “upskirting” is both wrongful and harmful were made clear. For example, during the meeting of the Second Reading Committee, Yasmin Qureshi MP described “upskirting” as “a depraved violation of privacy”, while Lucy Frazer MP highlighted that “people affected by upskirting have variously

23 An exception might be where they are recording the incident as evidence of a crime and intend to give the recording to the police. Whether this should be a defence is considered in Chapter 13.


26 Tanith Carey, “I was drugged in a bar, sexually assaulted and left frothing at the mouth, says singer spiked on night out” (16 September 2020) The Sun, https://www.thesun.co.uk/fabulous/12679345/rire-of-filmed-drug-rapes/ (last visited 7 October 2020).


described their experiences as “scarring”, “an invasion”, and “embarrassing and humiliating”.29

11.33 It is clear that taking a picture of someone who is being sexually assaulted, or who is nude or semi-nude against their will, in a public place is also wrongful and has the potential to be deeply harmful. Their sexual or bodily privacy, sexual autonomy and dignity have already been violated by their assailant, but taking a picture of their abuse constitutes a further violation. Additionally, the harms that could be caused by recording or live-streaming the depicted person’s abuse cannot be overstated.30

Nude or semi-nude in a changing room

11.34 The fourth example where we believe it is clear that criminalisation is warranted is taking a picture without consent of someone getting changed in a changing room, for instance at the gym. When an individual is changing in a changing room, there will be points when they are nude or semi-nude (unless they conceal themselves with clothing or a towel). If a picture is taken when they are nude or semi-nude, this would be an intimate image under our provisional proposals. Our view is that criminalisation is warranted in these circumstances, despite the depicted person being in a semi-public space (entry to the changing room would likely be limited to people of the same sex as the depicted person who are members of the gym).

Analysis

11.35 The arguments in favour of criminalising taking a picture without consent of someone getting changed in a changing room differ from the arguments in favour of criminalisation in the three previous examples. This is because the depicted person is voluntarily nude or semi-nude. However, a strong argument for criminalisation can be made.

11.36 As was discussed in the voyeurism case R v Bassett,31 in the context of changing rooms fleeting observation can be distinguished from prolonged observation, which can be distinguished in turn from taking pictures or videos. Looking for any period of time at people who are changing in changing rooms is generally understood to be unacceptable. Unintentional fleeting glances are unavoidable, intentional fleeting glances are tolerated (although rarely invited), but looking for a prolonged period risks making the person being looked at, and possibly others in the changing room, feel uncomfortable and distressed.

11.37 Staring at someone changing in a changing room is condemned, but it is unlikely to be deemed sufficiently wrongful or harmful to meet the criminal threshold. Taking a picture of someone changing in a changing room, however, does in our view meet the criminal threshold, because it is substantially more wrongful and harmful than prolonged staring. This brings us back to the scale discussed at paragraph 11.24 above. Because consent to (or tolerance of) intentional and unintentional fleeting


30 Tanith Carey, “I was drugged in a bar, sexually assaulted and left frothing at the mouth, says singer spiked on night out” (16 September 2020) The Sun, https://www.thesun.co.uk/fabulous/12679345/rise-of-filmed-drug-rapes/ (last visited 24 February 2021).

glances sits further down the scale than consent to prolonged observation, in our view there is a sufficient gap between consent to fleeting glances and consent to recording that non-consensual recording should be criminalised.

11.38 On this basis, our view is that taking a nude or semi-nude picture of someone in a changing room without consent should be criminalised, regardless of whether the person taking the picture intended to distress the depicted person or to obtain sexual gratification. Where they have such an intention we believe this makes them more culpable, but criminalisation is justified regardless.

**Breastfeeding**

11.39 The final example we have considered is taking a picture without consent of someone breastfeeding in a public place, for instance on a park bench, where their breasts are exposed, partially exposed or covered only with underwear. Under our provisional proposals, this would be a semi-nude image and would therefore be an intimate image.

**Analysis**

11.40 One argument in favour of criminalisation is that expectations around observation are similar when someone is breastfeeding in public to when someone is changing in a changing room. Fleeting glances are acceptable, but prolonged observation is not. Therefore, while we might argue here too that prolonged observation of someone breastfeeding should not be criminalised, taking a picture without consent is substantially more wrongful and harmful, such that it warrants criminalisation.

11.41 Another argument is that breastfeeding can be an inherently private act. It is at least as inherently private as changing one’s clothes. As with changing in public changing rooms, instances of breastfeeding in public can arise out of necessity as well as choice. Even when someone is breastfeeding in a public place they are entitled to a high degree of privacy due to the nature of the act.

11.42 A final argument is that there are strong public policy reasons to criminalise recording someone breastfeeding without their consent. Women are already protected from being discriminated against because they are breastfeeding. Under section 17 of the Equality Act 2010, it is unlawful for a trader or service provider to treat a woman “unfavourably” because she is breastfeeding, regardless of the age of the child. Scotland has gone further, making it a criminal offence to stop a woman from breastfeeding a child of up to 24 months in a public place or on licensed premises.32

11.43 Therefore, our provisional view is that criminalisation is warranted where an individual records someone breastfeeding in a public place. As with recording someone in a changing room, in our view criminalisation should not depend on whether the person who took the recording intended to cause the depicted person distress or to obtain sexual gratification.

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32  Breastfeeding etc (Scotland) Act 2005, s 1.
How jurisdictions currently approach intimate images taken in public

11.44 This section will outline how intimate image offences in England and Wales and other jurisdictions account for the context in which an intimate image was taken. It will also consider which of the examples above would fall within current intimate image offences in England and Wales.

England and Wales

11.45 As a general rule it is lawful to take pictures of people in public places, even when they do not consent to having their picture taken.33 However, it is at least possible for all of the current intimate image offences in England and Wales to be applied to images taken in public or semi-public spaces. This section will outline what role the circumstances in which an intimate image was taken plays in current intimate image offences.

11.46 As we discuss in Chapter 3, there are currently three offences that criminalise specific forms of intimate image abuse in England and Wales. There is the voyeurism offence in section 67(3) of the SOA 2003, the “upskirting” offence in section 67A(2) of the SOA 2003 and the disclosure offence in section 33 of the Criminal Justice and Courts Act 2015 (“CJCA 2015”).

The voyeurism offence

11.47 Under the voyeurism offence, it is an offence to record another person “doing a private act” (without consent and for the purposes of obtaining sexual gratification). Under section 68 of the SOA 2003, “a person is doing a private act if the person is in a place which, in the circumstances, would reasonably be expected to provide privacy”.34

11.48 The inclusion of a reasonable expectation of privacy element, linked to place, focuses the offence on the kind of behaviour with which Parliamentarians were chiefly concerned, namely so-called “Peeping Toms”. The focus on this behaviour was made clear in the Home Office’s report on reforming the law surrounding sexual offences, “Setting the Boundaries: Reforming the law on sex offences”, which preceded the SOA 2003. The report stated:

We thought that there was a genuine problem in the secret observation for the sexual gratification of the watcher of people, particularly women and children, when they had a reasonable expectation of privacy. The experience of victims, particularly those observed in their own homes, was of a violation not only of their privacy but of their sense of personal safety and integrity.35

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34 The image must also be sexual, nude, semi-nude or private. See Chapter 6 for a more detailed explanation of the nature of the image test in the voyeurism offence.

11.49 The aim of this offence was reiterated when the SOA 2003 was being developed. For instance, in the House of Commons Standing Committee on the Sexual Offences Bill, Paul Goggins MP said:

We want to restrict criminality for that offence to those who go to considerable lengths to spy on others who are engaged in private acts, rather than people who … just stumble across people while they are out and about.\footnote{Hansard (HC) Standing Committee B (8th Sitting), 18 September 2003, col 306.}

11.50 Is important to note that the offence is not limited to those engaging in a “private act” in a private place. The victim must be in a place which, in the circumstances, could be reasonably expected to provide privacy, not (necessarily) a private place. The drafting was originally narrower, and covered images where “the person is in a structure\footnote{“Structure” was defined as including a tent, vehicle or vessel or other temporary or movable structure.} which, in the circumstances, would reasonably be expected to provide privacy”. This was later amended to “place”, following concerns about naturists not being protected when they are nude outside in a place which affords them privacy, such as on their own land.\footnote{See, for instance, the contribution in the House of Lords of Baroness Noakes. Hansard (HL), 19 May 2003, vol 648, col 572.}

11.51 However, there are forms of non-consensual image taking which the voyeurism offence is too narrow to capture, in part because of the reasonable expectation of privacy element.\footnote{In Chapter 6, we explained that the definition of the image in the voyeurism offence also makes it too narrow to capture “upskirting” and “downblousing” images.} Notable examples are “upskirting” and “downblousing”, which often happen in places where the victim does not have a reasonable expectation of privacy (such as supermarkets, public parks and at concerts). Previously, when victims were “upskirted” or “downbloused” in public places such as these, the only offence available to them was the common law offence of outraging public decency.\footnote{For an act to fall within the common law offence of outraging public decency it must be carried out in a public place, when two or more people were present, and the act must be lewd, obscene or disgusting to such an extent as to outrage minimum standards of public decency. Simplification of Criminal Law: Public Nuisance and Outraging Public Decency (2015) Law Com No 358, pp 2-3.} For “upskirting”, this changed in April 2019 when the Voyeurism (Offences) Act 2019 made “upskirting” a specific offence under section 67A of the SOA 2003. This offence was the result of an impressive lobbying campaign, led by Gina Martin, who began the campaign after she was “upskirted” at a music festival in 2017 and the police took no action.\footnote{Owen Bowcott, “Upskirting to become a criminal offence punishable by two years in jail” (15 June 2018) The Guardian, \url{https://www.theguardian.com/law/2018/jun/15/upskirting-to-become-a-criminal-offence-punishable-by-two-years-in-jail} (last visited 24 February 2021).} The offence has undoubtedly left victims better protected.\footnote{See, for example Crown Prosecution Service, Ten men prosecuted in first year of upskirting legislation (31 December 2019) \url{https://www.cps.gov.uk/cps/news/ten-men-prosecuted-first-year-upskirting-legislation} (last visited 24 February 2021).} However, it does not cover all forms of non-consensual taking in places where the victim cannot reasonably expect privacy. For instance, it does not cover “downblousing”.\footnote{We provisionally proposed that “downblousing” should be a criminal offence in Chapter 7.}
There are very few reported cases which have discussed the reasonable expectation of privacy test in the voyeurism offence. What follows is an outline of how the test was applied in those few cases where it is discussed.

The first noteworthy case is *R v Bassett*. In this case, the defendant had filmed a man who was showering in the men’s changing room at a swimming pool. The man was showering with swimming shorts on, and the shower cubicle did not have a door. The question for the Court of Appeal was whether the man was engaged in a “private act” as defined by section 68 of the SOA 2003. The two specific questions were whether “breasts” includes the male chest and whether the man had a reasonable expectation of privacy.

The Court held that “breasts” does not include the male chest, because the male chest is not a part of the body in relation to which people typically expect privacy. On the subject of reasonable expectation of privacy, the Court reiterated its ruling in *R v Swyer* that someone can reasonably expect privacy “without being wholly enclosed or wholly sheltered from the possibility of being seen”. In *R v Swyer*, the Court found that a group of marathon runners had a reasonable expectation of privacy when they hid behind a hedge to urinate. However, the Court qualified its argument by distinguishing between a “chance encounter”, for instance with a dog walker “who happened unexpectedly and unwittingly upon them” and someone “closely watching” the runners. The Court argued that the runners would not have a reasonable expectation of privacy in the first scenario, but they may in the second. Applying this argument to a changing room, the Court held that people in changing rooms do not have a reasonable expectation of privacy from “casual observation” by other changing room users, but they may have a reasonable expectation of privacy from more deliberate and prolonged observation. This is a question for the jury on the facts of the case.

The second case where reasonable expectation of privacy was the key issue is *R v Richards*. In this case, Tony Richards had consensual sex with two sex workers on two separate occasions. On both occasions, he filmed the sexual activity without the consent of the sex workers. Richards argued the filming did not amount to voyeurism because the sex workers did not have a reasonable expectation of privacy. This because they were not in a place where they could reasonably expect privacy from Richards: he was in the same place as the sex workers and engaging in the “private act” with them.

The Court of Appeal held that the question was not whether the sex workers could reasonably expect privacy from Richards, but rather whether the sex workers could

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46 *R v Bassett* [2008] EWCA Crim 1174, [2009] WLR 1032 at [7].
47 [2007] EWCA Crim 204.
reasonably expect privacy from the sexual activity being recorded. Lord Justice Fulford stated:

a person who is engaging in an act of sexual intercourse alone with another in a bedroom is engaged in a private act in a place which, prima facie, would reasonably be expected to provide privacy from secret filming on the part of the other participant.\(^{51}\)

11.57 Therefore, this case established that making a sexual, nude or semi-nude recording without consent of someone with whom one is in a private setting, or engaged in a sexual act, is caught by the voyeurism offence (provided that the recording was made for the purpose of obtaining sexual gratification). But as Sarah Boland, who leads the CPS Appeals and Review Unit, pointed out to us, it is unclear what effect, if any, this has on the observing and operating equipment offences in section 67 of the SOA 2003.

11.58 In sum, the reasonable expectation of privacy test would exclude from the voyeurism offence taking photos of a streaker or nude protestors, which we argue above is appropriate. It would also likely protect people who are nude or semi-nude in public changing rooms or urinating in a secluded yet public spot. There is a question of fact for the jury or magistrates as to whether the depicted person was in a place which, in the circumstances, they could reasonably expect to afford them privacy. However, the test in the voyeurism offence is unlikely to provide protection for people breastfeeding in public or someone who is being sexually assaulted, or is nude against their will, in a public place.

The “upskirting” offence

11.59 Under the “upskirting” offence, it is an offence to record another person’s genitals or buttocks (or the underwear covering their genitals or buttocks) from beneath their clothing, “in circumstances where the genitals, buttocks or underwear would not otherwise be visible”.\(^{52}\) This does not relate to the setting in which the image was taken. The image can be taken in a private, public or semi-public place, provided that the victim’s genitals, buttocks or underwear would not have been visible had the perpetrator not recorded beneath their clothing. In fact, as we discussed at paragraph 11.51 above, one of the reasons why the “upskirting” offence was introduced was because the voyeurism offence could not protect people who were being “upskirted” in places where they could not reasonably expect privacy. Therefore, the “upskirting” offence was designed to apply in public and semi-public places as well as private places.

The disclosure offence

11.60 The disclosure offence also contains no requirement as to the circumstances in which the image was taken. As we discussed in Chapter 3, to be caught by the disclosure offence an image must be both “private” and “sexual”.\(^{53}\) However, “private” relates to

\(^{51}\) R v Richards [2020] EWCA Crim 95, [2020] 1 WLR 3344 at [25].

\(^{52}\) Sexual Offences Act 2003, s 67A(2)(b).

\(^{53}\) Criminal Justice and Courts Act 2015, s 33(1).
what the image depicts (it must depict something “not of a kind ordinarily seen in public”\(^{54}\)) not the circumstances in which it was taken.

11.61 This means that the disclosure offence can capture intimate images that were taken in public and semi-public places, so long as they depict something that is not *ordinarily* seen in public. For instance, it could capture sharing without consent a picture of someone who is nude, or engaging in a sexual act, in a public or semi-public place.\(^{55}\) In one sense this is desirable, because it means that the offence can be applied to some of those examples we discussed above where we suggested that criminalisation is justified. For instance, it could be applied where an image of someone being sexually assaulted in a public place, or of someone nude in a changing room, was shared without consent. But in another sense, this is undesirable, because it means that the offence can be applied to some of those examples we discussed above where we suggested that criminalisation is *not* justified. For instance, it could be applied where an image of a streaker, or someone participating in a naked protest, is shared without their consent.

11.62 The disclosure offence does contain one element which could limit its application to intimate images taken of people in public places. The image must have been shared “with the intention of causing [the depicted] individual distress”.\(^{56}\) If someone is pictured nude or semi-nude in a public place, the person who shared the image without consent could argue that, far from intending to cause them distress, they did not realise that sharing the image had the potential to distress them. They might assume that because the person was nude or semi-nude in a public place, they would be comfortable with images of them being shared. This, of course, would depend on the context, including the circumstances in which the image was taken and whether the sharer knew that the depicted person did not consent to the image being taken and/or shared. Additionally, there are a range of reasons why someone might share an image of someone who is nude or semi-nude in a public place, beyond wanting to cause them distress. For example, someone might share a picture of a naked protestor because they found the protest moving and wanted to spread the protestor’s message.

11.63 In sum, the disclosure offence applies to the non-consensual sharing of sexual and nude images taken in public places, provided that the sharer intended to cause the depicted person distress. We are of the view that there may be cases where this results in overcriminalisation, for instance if someone shares without consent an image of a naked protestor in order to cause them distress. There may also be cases where this results in undercriminalisation, for example where someone shares without consent a nude picture of someone getting changed in a changing room as a joke or prank.

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54 Criminal Justice and Courts Act 2015, s 35(2).

55 It could not capture images where someone is semi-nude or urinating in a public place, because the disclosure offence does not include these kinds of images. See Chapter 6 for a detailed explanation of the kinds of images each of the current intimate image offences captures.

56 Criminal Justice and Courts Act 2015, s 33(1)(b).
Other jurisdictions

11.64 Most of the other common law jurisdictions we consider in this consultation paper have opted to include a “reasonable expectation of privacy” element in their taking and sharing offences, with some notable exceptions.

Scotland

11.65 There are two intimate image offences in Scotland: the voyeurism offence in section 9 of the Sexual Offences (Scotland) Act 2009 (which includes “upskirting” images) and the disclosure offence in section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. The voyeurism offence incorporates the same test as the voyeurism offence in England and Wales. The perpetrator must record another person “doing a private act”, where “a person is doing a private act if the person is in a place which in the circumstances would reasonably be expected to provide privacy”.

11.66 The disclosure offence takes a different approach to excluding images taken in certain contexts. The offence includes a defence where the depicted person was voluntarily nude or engaging in a sexual act in a public place. The defence states:

In proceedings for an offence under subsection (1), A has a defence if the following matter is established—

(a) B was in the intimate situation shown in the photograph or film,

(b) B was not in the intimate situation as a result of a deliberate act of another person to which B did not agree, and

(c) when B was in the intimate situation—

(i) B was in a place to which members of the public had access (whether or not on payment of a fee), and

(ii) members of the public were present.

11.67 This is an interesting approach for two reasons. First because it limits the test to circumstances where the depicted person was pictured in a public or semi-public place. Where they were pictured in a private place, there is no such hurdle to overcome. Secondly because it seeks to avoid excluding images taken without consent of people being sexually assaulted, or people who were nude or semi-nude against their will, in a public place, both examples which we provisionally propose should be included in intimate image offences at paragraphs 11.30 and 11.31 above. We consider this approach further in the next section.


58 Sexual Offences (Scotland) Act 2009, s 10(1).

59 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(5).
Australia

11.68 Most Australian jurisdictions incorporate “reasonable expectation of privacy” into their taking offence, their sharing offence, or both. For instance, it is included in New South Wales’ taking, sharing and threatening to share offences, because it is included in the definition of the image. An “intimate image” is defined as:

(a) an image of a person's private parts, or of a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy, or

(b) an image that has been altered to appear to show a person's private parts, or a person engaged in a private act, in circumstances in which a reasonable person would reasonably expect to be afforded privacy.60

11.69 Western Australia has also incorporated “reasonable expectation of privacy” into their sharing and threatening to share offences through the definition of the image. An “intimate image” is defined as:

a still or moving image, in any form, that shows, in circumstances in which the person would reasonably expect to be afforded privacy —

(a) the person’s genital area or anal area, whether bare or covered by underwear; or

(b) in the case of a female person, or transgender or intersex person identifying as female, the breasts of the person, whether bare or covered by underwear; or

(c) the person engaged in a private act.61

11.70 In two Australian states, “reasonable expectation of privacy” is incorporated only into the taking offence. In Queensland’s taking offence, the image must be taken “in circumstances where a reasonable adult would expect to be afforded privacy”. In addition, the depicted person must be in a private place or engaging in a private act.62 It is also incorporated into South Australia’s taking offence through the definition of “indecent filming”. The definition includes filming another person in a state of undress, or engaged in a private act, “in circumstances in which a reasonable person would expect to be afforded privacy”. It also includes filming “another person's private region in circumstances in which a reasonable person would not expect that the person's private region might be filmed”.63

11.71 A similar element is part of the Australian Capital Territory’s recording offence. It is an offence to record “visual data” of another person, if:

60 Crimes Act 1900, s 91N.
61 Criminal Code Act Compilation Act 1913, s 221BA.
62 Criminal Code 1899, s 227A.
63 Summary Offences Act 1953, s 26A.
(a) a reasonable person would, in all the circumstances, consider the observing or capturing of visual data to be—

(i) an invasion of privacy; and

(ii) indecent.64

"Indecent" is not defined in the legislation, but it seems to qualify the act of recording (or observing) rather than the nature of the image. Therefore, it adds an extra element to the test.

11.72 Finally, South Australia adopted a similar approach to Scotland in their sharing offence by explicitly excluding images taken in a public place. However, they did this through the definition of the image rather than a defence. An image is an “invasive image” if (among other things) “it depicts the person in a place other than a public place”.65

New Zealand

11.73 New Zealand has incorporated “reasonable expectation of privacy” into their taking and possession offences and both of their sharing offences.66 It has done this through the definition of an “intimate visual recording”. Part of the definition states that the person in the image must have been “in a place which, in the circumstances, would reasonably be expected to provide privacy”.67

Analysis

11.74 South Australia and Scotland have taken the approach of excluding all images taken in a public place. We see merit in this approach. Where the image was taken in a private setting, there is no extra element for the prosecution to prove (or a defence for the defendant to raise and the prosecution to disprove). However, we think that both of these exclusions are too wide: they exclude some images taken in public places that we do not believe should be excluded.

11.75 The South Australian definition of an “invasive image” would exclude from criminalisation images where the depicted person was being sexually assaulted in a public place, or nude or semi-nude against their will in a public place or changing in a changing room. The Scottish defence is not as broad, because it only applies when the depicted person “was not in the intimate situation as a result of a deliberate act of another person to which B did not agree” and members of the public were present when the image was taken. This means that it would not exclude images taken where the depicted person was being sexually assaulted in a public place, nude or semi-

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64 Crimes Act 1900, s 61B.
65 Summary Offences Act 1953, s 26A(2).
66 New Zealand has enacted two separate sharing without consent offences. One applies when the image was taken without the depicted person’s knowledge or consent. The other applies regardless whether it was taken with the depicted person’s consent. Crimes Act 1961, s 216J and Harmful Digital Communications Act 2015, s 22.
nude against their will in a public place, or nude, semi-nude, urinating or defecating in a secluded spot or remote location when there were no people present.

11.76 However, the Scottish defence will exclude nude or semi-nude images of people in changing rooms, so long as there were other people in the changing room. It also excludes images of people breastfeeding in a public place, so long as there were other people present. We think these types of images should be included, therefore in our view, the Scottish and South Australian provisions are not sufficiently well-targeted.

11.77 Finally, it should be noted that both of these exclusions only apply to images *shared* without consent. As we explore at paragraph 11.81 below, we consider it important that such exclusions should apply to both the taking of images without consent and their subsequent sharing without consent. The New South Wales offence achieves this by incorporating the circumstances in which the image was taken into the definition of “intimate image” which then applies to their taking, sharing and threatening to share offences.

**The test**

11.78 This section considers how we can exclude from intimate image offences behaviours that ought not to be criminalised. As we detail at paragraph 11.2 above, the majority of intimate images are taken in private; we are only concerned here with a small range of behaviours that have a public element. As we have identified examples discussed above where we suggested that criminalisation is not justified, we seek to ensure that they are excluded from a criminal offence while ensuring those examples we discussed above where we believe criminalisation is justified are included. Our aim is also that the offences we provisionally propose are as clear and simple as possible, so that the police and prosecutors can apply them effectively. We therefore seek to ensure that any element we propose to exclude a small range of behaviours is not overly complex and does not place an unnecessary burden on the prosecution.

**Public and private places**

11.79 It is clear that when someone is engaging in a sexual or private act, or is nude or semi-nude, in a private place, then someone else should not take a picture of them without consent. Equally, someone should not subsequently share that image without consent. In Chapter 10, we concluded that taking (and subsequently sharing) an intimate image of someone in a private place without consent is sufficiently wrongful and harmful to warrant criminalisation by itself. That aside, in a private place, a person could always reasonably expect that a picture or video of them would not be taken without their consent.

11.80 Because of this, we do not think it is necessary for any reasonable expectation of privacy element to apply to images taken in private places. In practice, however it was worded, it would be an extra element for the prosecution to prove (or if it were included as a defence, for the defendant to raise and the prosecution to disprove). This would make the offences more complex and potentially place an additional burden on the prosecution. Given that in the vast majority of cases where an intimate image is taken or shared without consent the depicted person will have been pictured in a private place, this complexity and additional burden are difficult to justify. Therefore, our provisional view is that a reasonable expectation of privacy element
(however worded) should only apply when an image was taken in a public or semi-public place.

**Consultation Question 32.**

11.81 We provisionally propose that where an intimate image was taken without consent in a private place, a reasonable expectation of privacy test should not apply. Do consultees agree?

Application of a “reasonable expectation of privacy” test to a taking and sharing offence

11.82 As we discuss above, while the voyeurism offence does engage a “reasonable expectation of privacy” test, the disclosure offence does not. We suggested that this leaves the disclosure offence open both to overcriminalisation (for instance by including pictures taken without consent of a streaker or naked protestor with the intention to cause them distress) and undercriminalisation (for instance by not including pictures taken of people changing in changing rooms where the intention was not to cause them distress).

11.83 For this reason, we are of the view that both taking and sharing an intimate image without consent should incorporate a “reasonable expectation of privacy” test. Importantly, we think that such a test should involve consideration of the circumstances under which the image was *taken* in both a taking and a sharing offence. For a sharing offence, this would mean that the reasonable expectation of privacy is in regard to the circumstances under which the image was originally taken. It is the image itself that is of concern here; the circumstances in which it is shared are not relevant (circumstances where an image has previously been shared are a separate consideration which we discuss in the second part of this chapter. It is very unlikely that both would need to be considered in respect of the same conduct). This would depart from the way in which reasonable expectation of privacy has been applied to the sharing of intimate images in civil law, explored at paragraphs 11.4 to 11.13 above.

11.84 We think the “reasonable expectation of privacy” test should be concerned with the circumstances under which an intimate image was taken in cases of non-consensual taking and sharing. The aim of the test is to exclude from intimate image offences some images *taken* in public places, while ensuring other images *taken* in public places are included. The focus, therefore, is on the circumstances in which the image was taken. It follows that if an image was taken without consent in circumstances where criminalisation is not justified, then sharing that image without consent also would not warrant criminalisation. If we turn again to the streaker example; if Karen takes a photo of a streaker at a football game, we do not think she should be criminalised for taking that photo for the reasons outlined above. If Karen then sent that photo to a friend, for the same reasons we do not think this should be criminalised. The sharing is not sufficiently wrongful or harmful because of the circumstances of the original taking. Therefore, the same test can be applied to both taking and sharing offences.
Developing “reasonable expectation of privacy”

11.85 We provisionally propose incorporating into the offences a test so that where an intimate image is (or was) taken in a place to which members of the public had access, the prosecution must prove that the victim had a reasonable expectation of privacy in relation to the taking of the image. Such a test that includes a reasonable expectation of privacy element would satisfactorily distinguish between those images taken in a public place that we consider should and should not be criminalised.

Advantages of incorporating reasonable expectation of privacy

11.86 Whether the depicted person had a reasonable expectation of privacy would be a question of fact for the trier of fact (the jury or magistrates). The concept of reasonable expectation of privacy is familiar to lawyers.

11.87 One further advantage of incorporating a reasonable expectation of privacy element is that it is flexible and context dependent. This means that it could exclude some intimate images taken in public places without excluding them all. The test would allow courts to determine on the facts of each individual case: first, whether the image was taken in a place to which members of the public had access; and secondly, whether the person depicted had a reasonable expectation of privacy. Not all places to which members of public have access are equal. Some will be heavily populated such as a high street on a Saturday morning, some very remote such as a cliffside in winter. Semi-public spaces will vary greatly in the level of restriction placed on admittance. Stadia used for sports and concerts have very large capacity while still being “restricted”, whereas a life-drawing class might only have room for ten members of the public. A person choosing to appear nude or semi-nude in each of these places may have a different expectation of privacy. Someone who appears nude in a life-drawing class in front of ten people might have a stronger argument for expecting privacy than someone who decides to run nude through a concert crowd. Someone who decides to urinate behind a tree in a remote area of hillside might have a stronger argument for expecting privacy than someone who decides to urinate in the middle of a busy high street. We discuss at paragraphs 11.24 and 11.37 above the concept of a scale of acceptable observation. The wide range of contexts in which an intimate image may be taken in public will sit at various points on that scale and a reasonable expectation of privacy test is flexible enough to allow for such consideration. Indeed, case law on the reasonable expectation of privacy test in the voyeurism offence demonstrates that individuals in some public places may have a reasonable expectation of privacy, for instance in changing rooms and secluded spots. However, the opposite conclusion would be reached in the case of a streaker or a naked protestor, who very clearly could not reasonably expect privacy.

11.88 Additionally, a reasonable expectation of privacy element has been incorporated into taking and sharing offences in other jurisdictions. As we mentioned at paragraph 11.68, in New South Wales, a reasonable expectation of privacy test relates to the circumstances in which the image was taken, and applies to their taking, sharing and threatening to share offences. Therefore, we know that this test can be applied to both

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70 R v Swyer [2007] EWCA Crim 204.
taking and sharing offences. We also know that it can apply to the circumstances in which an image was taken (and not the circumstances in which it was shared) even when it relates to a sharing offence. A “reasonable expectation of privacy” test can therefore be used in both taking and sharing offences in the way we suggested above at paragraph 11.82.

Potential disadvantages of incorporating reasonable expectation of privacy

11.89 It might be thought that reasonable expectation of privacy is not the right test in this context because it is difficult to apply to images taken in public and semi-public places. If someone is in a public or semi-public place, in what sense can they reasonably expect privacy from other members of the public also in that place?

11.90 It could be argued that what we are seeking to protect people from is being photographed in public places when they are engaged in a sexual or private act, or nude or semi-nude. The question is not whether they had a reasonable expectation of privacy, but whether they could reasonably expect that an image of them would not be taken. This is similar to the argument explored above, which is that people who are engaged in a sexual or private act, or are nude or semi-nude, in a public place cannot reasonably expect that people will not glance at them fleetingly. However, in some circumstances, they may reasonably expect that people will not take pictures of them.

11.91 Privacy is certainly a difficult concept to apply to intimate images taken in public places when the focus is on the place where the depicted person is. This is the focus in the voyeurism offence: the depicted person must be “in a place which, in the circumstances, would reasonably be expected to provide privacy”.71 However, while there are other jurisdictions where reasonable expectation of privacy is linked to place,72 there are several jurisdictions where it is not. The Australian jurisdictions discussed above all use “circumstances” instead, which is arguably broader than “place”. Additionally, Colorado has an offence of “invasion of privacy for sexual gratification”. The image must be taken “in a situation where the person observed or photographed has a reasonable expectation of privacy”.73

11.92 When the focus is on the circumstances or situation in which the image was taken, rather than the place, then the idea that someone can have a reasonable expectation of privacy in a public place arguably makes more sense. Furthermore, focusing on the act that the depicted person is performing, the manner in which they are performing it and the surrounding circumstances can help explain why someone who is breastfeeding on a park bench and someone who is changing in a changing room almost certainly will have a reasonable expectation of privacy, while someone who is streaking at a football match will not.

11.93 A second point worth making is that the courts have on several occasions made a determination of the scope of an individual’s reasonable expectation of privacy. That is, they have held that while the depicted person may not have had a reasonable

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71 Sexual Offences Act 2003, s 68(1) [emphasis added].
72 For example, the Scottish voyeurism offence and New Zealand’s taking, possession and sharing offences. Sexual Offences (Scotland) Act 2009, s 9; Crimes Act 1961 (New Zealand), s 216H, s 216I and s 216J; and Harmful Digital Communications Act 2015 (New Zealand), s 22.
73 Criminal Code, Title 18, art 3, s 405.6 [emphasis added].
expectation of privacy in relation to being observed (to some degree), they did have a reasonable expectation of privacy in relation to being recorded. As we discussed at paragraphs 11.36 above, in Bassett, the Court of Appeal held that someone who is changing in a changing room does not have a reasonable expectation of privacy from “casual observation” by other changing room users, but they may have a reasonable expectation of privacy from more deliberate and prolonged observation and from recording. More recently, in Richards, the Court of Appeal held that someone who is engaged in consensual sex does not have a reasonable expectation of privacy from the person with whom they are having sex, but they do have a reasonable expectation of privacy from that sexual activity being recorded without their consent.

11.94 This suggests that the reasonable expectation of privacy test would be flexible enough to determine the scope of an individual’s reasonable expectation of privacy when they are engaging in sexual or private acts, or are nude or semi-nude, in public places, and allow for consideration of the circumstances beyond the mere facts of the place itself.

Limiting the reasonable expectation of privacy test

11.95 At paragraph 11.81, we provisionally proposed that a reasonable expectation of privacy test should only apply to images taken in public and semi-public places. When the depicted person is in a private place, they can always reasonably expect that an intimate image would not be taken of them without their consent. Therefore, if a reasonable expectation of privacy test were used, our provisional view is that it should only apply when an intimate image was taken in a public or semi-public place.

11.96 At paragraphs 11.29 to 11.43 above, we set out five situations in which we consider the victim always retains a reasonable expectation of privacy; where the image depicts a sexual assault, where the person depicted was not nude or semi-nude in public voluntarily, where the image shows “upskirting” or “downblousing”, where the person depicted was breastfeeding, and where the person depicted was nude or semi-nude in public changing rooms. The reasonable expectation of privacy test we provisionally propose should ensure that all five of those situations are covered by the taking and sharing offences. In this section we will set out how the test achieves this for all five examples.

11.97 There are some circumstances where we do not think it should have to be proven that the depicted person had a reasonable expectation of privacy when an intimate image was taken of them without consent in a public place. We do not think this should have to be proven when an image is taken without consent of someone being sexually assaulted in a public place, or of someone who is nude or semi-nude against their will in a public place. What distinguishes these circumstances from the other examples we consider is the violation inherent in the act captured by the image. Sexual assaults and being nude or semi-nude against one’s will are a serious violation of sexual privacy, sexual autonomy, bodily privacy and dignity. Taking an image of such a wrongful act is clearly wrongful and further violates the victim’s privacy and dignity. In such circumstances, the victim should be afforded the full protection of the criminal law from images of them being taken (and subsequently shared), and the prosecution

should not have to prove an additional element that is intended to exclude less harmful behaviours.

11.98 We describe these circumstances for the purpose of the test as being non-voluntary. In contrast, breastfeeding and changing in a public changing room are not in and of themselves violations of privacy and dignity. Although a person breastfeeding in public is semi-nude in public out of necessity, we would not characterise it as “non-voluntary”; there is still agency in the act of breastfeeding. We do consider that people breastfeeding should be protected from images being taken without consent, but this is because the act can be considered private and not because the act depicted is itself a violation of privacy.

11.99 Additionally, we do not think it should have to be proven that the depicted person had a reasonable expectation of privacy when “upskirted” or “downbloused” in a public place. This is for a different reason: here, the argument is that someone who is clothed always has a reasonable expectation of privacy in relation to the taking of such images.

11.100 The defence to the Scottish sharing offence has some attraction in this regard. The defendant has a defence if the depicted individual was in an “intimate situation” in a public place, but only if they were “not in the intimate situation as a result of a deliberate act of another person to which [they] did not agree”.76 However, our provisional view is that there are three problems with the Scottish defence.

11.101 First, sharing “upskirting” and “downblousing” images without consent is not excluded from the defence. This is because sharing “upskirting” and “downblousing” images is not included within the offence.77 Currently, in Scotland it is only a (different) offence to take “upskirting” images,78 and neither taking nor sharing “downblousing” images is criminalised. Secondly, as we discussed at paragraph 11.73, the defence is overly broad. It captures, for instance, breastfeeding and nude or semi-nude images taken without consent of people in changing rooms, provided that other people were present. Thirdly, we do not think that such a test should be contained within a defence. If it should not be an offence non-consensually to take or share an intimate image of someone who, when the image was taken, was in a public place where they could not reasonably expect privacy, then arguably this should be excluded as part of the offence and not left for the accused to raise as a defence.

11.102 With these problems in mind, reasonable expectation of privacy could be incorporated into the offence by requiring an additional element to be proven when:

76 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(5).

77 As Michael Matheson MSP pointed out to the Justice Committee at the second stage of the Abusive Behaviour and Sexual Harm (Scotland) Bill, people who are “upskirted” are not in an “intimate situation”, because their genitals, buttocks or breasts are not exposed or covered only with underwear. See Scottish Parliament, Official Report Justice Committee – Session 4 (1 March 2016) https://www.parliament.scot/parliamentarybusiness/report.aspx?r=10409&mode=pdf (last visited 24 February 2021) 44.

78 Sexual Offences (Scotland) Act 2009, 9(4B).
(a) the intimate image is (or was) taken in a place to which members of the public had access (whether or not by payment of a fee); and

(b) the victim is (or was), or the defendant reasonably believed the victim is (or was), voluntarily engaging in a sexual or private act, or is (or was) voluntarily nude or semi-nude.

The additional element would require the prosecution to prove that the victim had a reasonable expectation of privacy in relation to the taking of the image. As with the “without consent” circumstance element discussed in Chapter 8, the legal burden of proof for this test would be on the prosecution.79

11.103 This approach has several advantages. First, the additional element need only be proven when the victim was in a public or semi-public place. Therefore, in the majority of cases (when the victim was pictured in a private place) there is no additional burden on the prosecution.

11.104 Secondly, the additional element need not be proven when the victim was pictured without consent being sexually assaulted, or nude or semi-nude against their will, in a public place. This is because they were not voluntarily engaging in a sexual act, or voluntarily nude or semi-nude. We have also included the defendant’s “reasonable belief” in the voluntariness of the victim’s actions. If we consider the culpability of someone who takes such an image, knowingly taking or sharing an intimate image of someone who is nude, semi-nude or engaging in a sexual act against their will is clearly behaviour that should be criminal. The key to their high level of culpability is that they do so knowingly. If someone were to take an intimate image of someone nude in public without knowing that it was against their will, they do not have that same level of culpability. Let us return to the streaking example. We suggest that taking a photo of a streaker at a football match is not sufficiently wrongful behaviour. If that person streaking was only doing so because they were being threatened with violence if they did not, they were not nude in public voluntarily. However to the thousands of people in the crowd who see the streaker in the distance, it does not appear to be involuntary; it was reasonable for them to believe the streaker was voluntarily nude in a public place. Someone in the crowd who took a photo of that streaker has behaved exactly as we describe in those examples where the streaking was voluntary and their level of culpability, their belief in the circumstances in which they took the photo is the same.

11.105 Thirdly, it also need not be proven when the victim is “upskirted” (or “downbloused”) in a public place, because in these cases the victim is not nude or semi-nude. There is a distinction between the victim being nude or semi-nude and the image being nude or semi-nude. In “upskirting” and “downblousing” cases, the image will be semi-nude even though the victim was not.

11.106 Fourthly, unlike the Scottish defence, this approach does not exclude intimate images taken in public places when members of the public were present. We

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79 That is, the prosecution would have to prove that either: (1) the intimate image was not taken in a place to which the public had access; or (2)(a) the victim was not voluntarily engaging in a sexual act or was not voluntarily nude or semi-nude; and (b) the defendant did not reasonably believe that the victim was voluntarily engaging in a sexual act or was voluntarily nude or semi-nude.
identified above two sets of such circumstances where we assert that the victim does retain a reasonable expectation of privacy when they are nude or semi-nude in public: intimate images taken in changing rooms and of breastfeeding. We provisionally propose that legislation or accompanying explanatory notes include a clarification that in these circumstances, the person depicted retains a reasonable expectation of privacy.

11.107 The test also has the flexibility to allow for consideration of other circumstances where it is necessary for the prosecution to demonstrate that the victim had a reasonable expectation of privacy in relation to the taking of the image. As we discuss at paragraph 11.86 above, courts are well placed to determine the two relevant questions. First, whether the facts of individual cases make the test relevant (by determining whether the image was taken in a place to which members of the public had access). Secondly, whether the test is met (by determining whether the victim had a reasonable expectation of privacy).

**Consultation Question 33.**

11.108 We provisionally propose that where:

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

2. the victim is, or the defendant reasonably believes the victim is, voluntarily engaging in a sexual or private act, or is voluntarily nude or semi-nude,

the prosecution must prove that the victim has a reasonable expectation of privacy in relation to the taking of the image.

Do consultees agree?

11.109 We provisionally propose that legislation implementing this test make clear that a victim who is breastfeeding in public or is nude or semi-nude in a public or semi-public changing room has a reasonable expectation of privacy in relation to the taking of any image. Do consultees agree?

**INTIMATE IMAGES PREVIOUSLY SHARED IN PUBLIC**

11.110 This section of the chapter considers intimate images that already exist. We are now concerned with how an image is shared and not how it was taken. We have described what is meant by “sharing” in Chapter 7. It is an encompassing term that includes sharing between individuals or groups, in public or private and can be done both online and offline. Any time an intimate image is made available by one person to another, without the consent of the person depicted, it would fall under our definition of sharing.

11.111 This definition of sharing includes images that are shared more than once. If A sends an intimate image of themselves to B, B then sends it to C and C then sends it to D, then both B and C would be considered to have “shared” the image. This type of
onward sharing is sometimes referred to as secondary distribution. We discuss secondary distribution in Chapter 2 and explain that it can be as harmful as the initial sharing when done without consent. However, there are some circumstances of initial sharing that significantly lessen the wrongfulness of onward sharing.

11.112 If A had instead shared their image with the wider public, including B, B’s subsequent sharing of A’s image to C is a significantly different act. We argue below that this circumstance of public sharing makes the onward sharing less wrongful; in some circumstances it is not wrongful at all. It is also very common behaviour, if we think of the regularity with which people show or share with their friends intimate images printed in magazines or online. An offence that includes all types of onward sharing, regardless of the level of wrongfulness could lead to serious overcriminalisation. This section will consider how to carve out behaviours that are not wrongful from our provisionally proposed sharing offences. We examine which behaviours should be excluded from a sharing offence, which should be included, and provisionally propose a test to distinguish between them, drawing on the way in which existing offences in England and Wales and other jurisdictions deal with images previously shared in public.

**Examples where an intimate image that has previously been shared can be further shared without consent**

11.113 We first consider examples of onward sharing where the potential for harm and wrongfulness of the behaviour is so minimal that it is not appropriate to criminalise the behaviour.

**Sharing commercial pornographic images**

Liam is a teenage boy, he watches a number of professional pornographic videos that have been uploaded to the production company’s channel on PornHub. He downloads one of the videos to his phone and sends it to a group of his friends on WhatsApp as it features a sex act they had all been talking about.

11.114 The images were published on a website that is available to all members of the public to access. Liam is one of many members of the public who accessed the video. The friends to whom Liam sent the video could also have watched it directly on the website. It is difficult to see how serious harm could be caused to the people depicted by Liam’s sharing; it does not represent a serious violation of their bodily privacy or sexual autonomy as they had already consented to anyone being able to see the video on the website. This type of sharing behaviour is extremely common. It also occurs “offline” when people share magazines or newspapers with friends or colleagues that contain nude or semi-nude images. We are of the view that this type of behaviour is clearly not criminal.
Sharing images on public social media

Keneisha is a body positivity campaigner and shares semi-nude and sexual images of herself on her public Instagram account. David, one of Keneisha’s followers on Instagram, is inspired by one of the images so prints it out and puts it up in the common room at his university.

11.115 The image has been shared by Keneisha in a public place. Our provisional view is that sharing it further is not sufficiently wrongful or harmful to warrant criminalisation. Her bodily privacy and dignity are not violated as she has chosen to make the images public, nor is she likely to be harmed by the further sharing as she would be if she had shared the images only with her partner, for example. We are of the view that this behaviour should be excluded from the criminal law.

11.116 The examples we think should be excluded from intimate image offences are where the original sharing was always public and consensual.

Examples where an intimate image that has previously been shared cannot be further shared without consent

11.117 We now consider examples of onward sharing that are sufficiently wrongful and harmful to warrant criminalisation.

Image originally shared with consent in private

Tania sets up a private Facebook group for herself and four friends who all like the idea of burlesque dancing. Tania buys herself see-through lingerie that is used by burlesque dancers and posts a photo of herself wearing it to the private Facebook group page. Craig is one of Tania’s friends in the private group. For a laugh, he saves the photo on his phone and shows it to his work colleagues the next day.

11.118 While Facebook may be considered a public forum, Tania has created a small private group within it. She chose to share the image with that private group only and not her public Facebook profile. Craig knows that he is one of a small private group and that the photo was shared by Tania in the private group only as it was designed to be a safe space for them to discuss their joint interest. By sharing the image with other people without Tania’s consent, Craig could cause her significant harm. He has violated Tania’s bodily privacy and the autonomy she has to choose with whom to share the image. Even though the image was originally shared with more than one person, it is still intrinsically private. The onward sharing of a private nude photo is precisely the harmful behaviour that intimate image offences aim to capture. In our view, Craig’s behaviour should be captured under the criminal law.

80 Instagram community guidelines do not generally permit nudity but the filters do not always remove the images immediately and it is used by many to share images that would be considered intimate.
11.119 At paragraph 11.79 above, we concluded that for images taken in private, the person depicted always retains a reasonable expectation of privacy over their image. Similarly, this example demonstrates that images originally shared in private as opposed to public should always attract the protection of the criminal law. Sharing private images without consent is the primary wrongful and harmful behaviour that a sharing offence seeks to address. Therefore we provisionally propose that images previously shared in private should not be excluded from intimate image abuse offences.

**Image originally shared without consent**

Alfie and Sara were in a volatile relationship. Alfie took a photo of Sara when she was asleep naked in bed, but Sara does not know he took it. They broke up after a bad argument and Alfie uploaded that photo to a well-known “revenge porn” website with a caption that says: “this nasty slut of an ex deserves humiliating”. Charles frequents “revenge porn” sites; he sees the image of Sara who he thinks looks like someone at his work. Charles downloads the image and emails it to his work friends saying: “doesn't this slag look like the new manager?”

11.120 Both Alfie and Charles have shared an intimate image of Sara without her consent. Significant harm is likely to be caused to the victim by both the original and onward sharing; Sara has no control over her own image and every time it is shared without her consent, it is a violation of her bodily privacy. Alfie has committed an offence under our provisionally proposed sharing without consent offence. Charles’ act of onward sharing is no less wrongful simply because Alfie had already acted the same way. The original sharing made the image available to the public, however, the fact that it was made available to the public without Sara’s consent means that onward sharing is a similar violation each time. This is distinct from the earlier examples involving Liam and Keneisha, where it was the choice of the person depicted to share their image in public, and accordingly further sharing would not have the same level of impact. Charles’ actions are significantly more wrongful than they would have been if the original sharing had been consensual. Due to the nature of the image, the website and the caption, there is no doubt to anyone viewing it that the original sharing was without Sara’s consent. Therefore anyone who subsequently shares it is sufficiently culpable. In our view, Charles' behaviour should be captured by a criminal offence, in the same way that Alfie’s would be. The lack of consent to the original sharing is the key factor that warrants criminalisation.

**How jurisdictions currently approach images previously shared in public**

11.121 In Chapter 3 we noted that that it is a defence for a person charged with the disclosure offence in section 33 of the Criminal Justice and Courts Act 2015 (“CJCA 2015”) to show that—

(a) he or she reasonably believed that the photograph or film had previously been disclosed for reward, whether by the individual mentioned in subsection (1)(a) and (b) or another person, and
he or she had no reason to believe that the previous disclosure for reward was made without the consent of the individual mentioned in subsection (1)(a) and (b).

11.122 This demonstrates a recognition that, in some circumstances, onward sharing of an image that has already been shared should not be criminalised. This defence to the current disclosure offence is limited to images that were previously disclosed for reward. This would exclude the type of onward sharing in the example involving Liam above, where the intimate images were published in a magazine that pays the women depicted for the use of their photos. However, it would not exclude the onward sharing in the example above where the intimate image was first posted on Instagram. In that example Keneisha did not receive any reward for sharing her image but it was equally public. A defence that is based on whether the image was shared for reward is therefore too limited.

11.123 In Scotland, section 2(1)(c) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 requires an image not to have been previously disclosed with consent to the public at large, or any section of the public, for an offence to apply. In their consultation on proposed reform to the laws on intimate images, the Scottish Government asked whether there is a need to provide statutory defences and noted the section 33 CJCA 2015 defences. They considered that the previously disclosed for reward defence “appears to be intended to ensure that images which are already, in a sense, in the public domain, are not covered by the offence”. The Scottish offence does not limit the exclusion to images shared for reward; instead, it is the public nature of such sharing that warrants exclusion.

11.124 A number of Australian jurisdictions exclude images that have already been shared. For example, in Victoria, section 41D of the Summary Offences Act 1966 provides an exception to the offence of distributing an intimate image where the person depicted has expressly or implicitly consented to distribution of the image for the same or similar purpose. The example they give to illustrate the defence is a model who consented to a photograph being published in magazine A. It is not an offence for the same photographer to publish the image in magazine B as the purpose of the distribution — commercial — is the same. In South Australia, in section 26D of the Summary Offences Act 1953 there is a defence to the offence of distributing an image obtained by indecent filming where the person depicted consented to the distribution of the image generally.

11.125 Australian jurisdictions such as the Northern Territory and Queensland that introduced intimate image offences more recently appeared to consider including a defence similar to that in the section 33 disclosure offence that would exclude images previously shared for reward, but decided against this. In available commentary on the Scottish Government, Equally Safe - Reforming the criminal law to address domestic abuse and sexual offences (Response to questions) (March 2015)
Bill stages, these jurisdictions consider the elements of the offence, such as the absence of consent, address the issue without the need for a separate defence.  

11.126 As we describe above, secondary distribution would always fall within the definition of sharing for an intimate image offence. We conclude that an additional circumstance element is needed to exclude sharing that is insufficiently wrongful to warrant criminalisation.

The test

11.127 The examples above demonstrate that the wrongfulness of the onward sharing behaviour is dependent on two factors: whether the original sharing was in a public place and whether the person depicted consented to the original sharing. We provisionally conclude that where an image has been shared in public with consent, onward sharing without consent should not be criminalised. To achieve this we provisionally propose that it should not be an offence to share an intimate image without the consent of the person depicted where:

1. the intimate image has, or the defendant 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 the defendant reasonably believed that person depicted in the image consented to that previous sharing.

11.128 As with the “without consent” circumstance element discussed in Chapter 8, the legal burden of proof for this test would be on the prosecution.  

11.129 We propose this element would only need to be considered when there is onward sharing; it will not be applicable in the majority of cases which involve the initial sharing of an intimate image without consent. We therefore envision that it would not be unduly burdensome. This test would only apply where the image being shared is the same as the original image that was previously shared in public. If the image is altered in any way before it is reshared, the result is a new image that has not previously been shared. Therefore it would instead be considered as sharing an


83 That is, the prosecution would have to prove that either: (1)(a) the intimate image was not previously shared in a place to which the public had access; and (b) the defendant did not reasonably believe that it was previously shared in a place to which the public had access; or (2)(a) the person depicted did not consent to that previous sharing; and (b) the defendant did not reasonably believe that the person depicted consented to that previous sharing.
altered image, if after the altering it would still be (or now be) considered “intimate”. Sharing altered images is discussed in Chapter 7.

“A place to which members of the public had access”

11.130 We have identified above at paragraphs 11.113 to 11.115 examples where sharing has made the image available to any member of the public who is able to access it, namely a magazine available to buy or a website available to visit. At the other extreme, the original sharing on a private Facebook group between friends was not public as members of the public had no right to access that Facebook group. There will be some instances where the original sharing was in a place where some members of the public could have access in varying degrees. In the first section of this chapter we consider that public can include semi-public places such as concert venues and life-drawing classes; places where the public could be present but they are not fully open to all. Semi-public places may be limited by size (such as a bar with a maximum capacity) or by ticket holders whether paid for or free (such as a train or theatre) or by membership (such as a gym changing room). Online spaces could be analogous to semi-public places where they have similar limitations of size (such as an online event with a maximum capacity), ticket holders (such as online gallery or “VIP” access to certain content) or membership (such as a members only dating website). These restrictions both online and offline may have been imposed by the person who is sharing their image, to limit or refine the number of people who see it (for example by creating a social media account where members of the public have to request to be admitted, or an OnlyFans account where members of the public have to pay to subscribe).

11.131 We believe the test should apply equally to online and offline places to which members of the public had access. Intimate image abuse occurs both online and offline so any definition of public would need to incorporate both. Determining whether the original disclosure was made to the public will be a question of fact depending on the individual facts of each case. Both online and offline places can be open to members of the public to varying degrees as the examples above demonstrate. As far as we are aware, the extent to which online spaces are deemed public has not been specified in law and may be dependent on the purposes of the offence. This allows the test some flexibility in determining on the facts of individual cases whether the original sharing was done “in public”. The courts have already demonstrated a willingness and ability to consider questions of the public nature of online spaces and social media. As discussed in paragraph 11.12 above, the courts in Soriano v Forensic News LLC and Green Corns Ltd v Claverley Group Ltd held that information that has been made available to the public in online spaces can “still be information in which an individual enjoys a reasonable expectation of privacy against mass dissemination”.

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84 See discussion of whether online spaces are public for the purposes of the common law offence of outraging public decency in the Abusive and Offensive Online Communications Scoping Report (2018) Law Com No 381, p 134
85 [2021] EWHC 56 (QB).
86 [2005] EWHC 958 (QB), [2005] EMLR 31
87 Soriano v Forensic News LLC [2021] EWHC 56 (QB) at [106].
"Reasonably believed"

11.132 We have considered throughout this section whether the act of onward sharing in different circumstances is sufficiently wrongful behaviour. We now consider the culpability of the person committing the wrongful acts. A key part of culpability is whether the perpetrator is aware of the nature of their actions. There are two elements to determining criminality of sharing images that have previously been shared: whether the original sharing was public, and whether the original sharing was consensual. The awareness a perpetrator has of both of those elements affects their level of culpability. We therefore provisionally propose a “reasonable belief” component for both the public nature element and the consent element.

11.133 A defendant’s reasonable belief that the image was shared in public is important. Let us consider a website example. Ally sets up a website that appears to promote her new lingerie shop, to which Ally has uploaded images of herself posing in the underwear. Ally sends Gregg a link to the website via an email that says: “check out my new website, I can’t wait for everyone to see!” When Gregg visits the website it appears to him to be public, the text is written to inform new customers about the shop and asks for reviews. Gregg thinks Ally looks good in the photos and downloads one to send to his friend to get his opinion. Unbeknownst to Gregg, Ally had created a test website just for Gregg. It was not available to the public as it had not been launched. It was reasonable for Gregg to assume that his friend could also have had access to the website when he shared the photo and he was not aware that sharing it in this way could cause any harm to Ally. His culpability is the same as it would have been if the page had been public as that is what he reasonably believed the circumstances were when he shared the image. Without an element of reasonable belief, Gregg would be subject to a sharing offence as the website was in fact private. This limb of the test would be satisfied if either the original sharing was public, or the defendant had reason to believe that it was public even though in fact it was private.

11.134 In addition, there will be cases where the original image was shared without consent, but the defendant reasonably believed there was consent. A well-known example to demonstrate this is the Deep Throat pornographic video featuring Linda Lovelace. This video was a very popular film that was widely distributed publicly. Years after it was released, Ms Lovelace stated that the film actually depicts her sexual assault and her abusive husband had threatened and coerced her to make the film. Many of the people watching the film before this was revealed would have had no reason to believe that Ms Lovelace did not consent to the film’s original distribution. In such circumstances, where one person bought the film and shared it with a neighbour, without any reason to believe the original purchase was without the consent of the person depicted, we consider that they are not sufficiently culpable to be held criminally liable. Such cases may arise when the person depicted only makes it known that the original sharing was not with their consent after it has been done. We then

88 We have also considered an example with similar facts in Chapter 10 where we consider awareness of lack of consent.

have to consider the awareness of the defendant as to the true circumstances of non-consent.

11.135 The belief in consent must be reasonable. It is not satisfactory for a defendant to be able to argue that because the image was available on a public porn website, they can assume there was consent to the image being uploaded. This element ensures that the defendant must at least turn their mind to whether there was consent to the original upload where the nature of the image or caption associated with it indicate that it was shared without consent. The example above at paragraph 11.120 where an image was found on a “revenge porn” website and resharred highlights this issue. Such websites are freely accessible and public; that fact alone should not allow a perpetrator to claim there was reasonable belief in consent. Their belief would not be reasonable when the nature of the website and the image clearly indicate a lack of consent from the victim.

11.136 We therefore provisionally propose that it should not be an offence to share an intimate image without the consent of the person depicted where:

1. the intimate image has, or the defendant 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 the defendant reasonably believed that person depicted in the image consented to that previous sharing.

11.137 As with the “without consent” circumstance element discussed in Chapter 8, the legal burden of proof for this test would be on the prosecution.90

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90 That is, the prosecution would have to prove that either: (1)(a) the intimate image was not previously shared in a place to which the public had access; and (b) the defendant did not reasonably believe that it was previously shared in a place to which the public had access; or (2)(a) the person depicted did not consent to that previous sharing; and (b) the defendant did not reasonably believe that the person depicted consented to that previous sharing.
Consultation Question 34.

11.138 We provisionally propose that it should not be an offence to share an intimate image without the consent of the person depicted where:

(1) the intimate image has, or the defendant 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 the defendant reasonably believed that person depicted in the image consented to that previous sharing.

Do consultees agree?

CONCLUSION

11.139 This chapter has considered the extent to which images taken or previously shared in public should be excluded from our provisionally proposed offences. We invite consultees’ views on our provisional proposals.
Chapter 12: Threats to take, make and share intimate images without consent

INTRODUCTION

12.1 This chapter will explore the law in relation to threats to take, make and share intimate images without consent. Threats are not specifically criminalised in the current intimate image abuse offences of voyeurism, “upskirting” or the disclosure offence. We do know however that they are a very common form of intimate image abuse. The Revenge Porn Helpline told us that a quarter of calls they receive relate to threats. The Data & Society Research Institute found that 3% of Americans who use the internet have been the victim of a threat to share an intimate image. The charity Refuge have reported that 1 in 14 adults in England and Wales have experienced a threat to share an intimate or sexual image, and for young women this figure rises to 1 in 7; for young men it is 1 in 9. Refuge are currently campaigning for a change in the disclosure offence to include threats. In this chapter we will explore the extent of the current law and consider what kinds of threats could and should be criminalised.

12.2 First, we set out the range of intimate image abuse threats. Then we discuss the current criminal law in England and Wales that relates to threats more generally and consider how it could apply to threats in this context, as well as revisiting some of the offences outlined in Chapter 3 that could be used to address intimate image threats. We then explore other jurisdictions that have specifically criminalised threats relating to intimate images and analyse their approach. This chapter concludes that a new offence specific to intimate image threats would best meet the harm caused by such behaviour. We ask consultees for their views on a proposed new offence and for further examples of behaviours that we might need to consider.

TYPES OF THREAT

12.3 In Chapter 2 we set out the range of intimate image abuse threats. Here we provide a brief summary of those behaviours to understand the context in which we consider the current law. Initial research and pre-consultation stakeholder engagement has directed us to different types of threat:

(1) Threats to take intimate images. We have not had many examples of this behaviour shared with us yet, but we understand it may be happening in the context of abusive relationships or stalking. This type of threat may be made orally in person and is therefore harder to evidence and report than written threats.

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(2) Threats to make intimate images. We have been provided with a few examples where such threats have been made to photoshop a photo of the victim’s face on to pornographic pictures, usually accompanied by a threat then to share those made images.

(3) Threats to share intimate images. This is the most common type of behaviour. The evidence gathered so far suggests this mainly takes place in the context of abusive relationships, as a way of exerting control over another or as a form of blackmail sometimes referred to as “sextortion” (where the perpetrator threatens to share an intimate image of the victim for either financial or sexual gain). Threats to share may also be made to stop a victim reporting sexual or physical abuse or as a threat to “out” the victim (for example someone who identifies as LGBTQ+ or a sex worker). In some cases, there is no identifiable reason for the threat, there is no obvious intention to gain or coerce anything in particular, it may be to harass or distress the victim, or for a “joke”.

12.4 There are a multitude of ways threats can be made. A threat to take or make an image may be detailed in respect of the content of the image and when it may be taken or made, or it may be vague leaving a victim uncertain when and if it may be carried out. A threat to share may relate to an existing image that the perpetrator obtained consensually or non-consensually. Threats to share may be made when the perpetrator has an intimate image, or when they do not have an image but intend the victim to fear that they do. Victims may not always be aware whether the perpetrator has an image that is the subject of the threat. This is particularly prevalent in domestic abuse situations; a study conducted by Refuge as part of their Naked Threat campaign found that 1 in 20 people who had been so threatened, did not know if there was an image or not. A threat can be made with the intention of carrying it out, or not.

12.5 As this demonstrates, threats can cover a wide range of behaviours. We will need to consider whether all these behaviours should be criminalised, and if so, how.

EXISTING THREAT OFFENCES IN ENGLAND AND WALES

Assault

12.6 The treatment of threats in the criminal law of England and Wales primarily centres on threats of violence. Assault contrary to section 39, Criminal Justice Act 1988 is one such example. Assault “is committed when D intentionally or recklessly causes another to apprehend immediate and unlawful violence”. Further commentary advises that such a threat of violence “will
give rise to liability only if there is also a present ability (or perhaps a perceived ability) to carry the threat into execution.\(^8\) If this reasoning were to be applied to a proposed offence of threatening to take, make or share an intimate image without consent, the behaviour would only be criminalised if the threat could be actioned at the time. This could exclude a threat to take an image if there are no means by which to take one. It could also exclude a threat to share an image where an image does not exist.

12.7 The fault element of this offence includes recklessness in causing another to apprehend the violence. We consider recklessness in greater detail in Chapter 10.\(^9\) In summary, recklessness requires a defendant to be aware of a risk and to take that risk unreasonably (in the circumstances known to them at the time). Therefore they do not have to intend a certain consequence, they can be aware that there is a risk that the consequence may occur and unreasonably pursue a course of action that could lead to that consequence.

**Threats to kill**

12.8 Section 16 of the Offences Against the Person Act 1861 ("OAPA") creates the offence of threats to kill, if “a person … without lawful excuse makes to another a threat, intending that that other would fear it would be carried out, to kill that other or a third person”. The maximum sentence for this offence is ten years’ imprisonment on indictment. The term “lawful excuse” includes situations such as the prevention of crime or a threat made in self-defence.\(^10\)

12.9 The conduct element is that a threat is made. The only fault element is that the defendant must intend that the recipient of the threat fear that it would be carried out. There is no requirement for the defendant to have intended to carry it out, or for the recipient of the threat to have believed it would be carried out.\(^11\)

12.10 There have been many attempts to reform the law on offences against the person, including threats to kill. These are detailed in our Reform of Offences against the Person Report.\(^12\) In the report we concluded that an offence of threats to kill is still needed. Although public order offences\(^13\) could cover such behaviour, “these do not reflect the full gravity and nature of the wrongdoing, either in labelling or in sentencing terms.”\(^14\) We also considered that the threat to kill offences should be extended to include threats to rape, recognising the comparable level of harm caused by threats in the context of serious sexual offending.\(^15\)

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\(^9\) See Chapter 10 paras 10.22 to 10.27.


\(^12\) Reform of Offences against the Person Report (2015) Law Com 361.

\(^13\) Public Order Act 1986, ss 4, 4A and 5.


12.11 The specific offence of threats to kill that focuses on the intent of the defendant demonstrates that a threat can be criminally wrongful regardless of whether it is, or even could be, carried out.

**Threats to cause criminal damage**

12.12 Threatening to cause criminal damage to another person’s property is a criminal offence under section 2 of the Criminal Damage Act 1971 (“CDA 1971”). This offence is concerned with threats against property rather than a person. Section 2 reads as follows:

A person who without lawful excuse makes to another a threat, intending that that other would fear it would be carried out—

(a) to destroy or damage any property belonging to that other or a third person; or

(b) to destroy or damage his own property in a way which he knows is likely to endanger the life of that other or third person;

shall be guilty of an offence.

The maximum punishment for an offence under this section on indictment is ten years’ imprisonment, or six months imprisonment and a fine for a summary offence.

12.13 It is an objective question whether, on the facts, a threat has been made, and whether that threat was to destroy or damage property of another.\(^{16}\) Like threats to kill, the only mental element required for this offence is that the defendant must have intended that the recipient of the threat would fear it would, or might, be carried out.\(^{17}\) The intended victim does not have to fear that the threat will be carried out, as long as the defendant intended them so to fear.\(^{18}\) The defendant does not have to intend to carry the threat out, nor does the threat have to be carried out, or even be capable of being carried out, for the offence to apply.

12.14 Section 5 of the CDA 1971 defines "lawful excuse" to include where the defendant believed that the person who could give consent to the property being damaged or destroyed had given or would give consent.\(^{19}\)

12.15 This offence makes clear that the intention of the defendant is the key fault element. The ability or intention to carry out the threat is not relevant; therefore, the defendant need not have the means to carry out the threat for it to be considered an offence. This is an important consideration for intimate image abuse. As detailed above, Refuge report that many victims do not know whether an image exists or not when the perpetrator threatens to share an intimate image. Such a threat is harmful even when the perpetrator does not have an image to share and therefore cannot carry out the

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\(^{17}\) R v Ankerson [2015] EWCA Crim 549.

\(^{18}\) D Ormerod and D Perry (eds) Blackstone’s Criminal Practice 2020, para B8.35.

\(^{19}\) This definition of lawful excuse does not apply to s 2(b) or any part of the Act where endangerment to life is an element of the offence.
threat. Such a defendant is culpable if they intended the victim to fear that it would be carried out.

**Threats in sexual offences**

12.16 Threats in the context of sexual offences are more limited. Section 4 of the Sexual Offences Act 2003 (“SOA 2003”) creates an offence of intentionally causing a person to engage in sexual activity without consent. The means of “causation” are not defined in the legislation; any conduct that causes someone to engage in sexual activity could satisfy the criteria. That could include “threats of violence, inducements or persuasion”. It is possible, therefore, that some threats to take, make or share an intimate image where they are made to induce the victim to engage in sexual activity could be prosecuted under section 4. This could include a threat to share an intimate image unless the victim has sexual intercourse with the perpetrator, or in cases of “sextortion” where a perpetrator threatens to share an intimate image online unless the victim sends them more images, or a recording of themselves performing a sex act. On summary conviction the maximum sentence is six months’ imprisonment; on indictment it is ten years’ imprisonment. Where the sexual activity involved penetration, the maximum sentence on indictment is life imprisonment.

12.17 Section 75 of the SOA 2003 details when consent to sexual activity is presumed to be vitiated. Subsection 2 provides a list of circumstances in which it is presumed that the complainant did not consent to the sexual activity, unless the defendant can adduce sufficient evidence to raise an issue as to whether the complainant consented. If the defendant is able to provide such evidence, the prosecution must prove beyond reasonable doubt that the complainant did not consent, and that the defendant had no reasonable belief in consent. Section 74 of the SOA 2003 defines “consent” for the purposes of that Act as a person agreeing by choice, where that person has the freedom and capacity to make that choice. The circumstances listed in section 75 are ones where it could be presumed that a person is not free to make a choice, or in those circumstances does not have capacity to make a choice. As these are key to the definition of consent to sexual activity, consent that is not freely given or consent without capacity is not considered consent. We discuss consent to sexual activity under the SOA 2003 in Chapter 8.

12.18 Subsections (2)(a) and (b) specify such circumstances where any person was using violence, or causing the complainant to fear violence against them or another person. Here, a threat that might vitiate consent to sexual activity is limited to physical harm. A threat to take, make or share an intimate image for the purposes of coercing a complainant into sexual activity is not one of the circumstances provided for in section 75. It is still open to prosecutors to argue that the complainant did not consent, that the consent was not real because of the threat, or that the defendant had no reasonable belief in their consent because of such a threat. However there is no evidential presumption in the same way that there is for threats of violence.

12.19 Stakeholders have shared with us examples of such behaviour. We have heard examples that include threats to share images to coerce someone into performing sexual acts on a webcam, and threats to share intimate images with a religious victim’s family to coerce that victim to engage in sexual activity against their religious

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20 D Ormerod and D Perry (eds) *Blackstone’s Criminal Practice 2020*, para B3.75.
beliefs. We consider there is sufficient evidence that this behaviour occurs and that it amounts to serious sexual offending.

12.20 Academic Susan Leahy has written about the difficulties of prosecuting sexual coercion by non-violent threats and argues that societal attitudes to rape and lack of clarity in the law mean that harmful behaviour of this kind is often unpunished. It is therefore important that such behaviours are appropriately criminalised and that the law is clear enough to address the harm they cause. While some threats to share intimate images could form part of a section 4 offence, the severity of the impact on consent by intimate image abuse threats could also be reflected by direct inclusion in section 75 of the SOA 2003. We invite consultees’ views on whether threats to take, make or share an intimate image with the intent of coercing sexual activity should raise an evidential presumption that there was no consent to sexual activity.

Consultation Question 35.
12.21 We invite consultees’ views as to whether threats to take, make or share an intimate image with the intent of coercing sexual activity should raise an evidential presumption that there was no consent to sexual activity.

12.22 Threats are also included in sections 34 to 37 of the SOA 2003 which criminalise procuring or engaging in sexual acts with a person with a mental disorder by use of threats, inducement or deception. Threats are not defined in these provisions. We seek information from consultees on whether threats to take, make or share images are being used to procure or engage in sexual acts with a person with a mental disorder and if so, whether they can be and are being prosecuted under sections 34 to 37 of the SOA 2003.

Consultation Question 36.
12.23 We invite consultees to provide examples where threats to take, make or share intimate images have been used to procure or engage in sexual acts with a person with a mental disorder and information about the use of sections 34 to 37 of the Sexual Offences Act 2003 to prosecute such cases.

Application to intimate image abuse threats
12.24 The current law on threats focuses primarily on threats of violence, against property or people. The direct impact of these offences on intimate image abuse is limited, but it does show that threats can warrant criminalisation even where they are not immediately actionable or effective, and that whether a threat has been made can be established objectively.

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12.25 The offences of threats to kill and threats to cause criminal damage require the defendant to intend the recipient of the threat to believe it will be carried out, although the recipient does not have to believe the threat will be carried out. This is an important consideration for intimate image abuse cases. First, such an approach would enable the criminalisation of threats to take, make or share an intimate image even if the victim does not know whether the threat can be carried out, for example, where the victim does not know whether the perpetrator actually has an intimate image that they can publish online. Another example would be in the context of stalking, where a perpetrator threatens to take a photo of the victim undressing through their bedroom window; the victim may not know whether the perpetrator is able to do so. The threat itself is sufficiently harmful. Sufficient culpability is ensured by requiring the defendant to have intended the victim to fear that the threat would be carried out. Secondly, these offences do not require the prosecution to prove that the victim believed the threat. In Chapter 9 we have discussed how the law in this context should not require proof of the impact on the victim, that is, it should not require proof of actual harm. Instead, it is the conduct and fault of the perpetrator that should be criminalised. This is also demonstrated in the current threat offences.

12.26 Threats in the context of sexual offences are concentrated on threats that induce someone to engage in sexual activity. While this is the reason some intimate image abuse threats are made, it does not cover the range of intimate image abuse behaviours with which we are concerned in this consultation paper.

CURRENT CRIMINAL OFFENCES THAT COULD APPLY TO INTIMATE IMAGE THREATS

12.27 In Chapter 3 we set out current offences that might be applicable to intimate image abuse. Here we summarise those offences again but consider them specifically in the context of threats.

Blackmail

12.28 Section 21(1) of the Theft Act 1968 outlines the offence of blackmail:

A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—

(a) that he has reasonable grounds for making the demand; and

(b) that the use of the menaces is a proper means of reinforcing the demand.

12.29 The demand can be express or implied, and includes writing, speech or through conduct. It is irrelevant whether the person who made the threat intended to carry it out.
12.30 Although menace is not specifically defined, it is not limited to threats of violence and can include threats of any action which is detrimental to or unpleasant to the person who is being threatened.\textsuperscript{22}

12.31 The offence is triable only on indictment to the Crown Court. The maximum sentence for blackmail is fourteen years’ imprisonment.

12.32 As noted in the Parliamentary debate on the Policing and Crime Bill,\textsuperscript{23} it is possible that this offence could be used for some forms of threats to disclose intimate images without consent. However, it is limited to threats made “with a view to gain, for [the defendant] or another or with intent to cause loss to another”. While a “gain” for these purposes need not be financial, the Court of Appeal has ruled that the gain must consist of “property”.\textsuperscript{24}

12.33 While this offence may cover some instances of threats to disclose, such as “sextortion” where a victim is threatened with the sharing of their intimate image unless they pay money or send more intimate images, there are other instances where the blackmail offence would not apply. For example, we have heard from stakeholders of experiences of threats to disclose in a domestic context, where the perpetrator does not seek to make a gain, but rather: to humiliate or distress; to coerce or control; or simply for their own revenge.

### Harassment

12.34 Harassment applies to a course of conduct which harasses or alarms another or which causes that person distress. The conduct must take place on at least two occasions. Both the criminal offence and civil law remedy are contained in the Protection from Harassment Act 1997 (“PHA 1997”).

12.35 Section 1 of the PHA 1997 sets out the behaviour that is prohibited. As per section 1(1):

\begin{quote}
A person must not pursue a course of conduct
\begin{itemize}
  \item which amounts to the harassment of another, and
  \item which he knows or ought to know amounts to the harassment of another.
\end{itemize}
\end{quote}

12.36 Section 2 of the Act provides the criminal offence of harassment, which is committed when a person pursues a course of conduct that is in breach of section 1 or section 1A of the Act. Harassment under section 2 is a summary offence with a maximum penalty of six months’ imprisonment and/or a fine not exceeding 5 on the standard scale.

\textsuperscript{22} Thorne v Motor Trade Association (1938) 26 Cr App R 51.

\textsuperscript{23} On the 5\textsuperscript{th} sitting in the House of Lords on 16 November 2016, Hansard (HL), 16 November 2016, vol 776, col 1442.

\textsuperscript{24} R v Bevans (Ronald George Henry) (1988) 87 Cr App R 64.
12.37 A more serious offence of harassment is provided for in section 4(1) with the addition of fear of violence:

A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

12.38 The section 4 offence is an either way offence, with the maximum sentence on indictment being ten years’ imprisonment. On summary conviction, the maximum sentence is six months’ imprisonment, the same as the section 2 offence.

Definition of harassment

12.39 Harassment is not specifically defined in the legislation, with the exception of section 7(1) which states that “references to harassing a person include alarming the person or causing the person distress”. Case law focuses on conduct that is unreasonable and oppressive.25 There must be a minimum degree of alarm or distress for conduct to constitute harassment.26 However, the Court of Appeal emphasised in R v N that this on its own would not be determinative of harassment, and that the conduct must also be oppressive.27

12.40 Threats to disclose a person’s intimate images may constitute unreasonable and oppressive conduct and therefore come within the definition of harassment in section 2 of the PHA 1997. However, there must be an established course of conduct for the offence to be applicable.

Course of conduct

12.41 Section 7(3) of the PHA 1997 states that a “course of conduct” must involve conduct on at least two occasions (if in relation to a single person) or, if in relation to two or more persons, on at least one occasion in relation to each of those persons. In Patel,28 a case involving two or three incidents of domestic abuse, the Court emphasised the importance of establishing a nexus between incidents. It is not as simple as requiring two incidents to establish a course of conduct, there must be a connection between them. As noted in James v CPS, “the fewer incidents there are and the further in time they are apart, the less likely it will be that they can properly be treated as constituting a course of conduct.”29 In in Pratt v DPP, Latham LJ warned that the offending must:

Fall within the category of behaviour which is behaviour causing harassment of the other, not merely that there have been two or more incidents. The mischief which

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25 [2013] 1 WLR 935 at [1].
27 R v N [2016] EWCA Crim 92; [2016] 2 Cr App R 10 at [32].
the Act is intended to meet is that persons should not be put in a state of alarm or distress by repetitious behaviour.\textsuperscript{30}

This could make it challenging for prosecutors to apply the harassment laws to intimate image abuse. As we heard from stakeholders, in many cases there is likely only to be a small number of incidents; a threat to share an intimate image may only need to be made once to create the effect desired by the perpetrator. If a threat is not repeated, it may be difficult to substantiate a course of conduct and therefore apply the offence.

\textbf{Stalking}

12.42 Section 2A of the PHA 1997 provides for a separate offence of stalking. The provision states that

\begin{itemize}
  \item[(a)] The person pursues a course of conduct in breach of section 1(1), and
  \item[(b)] The course of conduct amounts to stalking
\end{itemize}

12.43 A course of conduct is considered to amount to stalking if it amounts to harassment, the behaviours are associated with stalking and the perpetrator knows or ought to know that the course of conduct amounts to harassment.\textsuperscript{31} Subsection 3 lists a number of behaviours that are associated with stalking that include contacting a person by any means or publishing any material about a person that relates to them or purports to come from them.

12.44 Section 4A of the PHA 1997 introduces a more serious offence of stalking where the course of conduct causes the victim to fear violence will be used against them or causes serious alarm or distress which has a substantial adverse effect on the victim’s daily life. The basic stalking offence is a summary only offence with a current maximum penalty of six months’ imprisonment; the more serious offence has a maximum sentence of ten years' imprisonment on indictment, and six months’ imprisonment on summary conviction.\textsuperscript{32}

12.45 Threats to take or share intimate images could constitute stalking; such threats often include contacting the victim or publishing material that relates to the victim or purports to be from them. (For example, where a perpetrator creates a Facebook page pretending to be the victim, uploads intimate images and sends a link to the victim threatening to invite all their friends to view the page.) This offence would also capture more widely understood stalking behaviour such as a perpetrator threatening a victim with taking photos of them through their bedroom window while they are getting undressed. However, as with the harassment offence, there must be a course

\textsuperscript{30} [2001] EWHC Admin 483 (165 JP 800) at [12].

\textsuperscript{31} Protection from Harassment Act 1997, s 2A(2).

\textsuperscript{32} Protection from Harassment Act 1997, s 2A(4) states that the maximum sentence on summary conviction is a term not exceeding 51 weeks’ imprisonment. Subsection 2A(5) states that this reference to 51 weeks should be read as six months until the Criminal Justice Act 2003, s 281(5) comes into force. There is no date currently set for the coming into force of s 281(5).
of conduct which is not always the case with intimate image abuse. Further, stakeholders have told us that the base offence of stalking does not satisfactorily reflect the gravity of harm from intimate image abuse.33

Controlling or coercive behaviour

12.46 Harassment that occurs in the context of an intimate relationship can now also be pursued as an offence of controlling or coercive behaviour under section 76(1) of the Serious Crime Act 2015:

A person (A) commits an offence if—

(a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,

(b) at the time of the behaviour, A and B are personally connected,

(c) the behaviour has a serious effect on B, and

(d) A knows or ought to know that the behaviour will have a serious effect on B.

12.47 A and B are “personally connected” if, according to the definition in section 76(2), they are either in an “intimate personal relationship” or are living together and either are members of the same family (including by way of marriage, engaged to marry, civil partnership or being parents/having parental responsibility of the same child) or were previously in an intimate personal relationship with each other.

12.48 Behaviour is said to have a “serious effect” on B if, as per section 76(4):

(a) it causes B to fear, on at least two occasions, that violence will be used against B, or

(b) it causes B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities.

12.49 This is an either way offence, with a current maximum penalty of six months’ imprisonment on summary conviction34 or five years’ imprisonment on indictment.

12.50 This offence could apply to threats to share intimate images in a domestic abuse context, where the victim’s intimate images are used as a means of gaining and retaining control. We heard from stakeholders of instances where threats of this kind are used to control the behaviour of the victim, to coerce them into remaining in the relationship or to obtain child contact where they had separated.

33 See Chapter 3 para 3.148 for further discussion.
34 Serious Crime Act 2015, s 76(11)(b) states that the maximum penalty on summary conviction is up to 12 months’ imprisonment, s 86(14)(e) states that this reference to 12 months should be read as six months until Criminal Justice Act 2003, s 154 comes into force. There is no date currently set for the coming into force of s 154.
Communications offences

12.51 The offences contained in section 1 of the Malicious Communications Act 1988 (“MCA 1988”) and section 127 of the Communications Act 2003 (“CA 2003”) govern a range of grossly offensive, indecent, threatening, menacing and false communications.

12.52 Section 1(a)(ii) of the MCA 1988 creates the offence of sending a communication to another which conveys a “threat”. The defendant’s purpose (or one of his purposes) in sending the communication must be that it should “cause distress or anxiety to the recipient or to any other person to whom he intends that it or its contents or nature should be communicated.”

12.53 This is an either way offence, with a current maximum sentence of six months’ imprisonment on summary conviction or two years’ imprisonment on indictment.

12.54 The offence of “improper use of a public electronic communications network” at section 127(1) of the CA 2003 reads:

A person is guilty of an offence if he—

(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b) causes any such message or matter to be so sent.

12.55 Unlike section 1 of the MCA 1988, this offence is summary only with a maximum sentence of six months’ imprisonment.

12.56 The Criminal Justice and Courts Act 2015 added section 127(5) which increases the time within which offences under section 127 must be prosecuted. It allows a prosecution to be brought within three years of the day the offence was committed so long as it is brought within six months of the prosecutor having sufficient evidence to justify proceedings.

12.57 It should be noted that the section 127 offence is limited to distribution via a public electronic communications network, and will therefore exclude any communication or image sharing done via a private network or peer-to-peer network (such as Bluetooth).

12.58 We reviewed these offences as part of a more general review of criminal offences that could apply online in our Abusive and Offensive Online Communications Scoping Report, published in November 2018. In September 2020 we published a consultation paper proposing reform of these offences.

35 Malicious Communications Act 1988, s 1(4)(b) states that the maximum sentence on summary conviction is a term not exceeding 12 months’ imprisonment; s 1(5) states that this reference to 12 months should be read as six months until Criminal Justice Act 2003, s 154 comes into force. There is no date currently set for the coming into force of s 154.


In our Harmful Online Communications consultation paper, the Law Commission provisionally proposes a new harm-based communications offence. The proposed offence would replace section 127(1) of the Communications Act 2003 and section 1 of the Malicious Communications Act 1988 and include the following components:

1. The defendant sends or posts a communication that was likely to cause harm to a likely audience;
2. in sending or posting the communication, the defendant intended to harm, or was aware of a risk of harming, a likely audience; and
3. the defendant sends or posts the communication without reasonable excuse.

Harm would be defined as "emotional or psychological harm, amounting to at least serious emotional distress". The consultation paper does not propose providing a list of factors for courts to consider when establishing likely harm, but does propose that the court "must consider the context in which the communication was sent or posted, including the characteristics of a likely audience".

The consultation paper describes the other criminal offences which cover explicit threats (such as threats to kill) but acknowledges that threats may fall under their proposed offence, as well as other explicit threat offences, when the communication was likely to cause harm to someone likely to encounter it.

The likely harm element of the proposed communications offence must amount to serious emotional distress. Information from stakeholders indicates that threats frequently occur in the context of abusive relationships or for blackmail purposes. The nature of these contexts suggests that such threats are likely to cause—and that those who make such threats often intend to cause—serious emotional distress. These types of threats are often experienced by marginalised communities where the additional social stigma they face means that serious emotional distress is more likely to be caused, and is often the intent of the perpetrator. For example:

An image is taken of man A engaging in sexual activity with man B. A chooses to live in his community as a heterosexual man as he is afraid he would be rejected otherwise. He ends his relationship with B. B is aware of A’s fears, and, unhappy that A would end things with him, threatens to send the images to A’s work colleagues and family.

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38 Above at 5.44.
39 Above at 5.49.
40 Above at 5.49.
41 Above at 5.59.
12.63 Because of the social stigma that A fears, B is aware this threat would cause him serious emotional distress. Similar situations might occur in social contexts where sexual activity before marriage could lead to shame or even so-called “honour-based” violence towards someone captured in an intimate image. The proposed communications offence may therefore capture the more harmful behaviours of which stakeholders have informed us. It may not capture the small minority of threats to take, make or share an image where the likely harm was did not reach the threshold of serious emotional distress.

12.64 The proposed communications offence would not require proof of actual harm, instead requiring that the communication was likely to cause harm, and that the defendant intended to cause harm, or was aware of a risk of causing harm. The consultation paper recognises the difficulties in requiring actual harm to be proven, including evidential difficulties where it is not known if harm was caused, and the emotional toll on victims who might have to provide evidence of the harm they suffered. In Chapter 9 of this paper, we reach the same conclusion that proof of actual harm should not be an element of intimate image abuse offences as such a requirement risks can retraumatise victims and present barriers to prosecution.

12.65 It is likely that a threat to take, make or share an intimate image would be captured by the proposed harm-based communications offence. The proposed offence would be committed at the point the threat was sent or posted without reasonable excuse. If the defendant intended to cause harm, or was aware that there was a risk of causing harm, it does not matter whether they intended to carry out the threat. This would potentially include a threat where the image does not exist, or there is no proof the image exists, as the threat itself is the harmful communication.

12.66 The proposed harmful communications offence would likely capture a wide range of threatening behaviours in an intimate image context. The omission of an actual harm element accords with stakeholder views on intimate image abuse offences. In a similar way to other current threat offences, it would capture threats even when they are not carried out. There are limitations however. This communications offence would only criminalise threats if they are sent or posted, without reasonable excuse. A threat to share an image that is made orally to a victim, for example in the context of an abusive relationship, would not be caught by such an offence.

12.67 The other limitation is with labelling. In Chapter 3 we describe stakeholders’ views that the harm caused by intimate image abuse is analogous to sexual offences; to categorise threats as a communications offence would therefore fail to reflect the nature of the harm. The Harmful Online Communications consultation paper recognises that there may be a labelling disparity in including threats in a communications offence as the harm can be different (for example it could be financial harm) and the paper asks consultees whether there should be a separate threatening communications offence. A similar argument could be made in the context of

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43 For example, the New South Wales case Jamal v Commissioner for Fair Trading [2020] NSWCATOD 99, discussed below at para 12.93, concerned a threat to disclose an intimate image that was made orally during the course of an argument between partners. This is an example that may be common.

44 Harmful Online Communications: The Criminal Offences (2020) consultation paper 248 at 5.211.
intimate image threats, given that the harm is understood by stakeholders as being akin to sexual offences.\textsuperscript{45} This limitation is sufficiently problematic to conclude that the proposed communications offence would not deal adequately with threats to take, make or share intimate images.

**Extension of the disclosure offence under section 33 of the Criminal Justice and Courts Act 2015**

12.68 There is support from stakeholders for criminalising threats to share intimate images. Parliamentarians and the domestic violence charity Refuge have campaigned to reform the disclosure offence under section 33 of the Criminal Justice and Courts Act 2015. Refuge launched their campaign The Naked Threat in 2020, aimed at such reform.\textsuperscript{46} MPs and peers have sought to amend the disclosure offence using the Domestic Abuse Bill that is currently passing through Parliament first, with a proposed amendment in the House of Commons and then a second proposed amendment in the House of Lords.

**The Commons amendment**

12.69 At the Report Stage of the Domestic Abuse Bill in the House of Commons on 6 July 2020, a new clause 34 was proposed by Caroline Nokes MP\textsuperscript{47} to include an offence of threatening to disclose private photographs and films with intent to cause distress as follows:

In the Criminal Justice and Courts Act 2015, after section [33] insert—

“33A Threat to disclose private photographs and films with intent to cause distress

(1) It is an offence for a person to threaten to disclose a private sexual photograph or film of a person to whom they are personally connected without the consent of an individual who appears in the photograph or film if the threat is made to either—

(a) the individual who appears in the photograph or film, or

(b) another individual who is intended to tell the individual who appears in the photograph or film,

(2) But it is not an offence under this section for the person to threaten to disclose the photograph or film to the individual mentioned in subsection (1)(a).

(3) For the meaning of “consent” see section 33(7)(a).

(4) A person guilty of an offence under this section is liable —

\textsuperscript{45} We discuss further this nexus between intimate image abuse and sexual offending in Chapter 14 where we also consider the need for certain instances of intimate image abuse to trigger ancillary orders associated with sexual offending, such as Sexual Harm Prevention Orders.


\textsuperscript{47} Hansard (HC), 6 July 2020, vol 678, col 695.
(a) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both), and

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine (or both).

(5) For the purposes of this section, “personally connected” has the same meaning as in section 2 of the Domestic Abuse Act 2020.”

12.70 At the Report Stage, the amendment was supported by Maria Miller MP48 and Ruth Edwards MP,49 although both Members commented that the matter was currently with the Law Commission for consideration. The amendment was not brought forward on the Bill that moved to the House of Lords.

12.71 This proposed offence is limited to instances that occur between people with a personal connection. This demonstrates the intention to capture the harm of such threats when used in abusive domestic relationships. However, this would mean other threatening behaviours would fall outside of the scope of this offence, including threats to share intimate images by someone who is only recently acquainted with the victim, by someone online whose identity is not known, and by work colleagues or friends. Some threats made outside the context of a personal connection may still fall under the blackmail offence if the defendant acted with a view to material gain. If not, there is currently limited recourse.

The Lords amendment

12.72 The matter has since been progressed by Baroness Morgan of Cotes who introduced a similar amendment at the Bill’s Committee Stage in the House of Lords on the 8 February 2021, alongside Lady Hodgson of Abinger, Lady Crawley and Lady Grey-Thompson. The amendment received impassioned support from the House. Baroness Morgan recognised the value of a wider review by the Law Commission but also expressed a desire to act swiftly:

I do not disagree that a full review of the law on image-based abuse would be welcome, but in the meantime we have a Bill before us which, as I said at Second Reading, provides an opportunity to tackle this abuse now.50

12.73 Lord Wolfson of Tredegar argued that that the House should resist the temptation to amend the law in a “piecemeal manner”.51 The amendment was withdrawn but it was suggested by Baroness Morgan that it may be introduced again at a later stage.52

12.74 This second amendment would also have created an offence of threatening to disclose private sexual photographs and films with intent to cause distress but differed in some details from the first. The second amendment did not include a “connected

48 *Hansard* (HC), 6 July 2020, vol 678, col 729.
49 Above, col 745.
50 *Hansard* (HL) 8 February 2021, vol 810, col 144.
51 *Hansard* (HL) 8 February 2021, vol 810, col 156.
52 Above, col 158.
person” element. It also only required a threat to have been made and did not require that it was made to the person depicted or to someone who is intended to tell the person depicted. It did therefore address some of the limitations of the first proposed amendment.

Analysis of the proposed amendments

12.75 However, as both amendments are intended to mirror the current disclosure offence, they are too narrow to address the wide range of threatening behaviours about which we have been told. Both amendments are limited to threats to disclose only; they would not cover threats to take or make intimate images. They are also limited to “private sexual” photographs or films. As discussed in Chapter 6, there are intimate images that would not be caught by this definition that we consider should be covered by intimate image offences, such as images of people nude or semi-nude in a public changing room or using the toilet. Neither amendment would capture threats to disclose altered images such as “deepfakes”.

12.76 In the first proposed amendment (introduced in the House of Commons), there was no indication whether the offence was intended to capture threats where there is no image. The wording as it was drafted linked the threat to disclose to a defined image, which could make it more difficult to apply in cases where there is no evidence that such a private sexual image exists. The second proposed amendment (introduced in the House of Lords) included the wording “without the consent to the threatened disclosure of an individual who appears, or is stated to appear, in the photograph or film”\(^53\) which suggests recognition that an image need not exist for the offence to apply.\(^54\)

12.77 In both the House of Commons and House of Lords debates on this issue, the campaigning work by Refuge: ‘The Naked Threat’ was mentioned throughout.\(^55\) This campaign urges the government to use the Domestic Abuse Bill to criminalise threats to share intimate images based on evidence Refuge has gathered as part of their victim support work.\(^56\) The campaign uses a quote from the designate Domestic Abuse Commissioner Nicole Jacobs:

“What’s more, the advent of new technologies enable perpetrators to make these threats even where such images do not exist, but there is no clear criminal sanction for this behaviour.”\(^57\)

\(^{53}\) *Hansard* (HL), 8 February 2021, vol 810, col 144 [emphasis added].

\(^{54}\) Lord Lucas, though, was not convinced that the amendment as drafted would cover images that did not exist, see *Hansard* (HL), 8 February 2021, vol 810, col 150.

\(^{55}\) See *Hansard* (HC), 6 July 2020, vol 678, col 716 to 745 and *Hansard* (HL), 8 February 2021, vol 810, cols 145, 148 and 153


12.78 While the focus of the campaign is on threats made in a domestic abuse context, including so called honour-based violence, this inclusion demonstrates an awareness that images need not always exist to cause harm.

12.79 Both amendments place threatening to share intimate images in the context of domestic abuse. The Domestic Abuse Bill is the chosen legislative vehicle. Caroline Nokes MP introduced the proposed amendment in the House of Commons saying:

> My new clause seeks to make it a specific offence to threaten to do so, because that is part of the mental control that abusers use over their victims. It need not necessarily be an actual act but can be the threat of an act.\(^{58}\)

Baroness Morgan of Cotes introduced the proposed amendment in the House of Lords saying:

> At its core, this is an issue about the exercise of control by one person—the abuser, the maker of the threats—over another. Too often, the threats are followed by physical abuse.\(^{59}\)

12.80 This suggests the primary harm targeted by both proposed amendments is coercion and control in an abusive relationship. The powerful work by Refuge on their Naked Threat campaign demonstrates clearly the connection between threats and domestic abuse. However, this is not the only context in which such threats happen. Sextortion can be committed by someone unknown to the victim. We have also heard about threats made to sex workers or migrants on temporary visas which is a different paradigm to an abusive intimate partner relationship.\(^{60}\) A threat offence must effectively criminalise threats of intimate image abuse in a wider range of contexts.

12.81 Ruth Edwards MP, when debating the first amendment, commented that the National Police Chiefs’ Council are working with the College of Policing to “issue clearer guidance to officers about the legal tools they currently have to prosecute some threats to share.”\(^{61}\) The need for clearer guidance suggests the patchwork of current laws are not sufficiently clear for efficient operational practice. The College of Policing published updated guidance on “revenge pornography” generally in 2020.\(^{62}\) This guidance includes one page addressing threats to share that confirms a threat is not part of the current disclosure offence and lists a range of offences that might be engaged instead “depending on the individual circumstances”.\(^{63}\) The offences listed for consideration are: harassment; stalking; malicious or distressing communications; blackmail; and controlling or coercive behaviour. The guidance does not elaborate

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58 Hansard (HC), 6 July 2020, vol 678, col 716.
59 Hansard (HL), 8 February 2021, vol 810, col 145.
60 We further discuss the variety of threatening behaviours in Chapter 2 from para 2.104.
61 Hansard (HC), 6 July 2020, vol 678, col 745.
63 Above, at p 4.
further on what circumstances might make each of those offences applicable or how officers on the ground might apply them in the context of intimate image abuse.

Application to intimate image abuse

12.82 There are some current offences that could be applied in certain intimate image abuse threats cases. The nature of each offence means that they are limited to certain types of threats and would only apply in specific situations. There are some threatening behaviours that would not be caught by any of the current offences. As the existing offences were not designed to target the harm of intimate image abuse, they create a patchwork effect and present difficulties in practical application and labelling of this particular harm. The proposed new communications offence is better at targeting the type of harmful threat behaviour seen in intimate image abuse, however this too has its limitations specifically in relation to oral threats.

12.83 The work by Refuge, campaigners and Parliamentarians to introduce a new offence to criminalise threats to share intimate images demonstrates the case and significant support for creating a new offence to address the gap in the current law. However, we consider that the proposed amendments to the disclosure offence are too limited to address the problem fully.

THREAT OFFENCES IN OTHER JURISDICTIONS

12.84 There are some jurisdictions that have criminalised threats in the context of intimate image abuse. In this section we consider the approach taken in other jurisdictions.

Scotland

12.85 Scotland introduced a new offence of disclosing intimate images including threats to do so. Section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 reads:

(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.

12.86 Section 2 states an offence will not be made out if person B consented, if A reasonably believed B consented, or where A reasonably believed disclosure was in the public interest or for the purpose of preventing, investigating or prosecuting crime. There is also a defence if B was in the intimate situation, by their own free will, in a public place and members of the public were present. The maximum penalty is 12

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64 A public campaign started in late 2020 by the #MyImageMyChoice coalition to change the law to include threats to share has, at the time of writing, collected over 44,000 signatures in support. The petition is hosted on Change.org, “#MyImageMyChoice! Change laws on sharing private images without consent” available at http://chn.ge/6dnGj2Cxtt (last visited 24 February 2021).
months’ imprisonment on summary conviction and five years’ imprisonment on indictment. “Threatens to disclose” is not further defined.

12.87 In 2018/2019 there were 596 crimes under this offence recorded by police,65 255 of those were the offence of threatening to disclose an intimate image.66 In the same period there were 59 people prosecuted, and 48 of those were convicted.67 Although this appears to reflect a large discrepancy between the number of crimes recorded and the numbers prosecuted and charged, it is not possible to draw direct comparisons between the numbers as there are differences in the way the data is produced.68

12.88 The first successful prosecution under this section came in 2017.69 A 59-year-old man was found guilty of threatening to upload to the internet an intimate image (video) of an ex-partner. He plead guilty so there was limited opportunity to test the offence, but it is of note that the first prosecution was for a threat. Commenting after the sentencing, Anne Marie Hicks, National Procurator Fiscal for Domestic Abuse stated: “this type of offending is often used as a form of online domestic abuse. It is designed to cause fear, alarm or distress and often used to humiliate, threaten and control the victim.”70 This demonstrates the type of harm from which the offence sought to protect.

12.89 In *Shanks v Procurator Fiscal*,71 the Sheriff Appeal Court considered an appeal against a sentence of a 12 month community payback order and 135 hours of unpaid work following a guilty plea to a charge of threatening to disclose a number of intimate images of an ex-partner to their children while intoxicated.72 The appellant argued that the sentence, which was in the higher range of available sentences, was unduly high given that the offending behaviour was a threat and was not carried out and therefore


66 Data provided by Scottish Government from Scottish Government Criminal Proceedings database.

67 Data provided by Scottish Government from Scottish Government Criminal Proceedings database.

68 The prosecution and conviction figures are produced by recording the “main charge”; there may have been convictions under the threat to disclose offence which are not recorded in these figures if the defendant was also charged with another offence that was recorded as the “main charge” (for example where a threat to disclose was prosecuted alongside a sexual assault charge, the sexual assault would be considered the “main charge” if it is subject to a more severe penalty and the threat to disclose charge would not be recorded in the prosecution figures, although it would be counted in the recorded crime figures). Further, the recorded crime data counts individual offences recorded whereas the prosecution data counts offenders, individual offenders may be charged with more than one incidence of the offence.


70 As above.

71 Glasgow [2018] SAC (Crim) 18.

was not an abusive act. The appeal court disagreed and restated the intention of Parliament to legislate against threats as well as actual disclosure.

12.90 The limited facts available in the two cases where a threat to disclose has been prosecuted does not shed light on whether an actual image is required. The wording “threatens to disclose … a photograph or film which shows, or appears to show” could suggest that an image is needed to prove that it shows an intimate image, or it could be argued that as long as the defendant has made such a threat, the offence is complete. It could also be argued that “appears to show” allows some leeway both as to the type of image (real or altered) and how that image forms part of the threat (whether the victim is shown what the image shows, or is told what the image shows). The Scottish law ties the threat to the distribution offence and therefore to the definition of an image. This could lead to the interpretation that the image must exist to satisfy the threat offence, in the way it must exist to satisfy the distribute offence. It appears this is yet to be tested.

12.91 The threat in the Scottish provision is to disclose only, not to take or make. It has an additional intent element which does cover a range of harm commonly caused by intimate image abuse. The recklessness element widens the scope which may overcome some of the evidential issues in proving intent. It would not necessarily capture threats made as a joke, unless it could be proved A was reckless as to whether they caused fear, alarm or distress.

New South Wales

12.92 Under section 91R of the Crimes Amendment (Intimate Images) Act 2017 No 29 [NSW], the Australian state has created a specific offence of threatening to record or distribute intimate images, with a maximum penalty of 3 years’ imprisonment. The section 91R offence states:

(1) A person who threatens to record an intimate image of another person:
   (a) without the consent of the other person, and
   (b) intending to cause that other person to fear that the threat will be carried out,

   is guilty of an offence.

(2) A person who threatens to distribute an intimate image of another person:
   (a) without the consent of the other person, and
   (b) intending to cause that other person to fear that the threat will be carried out,

   is guilty of an offence.

(3) A threat may be made by any conduct, and may be explicit or implicit and conditional or unconditional.

(4) A person may threaten to distribute an image whether or not the image exists.
(5) On proceedings for an offence against this section, the prosecution is not required to prove that the person alleged to have been threatened actually feared that the threat would be carried out.

12.93 In *Jamal v Commissioner for Fair Trading*, the tribunal considered a conviction of threats to disclose intimate images as part of a case involving disclosure while applying for a real estate license. The applicant contended that his recent offending, including the threat to disclose intimate images, were not disqualifying offences and the circumstances of the offence placed them at the lower end of seriousness. The agreed facts from the criminal trial were that the applicant said in an argument with his partner that he was going to put all the naked pictures and videos of her online. No intimate images were distributed. There is limited discussion by the tribunal of this argument; the Judge noted that:

the applicant’s offences fall within the ambit of serious offences, with the offence of ‘threaten to distribute intimate image without consent’ being an indictable matter that the prosecution elected to be heard summarily.

12.94 The case does not add much to our understanding of how section 91R is being interpreted, but does show that it is capable of being prosecuted as a serious offence.

**Victoria**

12.95 In the Australian state of Victoria, under section 41DB of the Summary Offences Act 1966:

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

(a) A makes a threat to another person (B) to distribute an intimate image of B or of another person (C); and

(b) the distribution of the image would be contrary to community standards of acceptable conduct; and

(c) A intends that B will believe, or believes that B will probably believe, that A will carry out the threat.

(2) A person who commits an offence against subsection (1) is liable to level 8 imprisonment (1 year maximum).

(3) For the purposes of this section, a threat may be made by any conduct and may be explicit or implicit.

12.96 Community standards of acceptable conduct, in relation to the distribution of an intimate image, includes standards of conduct having regard to the following:


74 Above at para 37-39.

75 Above at para 68.

76 Summary Offences Act 1966, s 40.
(1) the nature and content of the image;
(2) the circumstances in which the image was captured;
(3) the circumstances in which the image was distributed;
(4) the age, intellectual capacity, vulnerability or other relevant circumstances of a person depicted in the image;
(5) the degree to which the distribution of the image affects the privacy of a person depicted in the image.

12.97 There are two reported cases which involve section 41DB; both involve a catalogue of sexual offences and there is little discussion in the judgments about the application of section 41DB. In both, the defendant was found guilty and sentenced for threats to distribute intimate images in the lower courts: one in the context of a prolonged sexual assault on a victim unknown to the defendant; 77 and one in the context of an abusive relationship. 78

Western Australia

12.98 In Western Australia, the Criminal Law Amendment (Intimate Images) Act 2019 amended the Criminal Code to make an offence of distributing an intimate image of another person without their consent, or threatening to distribute an intimate image of another. The offences are separate, with the new threat to distribute offence included under section 338 of the Criminal Code. The definition of a threat under section 338 was amended to include “distribute an intimate image (within the meaning given to those terms in section 221BA) of any person other than the distributor.” This made threatening the distribution of an intimate image an offence in the following circumstances:

(1) Where the threat is made with intent to gain (section 338A), the maximum penalty is 7 years’ imprisonment.

(2) Where a threat is made (section 338B), the maximum penalty is 3 years’ imprisonment, or on summary conviction the maximum sentence is 18 months’ imprisonment.

(3) Where any person makes a statement, or conveys information which they know to be false and which expressly indicates, or may reasonably be construed as indicating a threat has been made, or that there has been, is, or is to be an intention, proposal, plan or conspiracy to make such a threat (section 338C), the maximum penalty is three years’ imprisonment or 18 months’ imprisonment on summary conviction. This section also includes an offence where any person does any act with the intention of creating a belief, suspicion or fear that such a threat is being, or has been, unlawfully done or attempted, and they know, at

77 Gray (a Pseudonym) v The Queen [2018] VSCA 163.
78 DPP v Lade (a Pseudonym) [2017] VSCA 264.
the time of doing that act, that the circumstance with respect to which the belief, suspicion or fear is intended to be created does not exist.

12.99 Each offence provides for a higher maximum penalty where there are aggravated circumstances, or where there are threats to kill. An intimate image can include “created or altered images”.79 Section 338C allows for an offence to be made out where a threat is made but the perpetrator knows the image does not exist. The Western Australia Department of Justice have clarified that an intimate image offence can be charged even if the image does not exist, or the defendant does not have the ability to carry out the threat.80

12.100 There is further provision under section 5A of the Restraining Orders Act 1994 where family violence is described as including distributing an intimate image of the family member without the family member’s consent, or threatening to distribute the image.

12.101 There is no mental element required in the Criminal Law Amendment (Intimate Images) Act 2019. Defences are set out which include where a reasonable person would consider the distribution of the image to be acceptable. The offence includes a reasonable expectation of privacy element in the definition of an intimate image.81

12.102 There are currently no reported cases involving these offences. Commentary at the Bill stage expressed concern that there was no mental element and suggested that a ladder approach of basic and specific intent would be more appropriate.82

**Australian Capital Territory (ACT)**

12.103 In the Australian Capital Territory, the Crimes (Intimate Image Abuse) Amendment Act 2017 amended the Crimes Act 1900 to include intimate image offences. Section 72E of the Crimes Act 1900 creates an offence of threatening to capture or distribute intimate images with a maximum penalty of 3 years’ imprisonment, 300 penalty units or both:

(1) A person commits an offence if—

(a) the person threatens to capture or distribute an intimate image of another person; and

(b) the person—

(i) intends the other person to fear that the threat would be carried out; or

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79 Criminal Law Amendment (Intimate Images) Act 2019, s 221BA(b).


81 Criminal Law Amendment (Intimate Images) Act 2019, s 221BA(a).

(ii) is reckless about whether the other person would fear that the threat would be carried out.

12.104 The offence then states that “a person may be found guilty even if carrying out the threat is impossible” and lists examples where “the image does not exist” and “technological limitations prevent the person from capturing or distributing the image”. The offence also provides that “it is not necessary to prove that the other person actually feared that the threat would be carried out”.

12.105 The ACT has criminalised both threatening to capture and distribute intimate images. The capturing element is only in the threat offence, not the substantive offence where distribution is the only criminal act. The explanatory statement for the Crimes (Intimate Image Abuse) Amendment Bill 2017 in relation to the threat clause states that “part of the policy addressed in this Bill is the activity where the taking or distributing of intimate images is used as a tool to harass, coerce or intimidate the affected person”. This suggests that the motives they sought to capture were considered similar whether the threat was to distribute or take. The definition of capturing an intimate image in section 72E(3) includes recordings, images capable of being transmitted in real time and images capable of being distributed. This suggests the capturing behaviour is linked to potential for distribution. The supplementary explanatory statement and Parliamentary debates on the introduction of the Bill and Act do not contain further explanation for including threats to capture. There are three reported cases of a section 72E offence, all arising from the same facts. They all involve threats to distribute, not to capture, and do not add anything further in respect of analysis of the wording of the threat offence.

Canada

12.106 There is no specific offence for threatening to distribute intimate images in Canada. In a similar way to the current status in England and Wales, other offences could be used to criminalise such threats. This could include extortion under section 346(1) of the Criminal Code:

Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.

12.107 In R v Hassan, prosecutors brought charges of extortion and criminal harassment against the defendant who had threatened to disclose, and did disclose, intimate

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83 Crime Act 1900, s 72E(2)(c).
84 Crime Act 1900, s 72E(2)(b).
86 R v EP [2019] Supreme Court of the ACT 89 (4 April 2019); R v EP (No 2) [2019] Supreme Court of the ACT 156 (17 June 2019); R v EP (No 3) [2019] Supreme Court of the ACT 242 (28 August 2019).
images of his ex-partner. Hassan was convicted of extortion on the facts as he threatened to disclose in order to induce the victim to stay in their relationship, which she did. However, he was acquitted on the criminal harassment charges as the victim had not feared for her safety (psychological or physical) as a result of the threats, as required by that offence.

12.108 It is likely, similar to the current situation in England and Wales, that some behaviour that should be criminalised may not be caught by existing offences which are not designed for intimate image abuse.

**Themes in comparative law**

12.109 The Western Australia, Australian Capital Territory and New South Wales offences criminalise threats even where there is no intimate image. The ACT and New South Wales offences explicitly state that a threat can be made even when there are no images. On the Second Reading of the New South Wales Bill in Parliament, the Hon Bronnie Taylor noted: “the offence will apply to threats to distribute intimate images whether or not the images actually exist, as often the victim may not know whether or not an image in fact exists.”\(^8^8\) While Victoria does not explicitly include threats where there is no image in their offence, a recent report by the Sentencing Council of Victoria considered “impossible threats to distribute are arguably caught because section 41DB focuses on the victim’s belief in the threat rather than the threat’s objective credibility or immediacy”.\(^8^9\) These offences reflect the reality that sometimes threats are made and the victim does not know whether the image exists, for example if an ex-partner still has an intimate image or if it has been deleted and the threat to distribute it is therefore empty. The harm to the victim from the threat is the same whether the image remains or not. The threat itself causes the harm, as recognised by these jurisdictions that include empty intimate image threats in their threats provisions.

12.110 The Australian offences also demonstrate how threats offences can be separated from taking, making and sharing offences.

12.111 Scotland requires an intent to cause fear, alarm or distress, or recklessness as to so causing. New South Wales and Victoria require the offender to intend that the victim will fear or believe the threat will be carried out. The ACT offence requires the offender intends the other person to fear that the threat would be carried out, or is reckless about whether they would so fear. Western Australia does not require an additional intent for their threats offence, but have introduced some offences that include an additional intent (such as a threat made with intent to gain). While there was some criticism of an offence with no mental element,\(^9^0\) Western Australia has sought to capture different categories of offending with higher sentences for aggravating circumstances. The ACT and New South Wales offences are most explicit in their intent element, specifying that prosecutors do not need to demonstrate that the victim

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\(^8^8\) Hansard, Legislative Council of New South Wales, *Crimes Amendment (intimate Images) Bill 2017 Second Reading* (21 June 2017).


\(^9^0\) Thomas Crofts and Tyrone Kirchengast, “A ladder approach to criminalising revenge pornography” (2019) 83(1) *Journal of Criminal Law* 87 to 103.
actually feared the threat would be carried out. In this way they mirror the offences in England and Wales of threats to kill and threats to cause criminal damage (as discussed above at paragraphs 12.8 to 12.15).

POTENTIAL NEW THREAT OFFENCE

12.112 Threats to take, make and share intimate images cause significant harm. Making such threats is a prevalent behaviour that stakeholders and Parliamentarians agree is not satisfactorily addressed in the current criminal law. Research undertaken by Professors McGlynn, Rackley and Johnson suggests that threats to disclose intimate images are being reported to police but no charges are brought as threatening to share is not understood to be an offence.91 This suggests the law in practice is unable adequately to respond to such threats.92 In this chapter we have considered the way threats are criminalised in England and Wales currently, how other offences may apply to certain threat behaviours, and the way that other jurisdictions have approached threats in an intimate image context. We agree with stakeholders that the current law does not adequately address the full range of behaviours or the harm that is caused by threats to take, make and share intimate images. We consider that a new offence is needed to address these behaviours. In this section we discuss the different elements that could be included in a new offence and ask consultees for their views.

Separate offence

12.113 We have provisionally concluded that a specific offence that criminalises threats is required. This offence could either be combined with the taking, making and sharing offences (as is the case in Scotland), or be a separate offence (as the Australian jurisdictions have done).

12.114 Threats have a different character to taking, making and sharing; the harm arises from the threat itself rather than the taking, making or sharing that may or may not follow. It is not necessary therefore to include threats in the same substantive offence. This is reflected in the current law on threats to kill or cause criminal damage; they are separate from the offences of causing criminal damage or homicide. By separating out a threats offence we are also able to tailor the elements to ensure that they only criminalise the harmful behaviour and are not unduly restricted by a focus on the taking, making or sharing offences.

Threats to take an intimate image

12.115 Currently we do not have evidence of examples of threats to take an intimate image. It is possible that the behaviour is happening and we are not yet aware of it, particularly in the context of domestic abuse or stalking. It may be that stakeholders are unaware of examples because victims are not reporting threats to take intimate images, whether because they are made orally and difficult to prove, or they are not considered an offence. The Scottish provision only criminalises threats to share intimate images, not to take them. The draft amendments to the Domestic Abuse Bill,


and the Naked Truth campaign by Refuge, would amend the disclosure offence to include threats to disclose only; they would not incorporate threats to take intimate images. We invite consultees to share with us any experiences of threats to take intimate images of which they have experience or are aware.

**Consultation Question 37.**
12.116 We invite consultees to provide examples where threats to take intimate images have been made.

**Threats to make an intimate image**
12.117 We have been made aware of examples of threats to make an image that are accompanied by a threat to share that image. These include threats to photoshop an image of a victim’s face on to a pornographic image and then upload the altered image to a pornographic website. We consider that this behaviour could be captured by an offence of threatening to share an intimate image, where the definition of image includes altered images. In Chapter 7 we provisionally propose that a sharing offence should include images which have been altered to appear intimate. A similar approach could be taken to a threats to share offence.

12.118 We are not currently aware of any examples where the threat is solely to make an intimate image, without an accompanying threat to share that image. We consider in Chapter 7 the harms associated with making intimate images, and we acknowledge that threats to make an image may cause harm. However, we do not currently have evidence of such threats. We invite consultees to share with us any experiences of threats to make intimate images of which they have experience or are aware.

**Consultation Question 38.**
12.119 We invite consultees to provide examples where threats to make intimate images have been made without an accompanying threat to share the image.

**Threats to share an intimate image**
12.120 We consider that there is sufficient evidence to propose an offence of threatening to share an intimate image. We know that this behaviour is prevalent (Refuge have reported that one in seven young women have experienced such a threat) and there is already appetite to change the current disclosure offence to include threats (see the

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discussion of the draft amendments to the Domestic Abuse Bill from paragraph 12.68 above).

12.121 We provisionally propose a new offence of threatening to share an intimate image, rather than adopt the draft amendments to the disclosure offence. This is because the disclosure offence and its proposed amendments have limitations as discussed at paragraph 12.75 above and in Chapter 3, and would not cover the full range of threats to share intimate images.

12.122 As suggested above, at paragraph 12.115, we provisionally propose that an offence of threatening to share an intimate image should include images that have been altered.

Elements of a proposed threatening to share offence

12.123 We now consider what the elements of such an offence should be.

Conduct

12.124 The relevant conduct should be that a person threatens to share an intimate image of another. This follows the conduct elements of the current threat offences of causing criminal damage and threats to kill. In those offences, whether a threat has been made, and whether it is a threat to cause damage or to kill are objective questions, that will be decided on the facts.

12.125 The definition of “intimate image” for this threat offence should follow the definition used in the substantive offences of sharing an intimate image; we provisionally propose a definition of “intimate” in Chapter 6 and in Chapter 7 we provisionally propose that a sharing offence will include images that have been altered. We have established in this chapter that it is important to criminalise threats to share even where an image does not exist, or where the victim is unsure if it exists, as such empty threats cause similar harm as threats that can be carried out. We do not anticipate that it will be problematic to use the same definition of an intimate image as used in a sharing offence, where the image must exist. We consider that it will be a question of fact for the trier of fact (jury or magistrates) to consider whether the threat relates to an image that is intimate, or would be intimate if it existed.

12.126 In Chapter 11 we provisionally conclude that there are some circumstances where sharing an image that was taken in public (for example of a streaker or naked protestor), or previously shared in public with consent (for example uploaded to a mainstream porn website), should not be criminalised. We propose two “public element” tests that would exclude such examples from a sharing offence. For the reasons set out in detail in the previous chapter, we do not consider that sharing intimate images without consent in such circumstances warrants criminalisation. It follows, therefore, that threatening to share such images does not warrant criminalisation. In the examples we consider, such as images of a streaker or an

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95 In Chapter 6 at para 6.123, we observe that for the purpose of a threat offence, intimate images could include images that are considered intimate within particular religious groups, and at para 6.125 we seek consultees’ views as to whether and to what extent such images should be included in intimate image offences, when the perpetrator is aware that the image is considered intimate by the person depicted.

image that was previously uploaded to a porn site by the person depicted, the harm caused to the person depicted by subsequent non-consensual sharing is more minimal. If sharing such an image would not cause significant harm, threatening to share that image becomes a less serious behaviour.\textsuperscript{97} We therefore consider that a threat to share offence should include the same definition of “intimate image” and the same “public element” tests as our provisionally proposed sharing offences.\textsuperscript{98} This is reflected in the New South Wales and Western Australia offences which utilise the same “reasonable expectation of privacy” test for the offences of sharing and threatening to share an intimate image.

**Fault**

12.127 It is necessary to distinguish behaviour that is a threat from behaviour where someone is simply making a statement of intent, or a mutual joke. To achieve this, the offence requires a fault element. We provisionally propose that the fault element of a threatening to share offence should be that

\begin{itemize}
  \item[(a)] D intends to cause V to fear that the threat will be carried out; or
  \item[(b)] D is reckless as to whether V will fear that the threat will be carried out.
\end{itemize}

**Intention**

12.128 The current offences of threats to kill and threats to cause criminal damage, as well as the intimate image offence in the ACT, have a similar fault element of intention to cause V to fear that the threat will be carried out. Including this intention requirement will avoid overcriminalisation in situations where a threat was made as a mutual joke, or was a simple statement of intent. This fault requirement does not require that the threat is carried out, or that it is capable of being carried out. It does not require the victim to believe it would be carried out, or that they were in fear, just that the defendant intended them so to fear. This is also in line with the current threats offences as described earlier in this chapter, and with the information we have been given by stakeholders that the harm is caused whether the threat is real or empty.

**Recklessness**

12.129 We have considered whether it is sufficient to require the defendant to intend to cause the victim to fear that the threat will be carried out. This would limit its applicability to cases where there is evidence of such intent. The harmful behaviours that warrant criminalisation are not limited to threats where the defendant has intended that the victim fear the threat would be carried out. We therefore provisionally propose to include an element of recklessness. This would mean that a defendant who does not intend a victim to fear the threat would be carried out, but is aware that there is a risk that they would fear that, is also guilty of the offence. For further discussion of recklessness see Chapter 10. A similar recklessness element is

\textsuperscript{97} If the content of the threat itself is sufficiently harmful, regardless of the nature of the image, the existing communications or blackmail offences could still apply.

\textsuperscript{98} We invite consultees’ views on our provisionally proposed public element tests at Consultation Questions at 11.80 and 11.108.
included in the offence of assault (see paragraph 12.6 above) and the Scottish threatening to disclose offence (see paragraph 12.85 above).

12.130 We acknowledge that some threats to share intimate images may be made in jest. While many would consider it in poor taste, we do not consider that such behaviour should be criminalised where the joke was mutual. If the context was a mutual joke, the person making the threat would not be aware that there is a risk that the recipient would fear the threat be carried out, because there would be no such risk; as far as they are concerned both parties think it is a joke and would not be acted on. They would not reach the threshold of recklessness in such cases.

12.131 We have considered recklessness in the context of consent in Chapter 10. We concluded that recklessness as to lack of consent was not appropriate, in line with the approach to consent in the Sexual Offences Act 2003, and because it fails to reflect individuals’ responsibility to satisfy themselves as to consent, as it would not capture those instances where the defendant was not aware of the risk that the victim did not consent because he did not turn his mind to the issue of consent.

12.132 In our provisional view, recklessness is an appropriate fault element where the conduct is a threat and consent is not part of the offence.

Additional intent

12.133 We have considered alternative additional intent requirements such as the intent to cause distress in the current disclosure offence. We consider that such an element is unnecessary, given the proposed fault element (at paragraph 12.127 above). Inherent in a threat which the defendant intends the victim to fear will be carried out (or is reckless thereto) is an intention to cause the victim distress (or recklessness as to whether distress is caused). Such an additional intent requirement would be superfluous.

12.134 We have also considered including an additional intent element relating to obtaining sexual gratification. However, the conduct element of this offence is in the making of a threat, not the taking or sharing of an image. We do not have any evidence that threats are made for the purpose of obtaining sexual gratification. The subsequent taking or sharing of an intimate image might be done for such a purpose and we consider this in the elements of the taking and sharing offence in Chapter 10. Therefore, we do not consider it appropriate to include such an additional intent element in a threatening to share offence. However, we do acknowledge that the behaviour can have a significant sexual component. This could be in the context of an abusive relationship, “sextortion” or coercion to engage in sexual activity. In Chapter 14, we consider the availability of ancillary orders that may be appropriate given that much of the offending at issue is sexual offending.

Harm

12.135 We do not propose to include an actual harm element in this offence for the reasons discussed in Chapter 9 and at paragraphs 12.25 and 12.64 above. It would create a barrier to prosecution and potentially retraumatise victims by requiring them to give evidence of the harm they have suffered.
Victim and recipient

12.136 The examples of threats of which we are aware involve the threat to share being made to the person who is or would be depicted in the image. Our proposed offence is designed to reflect this scenario. Other threat offences consider the possibility that a threat can be made to one person, but the threatened action relates to a third person. For example A sends a threat to B that A is going to kill C. B and C are related. We are not aware of examples like this in the context of intimate image abuse. We invite consultees to share any examples of this behaviour of which they have experience or are aware.

Consultation Question 39.

12.137 We invite consultees to provide examples where a threat to share an intimate image of V is not directed at V, but is made to a third party.

Consultation Question 40.

12.138 We provisionally propose that it should be an offence for D to threaten to share an intimate image of V, where:

(a) D intends to cause V to fear that the threat will be carried out; or

(b) D is reckless as to whether V will fear that the threat will be carried out.

Do consultees agree?

12.139 We provisionally propose that the same definition of “intimate image” is used for both the offences of sharing and threatening to share an intimate image (which will include altered images). Do consultees agree?

Without consent

12.140 The absence of consent is integral to the way the victim experiences intimate image abuse. Our provisionally proposed offences of taking or sharing an intimate image require the prosecution to prove that the person depicted did not consent, as do the current disclosure, voyeurism and “upskirting” offences. That is because intimate images can be taken and shared with consent and it is necessary to exclude consensual behaviour from the offence. By contrast, a threat cannot be made with consent; arguably it would be superfluous to require the prosecution to prove that the person depicted did not consent. If the recipient consents, it is not a threat. Proof of
lack of consent is not a feature of the blackmail offence,\textsuperscript{100} existing threat offences,\textsuperscript{101} or most threat offences relating to intimate image abuse in other jurisdictions.\textsuperscript{102}

12.141 In the face of a threat, some victims may respond with words to the effect of “well go on then and do it” in an attempt to defuse the situation. This could be construed as giving their consent to the threat and the threatened sharing. If we were to require the prosecution to prove that the person depicted did not consent, there is a risk that victims who have tried to defuse a threatening situation in such a way, would lose the protection of the law. In the House of Lords debate on the proposed amendment to the Domestic Abuse Bill described in paragraph 12.72 above, Lord Lucas raised this concern with the inclusion of “without consent”:

If it is a threat, what does consent look like? What would it take for someone to consent to a threat? How would that be phrased; how would it work? Is “publish and be damned” consent? If not, what would be?\textsuperscript{103}

12.142 However, by not requiring the prosecution to prove that the person depicted did not consent, we risk including behaviour that should not be criminalised. For example, D threatens V that he will share an intimate image of V, intending that V will fear that the threat will be carried out, but V genuinely gives her consent to the sharing of the image. V does not suffer any harm and she does not feel threatened by D’s behaviour as she is happy for her image to be shared.

Consultation Question 41.

12.143 We invite consultees’ views as to whether the prosecution in a threatening to share an intimate image case should be required to prove that the person depicted did not consent.

CONCLUSION

12.144 There is a patchwork of existing laws that could be used to criminalise some intimate image threats, however as they were not designed to protect against this unique harm, they are not always sufficient or appropriate. The Law Commission’s

\textsuperscript{100} The blackmail offence under the Theft Act 1968, s 21 requires that an unwarranted demand was made with menace. Similar to a threat offence, a lack of consent is inherent in the act that constitutes the offence. One cannot blackmail another with their consent as it would not be unwarranted or menacing therefore the offence would not be made out.

\textsuperscript{101} The offence of threatening to cause criminal damage does include an exception where the threat was made with a lawful excuse in Criminal Damage Act 1971, s 5(2), and lists consent as a lawful excuse (s 5(2)(b)). However, this list of lawful excuses applies to all offences in the Act and is not limited to threats. Consent will constitute a lawful excuse for the offence of causing criminal damage; its inclusion does not indicate its relevance to threatening to cause criminal damage.

\textsuperscript{102} Only the New South Wales threatening offences specifically include the absence of consent (Crimes Amendment (Intimate Images) Act 2017, s 91R(1)(a). The Scottish offence covers disclosure as well as threats to disclose; the absence of consent is needed for the disclosure offence (Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(3)(a)).

\textsuperscript{103} Hansard (HL) 8 February 2021, vol 810, col 150.
provisionally proposed harm-based communications offence may be well-placed to capture a number of such threats but it is limited to threats sent or posted, and the labelling of this behaviour as a communications offence does not reflect the harm victims suffer.

12.145 We provisionally propose that the most appropriate approach is a new specific offence of threatening to share intimate images, as outlined above, that includes images that have been altered.
Chapter 13: Reasonable Excuse

INTRODUCTION

13.1 Defences ensure that a defendant is not found guilty of an offence where their conduct was acceptable in the circumstances, or where it was unacceptable but the defendant was insufficiently culpable.¹ Theorists broadly categorise the former as justifications (or permissions²), and the latter as excuses.³

13.2 This chapter focuses on possible justifications for conduct that would otherwise fall within the scope of our provisionally proposed base offence. As the base offence contains no additional intent element, it has greater potential than the existing disclosure, voyeurism and “upskirting” offences to incorporate conduct which should be considered acceptable in the circumstances.

13.3 Under the “base” offence, it would be an offence for a person (D) intentionally to take or share a sexual, nude, semi-nude or private image of someone else (V) if—

(a) V does not consent; and

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

13.4 The base offence includes two additional elements which only apply when the image is taken or has previously been shared in public. First, where an intimate image is taken or shared without consent and:

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

(b) the victim is, or the defendant reasonably believes the victim is, voluntarily engaging in a sexual or private act, or is voluntarily nude or semi-nude.

Under these circumstances, D has not committed an offence unless V has a reasonable expectation of privacy in relation to the taking of the image.

13.5 Secondly, where an intimate image has been shared without consent and:

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

³ See, for example, J C Smith, Justification and Excuse in the Criminal Law (1989); V Tadros, Criminal Responsibility (2005), p.266.
(b) either the person depicted in the image consented to that previous sharing, or the defendant reasonably believes that person depicted in the image consented to that previous sharing.

Under these circumstances, D has not committed an offence.

13.6 As with the “without consent” circumstance element discussed in Chapter 8, the legal burden of proof for both tests would be on the prosecution.4

13.7 Drawing on existing defences in intimate image abuse offences in a number of common law jurisdictions, we examine five potential statutory justifications or permissions which identify circumstances in which the defendant’s conduct was acceptable. It would be possible to structure this discussion as either a series of discrete defences, or as examples of reasonable conduct upon which a defence of “reasonable excuse” could be based.5 We take the view that the latter is clearer for the purpose of this chapter, and would also be likely to be clearer as a matter of legislative drafting.

13.8 We begin by considering a defence of reasonable excuse in general terms. We then set out the following examples which we consider might be covered by the defence:

(1) conduct necessary for the purposes of preventing, detecting, investigating or prosecuting crime;

(2) conduct necessary for the purposes of legal proceedings or the administration of justice;

(3) conduct necessary for a genuine medical, scientific or educational purpose; and

(4) conduct in the course of or with a view to the publication of material in the public interest.

13.9 In Chapter 12, we provisionally proposed a separate framework for threats. The reasonable excuse defence we consider in this chapter would not be compatible with a threats offence.

**REASONABLE EXCUSE OR REASONABLE CONDUCT**

13.10 While the defence of reasonable excuse exists in English and Welsh law, it does not feature in the disclosure offence in England and Wales or Scotland—though as those offences have an additional intent element, such a defence is arguably unnecessary. It was, however, included in the more recent intimate image provisions in the Australian states of New South Wales (“NSW”) and Western Australia (“WA”).

**England and Wales**

13.11 A number of offences in England and Wales contain either a defence of reasonable excuse, or a requirement within the offence that the prosecution prove that the

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4 See Chapter 11 paras 11.102 and 11.137 for further detail.

5 Confusingly, the term “reasonable excuse” is frequently used to refer to justifications or permissions. Ashworth and Horder, *Principles of Criminal Law* (7th ed 2013) 116.
defendant acted “without reasonable excuse”. In *JB v Director of Public Prosecutions* (*DPP*), Sir John Thomas P (as he then was) explained:

It is clear from the decision of the Supreme Court in *R v G* (in the context of section 58(3) [of] the Terrorism Act 2000)\(^8\) and the Court of Appeal Criminal Division in *R v AY*\(^10\) (in the same context) that what constitutes a reasonable excuse is essentially a question which is dependent on the circumstances of each case in the context of the offence to which it relates … it may not be helpful to draw analogies with cases where it has been decided a reasonable excuse arose.\(^11\)

13.12 In our Harmful Online Communications consultation paper, we observed:\(^12\)

“Reasonable excuse” does not have any precise definition. In the case of *R v AY*,\(^13\) the Court of Appeal held that “the concept of ‘reasonable excuse’ is par excellence a concept for decision by the jury on the individual facts of each case.”\(^14\) In *R v G*,\(^15\) Lord Rodger observed that “It is comparatively easy to identify examples of excuses which could never be regarded as reasonable. It is similarly easy to give examples of excuses which everyone would regard as reasonable”.\(^16\) However, there is also a “middle range” of cases, which must be left to the jury.\(^17\)

**New South Wales and Western Australia**

13.13 The NSW\(^18\) and WA\(^19\) provisions provide a detailed framework for the defence of “reasonable conduct”. The provisions are identical, save for one factor, which we highlight below.

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9 Collecting, recording, possessing, viewing or accessing information of a kind likely to be useful to a person committing or preparing an act of terrorism.


14 Above at [25].


16 Above at [81].

17 Above at [81].

18 Crimes Act 1900, s 91T.

19 Criminal Code 1913, s 221BD(3)(d).
13.14 Both provisions state that a person does not commit an offence20 “where the conduct was reasonable in all the circumstances” and in considering whether the conduct was reasonable the court will have due regard to the following:

- the nature and content of the image;
- the circumstances in which the image was recorded or distributed;
- the age, mental capacity, vulnerability or other relevant circumstances of the depicted person;
- the degree to which the accused’s actions affect the privacy of the depicted person;
- the relationship between the accused and the depicted person;
- any other relevant matters.21

13.15 Neither jurisdiction requires any additional intent element to be proved when prosecuting the offence. In WA, the prosecution need only prove that the victim did not consent to the recording or distribution. The defendant’s belief in consent or knowledge of lack of consent is irrelevant. In NSW, the prosecution must prove either that the defendant knew that he did not have consent or that he was reckless as to lack of consent. The maximum penalty in both jurisdictions is three years.

13.16 The explanatory memorandum presented to the Legislative Council and Legislative Assembly on the WA provisions stated:

The ‘reasonable person’ defence is intended to give courts the capacity to consider the myriad factors that may amplify or diminish the criminality of a given distribution. It recognises that there are circumstances in which the distribution of an intimate image is consistent with community standards and should therefore not give rise to criminal liability; for example, where a parent sends a photo of their naked baby in the bath to the other parent.22

Analysis

13.17 A defence of reasonable excuse is potentially broad in scope. Whether there was a reasonable excuse for taking or sharing an intimate image without consent would be a question of fact to be determined by the trier of fact (the magistrates or the jury).

Unless the judge is satisfied that no reasonable jury could regard the defendant's excuse as reasonable, the judge must leave the matter for the jury to decide. When

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20 In New South Wales this would be both recording and distributing an intimate image; in WA it would be distributing an intimate image.

21 This factor only appears in the Western Australia provision.

doing so, if appropriate, the judge may indicate factors in the particular case which
the jury might find useful when considering the issue.23

13.18 Such a wide defence may be at odds with the objective of preventing the serious
wrongs and harms set out in detail earlier in this paper.

13.19 Whilst there is merit in the argument that each case should be judged on its own facts,
a broad reasonable excuse defence could increase the risk of disparity of outcomes.
This risk is evident in criticisms of the Health Protection (Coronavirus, Restrictions)
(England) Regulations 2020.24

13.20 In effect, then, a broadly conceived defence risks limiting the scope of the offence,
and diminishing the protection it should offer to victims. The offence would depend on
the views of magistrates and juries as to what is or is not “reasonable” under the
circumstances. As Charlotte Bishop stated to us, “objective standards become
masculine standards”. As we described in Chapter 5, there is evidence of a culture of
victim blaming in society. Therefore, there is a risk that a defence that allows the trier
of fact to assess the reasonableness of a defendant’s conduct would undermine the
very aim of the provisionally proposed base offence.

13.21 The New South Wales and Western Australia frameworks address this concern by
requiring the trier of fact to assess the evidence against a clear set of statutory factors.
This has the advantage of providing a more transparent decision-making process as
well as encouraging a more unified and consistent approach whilst seeking to retain
an appropriate level of judicial discretion and flexibility in each case.

13.22 The New South Wales and Western Australia legislatures appear to have incorporated
a reasonable conduct defence into their offences in part to avoid the criminalisation of
parents who share photos of their babies within their family or friendship groups (see
paragraph 13.16 above). We also find that reasoning persuasive. It is clear that
parents should not be liable for a criminal offence under these circumstances.
However, under the base offence that we have provisionally proposed, it is at least
theoretically possible that they could be. The harms and wrongs detailed in Chapter 5
are weakly or minimally present in such cases. A defence of reasonable excuse, or a
requirement that the prosecution prove that the defendant did not have a reasonable
excuse, would provide a mechanism for the law to recognise the legitimacy of sharing
such images.25

13.23 Another way to limit the defence appropriately, and to provide notice to society about
behaviour which is not criminal, would be to provide a list of possible “reasonable
excuses” in statute. Below we consider four possibilities for inclusion in such a list.

13.24 We intend this to be an inclusive rather than an exhaustive list. There are likely to be
reasonable excuses which do not fall within one of these four possibilities. Examples

24 See, for example Graham Gilbert, Reasonable Excuses: What Might Be and What Might Not? (9 April 2020)
https://www.3pb.co.uk/content/uploads/Reasonable-Excuses-What-Might-Be-and-What-Might-Not-Graham-
Gilbert.pdf (last visited 24 February 2021).
25 We note that images of children which are indecent are criminalised under the Protection of Children Act
1978, which is outside the scope of this project.
might include limited further sharing of an image in order to obtain advice on how to proceed on receipt of it, or the example that influenced the Australian jurisdictions discussed above of intra-familial sharing of naked images of their young children. The use of an inclusive list is intended to provide explicit defences for the most frequent scenarios where there is reasonable excuse to take or share an intimate image without consent, while providing scope for courts to consider reasonable excuse in rarer examples where appropriate.

CONDUCT WHICH MIGHT CONSTITUTE “REASONABLE EXCUSE”

For the purposes of preventing, detecting, investigating or prosecuting crime

13.25 There is a defence to this effect in the disclosure offence found in section 33 of the Criminal Justice and Courts Act 2015 (“CJCA 2015”) in England and Wales, and more broadly in Scotland under the disclosure offence found in section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

13.26 A similar defence also applies to the equivalent offences in a number of Australian jurisdictions. The New South Wales and Western Australia defences are limited to conduct by “law enforcement officers” for “genuine law enforcement purposes”. The provisions are drafted as exclusions rather than defences and the term law enforcement officers is defined in the legislation, to ensure that only certain public officials are exempted. Unlike the UK defences, reasonable belief is not a component of either defence.

England and Wales

13.27 In England and Wales, section 33(3) of the CJCA 2015 provides a defence for a person charged with the disclosure offence “to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.”

13.28 The Act does not expressly limit this defence to law enforcement officers; it could therefore be used by members of the public. The burden of proving this defence is on the defendant, on the balance of probabilities.26

Scotland

13.29 In Scotland, the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 criminalises the disclosure of intimate images and threats to disclose intimate images. Section 2(3)(c) provides that the defendant has a defence if he or she “reasonably believed that disclosure of the photograph or film was necessary for the purposes of the prevention, detection, investigation or prosecution of crime.”

13.30 The section is slightly wider in scope than the CJCA 2015, since it includes the prosecution of crime. The defence does not extend to threats, and it is not explicitly limited to law enforcement officers.

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26 Criminal Justice and Courts Act 2015, s 33(3); Explanatory Notes to the Criminal Justice and Courts Act 2015 at para 335.
13.31 The explanatory note to section 2 provides an example of the use of the defence: "disclosing to the police an image believed to be portraying illegal activity." This confirms that the defence was intended to extend to members of the public as well as law enforcement officers. There was little discussion of this defence in any of the parliamentary debates on the Bill.28

New South Wales

13.32 The recording and distributing offences inserted by the Crimes Amendment (Intimate Images) Act 2017 into the Crimes Act 1900 contain an exemption for law enforcement officers: "[a] person does not commit an offence if … the conduct alleged to constitute the offence was done by a law enforcement officer for a genuine law enforcement purpose." A law enforcement officer is defined as “a police officer or other person who exercises law enforcement functions under a law of this State, another State, a Territory or the Commonwealth.”29

13.33 The NSW legislative framework was implemented following a consultation exercise by the NSW Justice Department following recommendations of the Legislative Council Standing Committee on Law and Justice. The discussion document30 asked stakeholders various questions on the construction of a new offence of non-consensual recording and distribution of intimate images.31

13.34 In relation to whether there should be any statutory defences, consultee responses were minimal. However, the Director of Public Prosecutions and academics Henry, Powel and Flynn identified “investigation, prevention and detection of crime” as a specific defence but did not elaborate on their answer. The Law Society32 and Bar Association33 simply agreed that a range of defences should be available.

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27 Explanatory Notes to the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, at para 16
29 Crimes Act 1900, s 91T.
13.35 In the Parliamentary readings of the Bill there was little or no debate on statutory
defences and the Bill was passed without any substantial amendments.

**Western Australia**

13.36 In Western Australia, an exception to the distribution offence states that it is not an
offence —

- (a) for a member or officer of a law enforcement agency or their agents to
distribute an intimate image when acting in the course of their official
duties.34

13.37 Law Enforcement Agencies, for the purposes of the Act, include:

- (a) the Police Force of the State;
- (b) the Police Service of the State;
- (c) the Office of the Director of Public Prosecutions of the State;
- (d) the Corruption and Crime Commission;
- (e) any entity of another State or a Territory, the Commonwealth or another
country that has functions similar to functions of an entity referred to in
paragraph (a), (b), (c) or (d).35

13.38 Again, there is little by way of explanation in the Act or in the Parliamentary debate of
this provision. In the second Parliamentary reading of the Bill, the Attorney General
stated that:36

… nothing in the bill will make it an offence for a law enforcement officer to distribute
an image in the course of their official duties; for a person to distribute an intimate
image in accordance with or in the performance of functions under a written law—for
example, as part of making a complaint to the Office of the eSafety Commissioner
pursuant to the enabling legislation for that office; or for a person to distribute an
intimate image for the purposes of the administration of justice.

13.39 The explanatory memorandum presented to the Legislative Council and Legislative
Assembly stated that,

These exceptions are intended to ensure that the distribution offence does not
modify the behaviour of public officials in a way that would frustrate legitimate law
enforcement activities, the giving of effect to the will of Parliament as expressed in
statute, or the administration of the justice system.

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34 Criminal Code 1913, s 221BD(4).
35 Criminal Code 1913, s 221BA.
36 Parliament of Western Australia Assembly, *Introduction, First and Second Reading of Criminal Law
Amendment (Intimate Images Bill)* (28 June 2018) Hansard p4156b-4159a
https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/E2624DFDA0AC0FF4482582FE0018DF49/$FILE/
A40%20S1%202020180628%20p4156b-4159a.pdf (last visited 24 February 2021).
13.40 Since the provision was implemented, there has been one case involving a police officer charged with “showing” a photo of a partially naked woman to three of her colleagues. The officer was a detective in the child protection unit and during one of her cases, where she had been interviewing a child and waiting for some notes to be written up, she opened a word game on her phone to entertain the child because they had become bored. Without her knowledge the child opened her private photographs in which there was an image of a topless woman asleep on a bed. The officer was concerned about what had occurred and explained the circumstances to three of her female colleagues later that evening over a meal and drinks. She showed her colleagues the image in question. The officer then reported the matter which led to an internal investigation and the police officer was subsequently charged.

13.41 According to an account in the media, the prosecution case was that it was unnecessary for the officer to have shown the image to her colleagues since she could have described it and the exclusion did not apply because the disclosure was in a social setting (a restaurant) rather than in a professional environment. The prosecution stated that it was a “gross invasion of privacy”. The defence argued that the intention of the law was to criminalise “deliberate and malicious” acts of distribution of images and that the conduct of the defendant was simply to seek advice.

13.42 The Magistrate dealing with the case agreed with the defence submission and stated that the circumstances were not of the kind envisaged by the Attorney General and that the exception could be applied to this particular case since there was no doubt that the incident had occurred in the context of the officer’s work.

Analysis

13.43 In the context of intimate image abuse, this defence operates primarily in relation to a disclosure or sharing offence, but in NSW it has a broader remit and covers both disclosure and recording of images. It is clear that there will be legitimate reasons for images to be recorded and disclosed by police officers and the subsequent disclosure of those images by prosecutors in accordance with their respective duties and disclosure obligations. Members of the public may also become involved by witnessing a crime, recording it, and reporting it to the police and then sharing the recording or still images for the purposes of assisting the police with their investigation into a crime.

13.44 Our provisional view is that law enforcement purposes should constitute a reasonable excuse for conduct which would otherwise fall within the base offence we provisionally propose. We go on now to consider particular issues which will influence the nature of the defence: whether it should be restricted to law enforcement officers, and whether it should be based on the defendant’s “reasonable belief” that disclosure was necessary for law enforcement purposes.

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38 Above.

39 Above.
Restriction to law enforcement officers

13.45 Crime prevention and detection very often involves law enforcement agencies identifying or recognising the risk of a crime and then implementing necessary actions or strategies to reduce the instances of it in collaboration with local communities as a means to raise public awareness and reduce crime risks.

13.46 Therefore, it is likely that there will be cases where members of the public take a recording in order to assist the police and/or subsequently come forward and share a recording with the police. In these circumstances, the conduct has a legitimate aim: to provide evidence that could be used for a genuine law enforcement purpose.

13.47 It is worth noting that although the Australian provisions analysed above are restricted to law enforcement officers, NSW and WA also have a separate reasonable excuse defence, which an ordinary member of the public could use when the recording or sharing was for the purpose of the prevention or detection of a crime.

13.48 The need to extend the defence to the general public is recognised not only in the defence to the disclosure offence discussed at paragraph 13.28 above, but in similar offences found in the Protection from Harassment Act 1997 (“PHA 1997”)\(^\text{40}\) and Data Protection Act 2018 (“DPA 2018”)\(^\text{41}\).

13.49 We therefore provisionally conclude that any defence of reasonable excuse for conduct for the purposes of preventing, detecting, investigating or prosecuting crime should extend to members of the public.

Reasonable belief

13.50 The England and Wales and Scottish provisions both include a reasonable belief test. The defendant must reasonably believe that that disclosure was necessary for the purposes of preventing, detecting or investigating crime (in the Scottish provision this extends to prosecuting crime). The defendant is not required to prove that it was necessary for the purposes of preventing, detecting, investigating or prosecuting a crime. This would create a much higher threshold.

13.51 The NSW and WA provisions apply such a higher threshold: the conduct must be for genuine law enforcement purposes; there is no reasonable belief element. However, the burden of proof is on the prosecution,\(^\text{42}\) which mitigates the harshness of this requirement. The defence is also limited to law enforcement professionals.

13.52 A similar defence is found in section 170(2)(a) of the DPA 2018, which states:

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\(^{40}\) Protection from Harassment Act 1997, s 1(3)(a).

\(^{41}\) Data Protection Act 2018, s 170(2)(a).

It is a defence for a person charged with an offence under subsection (1) to prove that the obtaining, disclosing, procuring or retaining—(a) was necessary for the purposes of preventing or detecting crime.

We are not aware of any cases under the DPA 2018 that address this defence, which is not mitigated in the way described in the previous paragraph; the burden of proof is on the defendant.

13.53 Another variation on this kind of defence exists in the Protection from Harassment Act 1997. This defence neither contains a reasonable belief element, nor is the defendant required to prove that the conduct was necessary for the purpose of preventing or detecting crime. Section 1(3)(a) states:

Subsection (1) does not apply to a course of conduct if the person who pursued it shows—(a) that it was pursued for the purpose of preventing or detecting crime.

13.54 In Hayes v Willoughby, Lord Sumption, giving judgment for the Supreme Court, stated that “although [section 1(3)(a) of the PHA 1997] was no doubt drafted mainly with an eye to the prevention or detection of crime by public authorities, [it] applies equally to private persons who take it upon themselves to enforce the criminal law”. He went on to state that although a test of reasonableness was deliberately not included in section 1(3)(a), there needed to be some “control mechanism”. It was held that the concept of “rationality” was the necessary control mechanism, which was not to be confused with reasonableness.

Reasonableness is an external, objective standard applied to the outcome of a person’s thoughts or intentions... A test of rationality, by comparison, applies a minimum objective standard to the relevant person’s mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse.

13.55 However, Lord Reed, dissenting, stated:

I cannot readily bring to mind any example, in any context, of a statutory requirement not of reasonableness but of rationality, the latter being understood as conceptually distinct from the former. I would be slow to infer that criminal liability was intended to turn upon the subtle distinction between what is unreasonable and what is irrational... Are juries to be required to determine where that boundary lies? It may be that appropriate directions can be devised by judges, although I do not underestimate the difficulty of devising directions which accurately reflect Lord Sumption’s analysis. I have to confess that I am not sure that I understand the distinction drawn ... between on the one hand “rationality [as] a familiar concept in public law”, which “is not the same as reasonableness”, and on the other hand “the broader categories of Wednesbury unreasonableness”;


44 Hayes v Willoughby [2013] UKSC 17, [2013] 1 WLR 935 at [14].
should be “an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse”, but that the court is not referring to “a decision lying beyond the furthest reaches of objective reasonableness”; or how that test is related to the causal connection between the purpose and the conduct, discussed in para 15; or whether it is the same test as is reflected in the various standards, ranging from gross negligence to “complete irrationality”... In any event, a meaningful jury trial requires not merely that the jury is given a legally accurate direction, but that it is one which they can make sense of in practice and apply with confidence to the evidence they have heard. I am not convinced that Parliament can have intended that a jury should be expected to understand and apply the sophisticated distinctions which Lord Sumption seeks to draw.45

13.56 Based on *Hayes*, it is clear that some form of “control mechanism” will be imported by the courts even where the provision is silent as to “reasonableness”. The concept of rationality is not a familiar term within the Magistrates’ and Crown Courts, but reasonableness is. A reasonable belief test would therefore provide greater clarity.

13.57 Our provisional conclusion is that to require the defendant to prove that the act was necessary risks imposing a disproportionately high threshold and has the potential to criminalise conduct where the defendant was insufficiently culpable to warrant the sanction of the criminal law. The defendant’s reasonable belief that the act was necessary should be sufficient. There is a public interest in the effective prevention, detection, investigation and prosecution of a crime which outweighs the harm that might inadvertently be caused to individual victims, and negates the wrongfulness that would be present in other circumstances.

For the purposes of legal proceedings or the administration of justice

13.58 This defence is not currently present within the disclosure offences in England and Wales and Scotland. However, as those offences have an additional intent element, requiring proof that the defendant intended to cause the person depicted distress, such a defence is arguably unnecessary.

13.59 It usually covers situations where images have been gathered during the course of an investigation of a crime and are presented as evidence in a criminal trial or disclosed to the defence as part of service of evidence or disclosure of unused material and/or shared with the bench, judge and jury as part of the trial process. Therefore, it may extend to a broad range of individuals who work within the justice system.46

13.60 In New South Wales there is a specific exclusion for such conduct that involves the recording or distribution of an intimate image; in Western Australia there is an exclusion and a defence, both of which apply only to the distribution offence. We consider how these operate in these jurisdictions below.

45 Above at [28].

New South Wales

13.61 In New South Wales this exception acts in addition to the exception for conduct done by a law enforcement officer for a genuine law enforcement purpose discussed above. Section 91T(c) of the Crimes Act 1900 states that it is not an offence where “the conduct alleged to constitute the offence was required by a court or otherwise reasonably necessary to be done for the purpose of legal proceedings.”

13.62 The provision does not draw a distinction between conduct involving recording and conduct involving distribution, as long as it was required by a court or otherwise reasonably necessary for the purpose of legal proceedings. The exception is arguably also not limited to criminal legal proceedings. It is difficult to envisage circumstances where a court would require a recording to be made of an intimate image without consent and it is noted the exception does not include conduct which is done for the purpose of the administration of justice. At the time of writing there have been no reported cases on this exception.

Western Australia

13.63 In Western Australia “administration of justice” and “legal proceedings” are two separate provisions and act in addition to the exception “for genuine law enforcement purposes”. They are limited to the offence of distributing an image.

13.64 Under section 221BD(4) of the Criminal Code Act Compilation Act 1913, it is not an offence

(c) for a person to distribute an intimate image for the purposes of the administration of justice.

13.65 Under section 221BD(3) it is a defence where

(b) the distribution of the image was reasonably necessary for the purpose of legal proceedings.47

13.66 There is a distinction, therefore, between distribution for the purposes of the administration of justice, which acts as an exception or exclusion and distribution that is reasonably necessary for the purpose of legal proceedings, which is a defence.

13.67 The Act does not define these terms nor is there any explanatory material as to the factors or circumstances to which the courts should have regard in determining whether conduct is for the purpose of legal proceedings or for the purposes of the administration of justice.

13.68 In the second Parliamentary reading48 of the Bill, the Attorney General stated:

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47 Criminal Code 1913, s 221BD(3).

If the accused person raises evidence that one of the exceptions applies, the onus is on the prosecution to disprove that fact. This is in contrast to defences under which the onus is on the accused to establish on the balance of probabilities that the defence applies. The rationale for this difference is that the question of criminality should not normally arise in the circumstances that are the subject of the exclusions. The defences and exclusions have also been drafted with a view to maintaining consistency with similar legislation that is currently before the commonwealth Parliament.

Analysis

13.69 There will be circumstances where the distribution or sharing of intimate images without consent will be necessary in legal proceedings or for the purposes of the administration of justice. The position is more nuanced in relation to taking intimate images without consent.

13.70 In a 2015 article, Ricci, Pinborough and Ridout suggested that the use of intimate images is increasing in the context of family law proceedings.49 In our meeting with the Magistrates Association (MA), its Chair, Jo Easton, noted that the MA Family Court Committee had reported seeing a greater proportion of intimate images in the context of family law proceedings than in the criminal courts.

13.71 Ricci, Pinborough and Ridout identified a number of scenarios where intimate images might be used in the course of family proceedings:

(1) injunctions – to prevent sharing intimate images, threats to share intimate images, or creating online profiles to impersonate the victim and encourage unwelcome advances by third parties.

(2) private law proceedings – as part of a fact-finding exercise to determine the extent of controlling, manipulative, or harassing behaviour during a relationship or following separation to the extent that it is relevant to child arrangements.

(3) public law proceedings – where vulnerable teenagers or young people are victims of sharing (or threats to share) intimate images.

(4) financial remedy proceedings – where sharing intimate images or posting information on social media platforms may have direct impact on an individual’s current or future employment and might therefore become a relevant conduct issue, or sexual photographs or videos might become disputed property.

(5) in any proceedings, allegations may arise of threats to release intimate photos or videos as a means to manipulate or coerce an individual into taking or ceasing a particular course of action.

13.72 In each of these scenarios, the use of the image by court officials should be excluded from criminal liability. Therefore, any sharing or distribution for the purposes of the administration of justice by a court official should not be criminalised – for example

court staff collating a file bundle and “distributing” the image to all parties in court. Good practice would dictate that images should be utilised sensitively, for example blacking out certain parts of the image whilst retaining the originals or blurring parts of the copied image, but otherwise the distribution of these images should not be criminal.

13.73 Our provisional conclusion is that a defence of reasonable excuse should apply to the sharing offence, when the sharing was for the purposes of the administration of justice, However, it is difficult to envisage circumstances where there would be a reasonable excuse for taking or recording an intimate image without consent in the context of the administration of justice.

13.74 In relation to legal proceedings, however, the issue is slightly more complex. An individual may take and share an intimate image non-consensually, with a view to initiating civil or family proceedings or bolstering their case in existing proceedings, or they may ask another person to take such an image.

13.75 For example, a party in divorce proceedings may hire a private investigator in an effort to uncover an illicit affair. If an image is taken by the private investigator of the couple engaged in a sexual act and then shared with the party instructing them, then arguably the investigator should be entitled to rely on a defence that the taking and sharing were for the purpose of legal proceedings. A party to the proceedings who then shares the image during the court proceedings should also be able to rely on this defence because the evidence is relevant and admissible for the purpose of the legal proceedings.

13.76 Our provisional view is that the defence of reasonable excuse should apply to taking or sharing an intimate image for the purpose of legal proceedings, to ensure that they are not hampered or undermined by the threat of criminal sanctions.

13.77 For the reasons we set out at paragraph 13.57 above in relation to the previous defence, our provisional view is that the defendant’s reasonable belief should be sufficient to found each defence.

For a genuine medical, scientific or educational purpose

13.78 This exception is included in the NSW and WA legislation. There is no similar provision in the disclosure offence in England and Wales.

13.79 The Scottish disclosure offence also lacks such a defence, but there are two reasons why it is unnecessary. First, it has a similar (albeit broader) additional intent element as the English offence. Secondly, the legislation contains a broad public interest defence that could apply in these circumstances: “In proceedings for an offence under subsection (1), A has a defence if any of the following facts is established—… (d) A reasonably believed that disclosure of the photograph or film was in the public interest.”50

50 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(3).
13.80 Particular issues may arise in this context where the person depicted lacks capacity to consent. We deal with these below.

**New South Wales**

13.81 In New South Wales, there is an exception for recording or distributing an intimate image without consent “for a genuine medical or scientific purpose.”\(^{51}\)

**Western Australia**

13.82 In Western Australia, the exception is broader in scope as it includes educational purposes, although it only applies to distribution. A person does not commit an offence if “the distribution of the image was for a genuine scientific, educational or medical purpose.”\(^{52}\)

13.83 There is very little by way of explanatory material on either the NSW or WA exceptions, or evidence of their application.

**Analysis**

**Persons lacking capacity to consent**

13.84 Taking or sharing an intimate image where the depicted person lacks capacity to consent may be in the depicted person’s best interests, for example, for diagnostic purposes. In such cases, consent may be obtained from a third party with authority to consent in the depicted person’s best interests. Such third-party consent would not suffice for the purposes of intimate image abuse offences (whether current or provisionally proposed) because it would not be consent from the person depicted.

13.85 In the case of a child lacking capacity, someone with parental responsibility may provide consent to treatment.\(^{53}\) The common law is less clear in relation to research, but reliance on parental consent is well-established.\(^{54}\) Clearly, intimate images of children taken for the purposes of treatment or research with the consent of someone with parental responsibility should not be caught by our base offence.

13.86 The situation of adults lacking capacity is significantly more complicated, as a result of the operation of the Mental Capacity Act 2005 (“MCA 2005”). A donee of a lasting power of attorney (appointed by the person who has lost capacity prior to their loss of capacity) or a court-appointed deputy may provide consent to care or treatment, but not to research.\(^{55}\) However, in most cases involving an adult lacking capacity, there will be neither a donee of a lasting power of attorney nor a deputy. Instead, the person taking or sharing the intimate image without consent will be protected from liability by

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\(^{51}\) Crimes Act 1900, s 91T(a).

\(^{52}\) Criminal Code 1913, s 221BD(3)(a).


\(^{55}\) Mental Capacity Act 2005, ss 9, 19, 32(7).
the operation of section 5 of the Mental Capacity Act 2005 if the act is in connection
with the care or treatment of the depicted person:

(1) If a person ("D") does an act in connection with the care or treatment of another
person ("P"), the act is one to which this section applies if—

(a) before doing the act, D takes reasonable steps to establish whether P
lacks capacity in relation to the matter in question, and

(b) when doing the act, D reasonably believes—

(i) that P lacks capacity in relation to the matter, and

(ii) that it will be in P's best interests for the act to be done.

(2) D does not incur any liability in relation to the act that he would not have
incurred if P—

(a) had had capacity to consent in relation to the matter, and

(b) had consented to D's doing the act.

(3) Nothing in this section excludes a person's civil liability for loss or damage, or
his criminal liability, resulting from his negligence in doing the act.

(4) Nothing in this section affects the operation of sections 24 to 26 (advance
decisions to refuse treatment).

13.87 The effect of the section 5 defence is explained in the Explanatory Notes to the Act:

This provides statutory protection against liability for certain acts done in connection
with the care or treatment of another person. If an act qualifies as a “section 5 act”
then a carer can be confident that he will not face civil liability or criminal
prosecution. Civil liability could involve being sued for committing a tort such as
battery, false imprisonment or breach of confidence. Criminal prosecution might be
for an offence against the person (assault or causing actual bodily harm) or for an
offence against property (theft).56

13.88 The effect of section 5(2) of the MCA 2005 is that the person who has taken or shared
an intimate image without consent in connection with the depicted person’s care or
treatment, reasonably believing that to be in their best interests, is treated as if the
depicted person had capacity and had consented. In that case, no offence would be
committed. This provision would operate even when consent has been obtained from
a donee of a lasting power of attorney or a court-appointed deputy, provided the
conditions are met. In our provisional view, this defence provides sufficient and
appropriate protection against liability for our provisionally proposed base offence for
acts in connection with the care or treatment of adults lacking capacity.

56 Explanatory Notes to the Mental Capacity Act 2005 at para 37 [emphasis added].
13.89 In relation to research involving adults lacking capacity, it is very unlikely that a research project involving the taking or sharing of intimate images would meet the requirements of the research provisions of the MCA 2005. Those provisions cover intrusive research:

Section 30

(2) Research is intrusive if it is of a kind that would be unlawful if it was carried out—

(a) on or in relation to a person who had capacity to consent to it, but

(b) without his consent.

13.90 As taking or sharing an intimate image without consent will be covered by our provisionally proposed base offence, research which involves taking or sharing an intimate image of an adult lacking capacity will fall within the definition of "intrusive research".

13.91 Intrusive research is unlawful unless it is approved by a Research Ethics Committee flagged to approve such projects, and meets the requirements of sections 32 and 33 of the MCA 2005.57 Section 32 provides:

(2) The research must be connected with—

(a) an impairing condition affecting P, or

(b) its treatment.

(3) "Impairing condition" means a condition which is (or may be) attributable to, or which causes or contributes to (or may cause or contribute to), the impairment of, or disturbance in the functioning of, the mind or brain.

(4) There must be reasonable grounds for believing that research of comparable effectiveness cannot be carried out if the project has to be confined to, or relate only to, persons who have capacity to consent to taking part in it.

(5) The research must—

(a) have the potential to benefit P without imposing on P a burden that is disproportionate to the potential benefit to P, or

(b) be intended to provide knowledge of the causes or treatment of, or of the care of persons affected by, the same or a similar condition.

(6) If the research falls within paragraph (b) of subsection (5) but not within paragraph (a), there must be reasonable grounds for believing—

57 Mental Capacity Act 2005, s 30(1).
(a) that the risk to P from taking part in the project is likely to be negligible, and

(b) that anything done to, or in relation to, P will not—

(i) interfere with P’s freedom of action or privacy in a significant way, or

(ii) be unduly invasive or restrictive.

13.92 The “subject condition” requirement in subsection 32(2) and the “necessity” requirement in subsection 33(4) are likely significantly to narrow the range of potential research projects involving intimate images of adults lacking capacity. Of those projects that do meet these criteria, non-therapeutic research projects involving intimate images may involve a significant interference with the depicted person’s privacy, and thus fail the test in subsection 33(6)(b)(i).

13.93 Parliament has made clear that research involving adults lacking capacity should be strictly regulated. In our provisional view, on the rare occasions that such research involving non-consensual intimate images meets the requirements of the MCA 2005 research provisions, it should not be criminalised under our provisionally proposed base offence. While such research would not be unlawful by operation of subsection 30(1), there is no explicit defence to criminal liability equivalent to the section 5 defence (for acts in connection with care or treatment) for research that would otherwise fall within our base offence.

13.94 In sum, although section 5 of the MCA 2005 provides a defence to criminal liability for acts in connection with the care or treatment of adults lacking capacity which would be available to those taking or sharing intimate images without consent, there are three other situations in which no such defence is available:

(1) research involving adults lacking capacity that is permitted under the MCA 2005;

(2) treatment involving children lacking capacity for which consent has been provided by someone with parental responsibility; and

(3) research involving children lacking capacity for which consent has been provided by someone with parental responsibility.

13.95 We have considered a bespoke solution for these categories. In relation to categories (2) and (3), we could provide that consent from someone with parental responsibility should suffice for the purpose of the consent requirement in our provisionally proposed base offence. For category (1) this would be more complicated, but consent could be sought from the personal or nominated consultee who must be consulted.

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58 P Lewis, “Procedures that are Against the Medical Interests of Incompetent Adults” (2002) 22(4) Oxford Journal of Legal Studies 575, p 602.

59 P Lewis, “Procedures that are Against the Medical Interests of Incompetent Adults” (2002) 22(4) Oxford Journal of Legal Studies 575, p 601.

60 Those which fall under the Mental Capacity Act 2005, s 33(5)(b).
about the research participation of the person lacking capacity.\textsuperscript{61} Alternatively, the
defence in section 5 of the MCA 2005 could be extended to cover research that is
lawful under the MCA 2005. However, our provisional view is that a where the taking
or sharing without consent was for a genuine medical, scientific or educational
purpose, a defence of reasonable excuse would be more flexible. In particular, it could
also accommodate circumstances involving persons \textit{with} capacity who have not
consented to the taking or sharing of an intimate image.

\section*{Persons with capacity}

13.96 Are there any circumstances where a defence would also be necessary for persons
with capacity who have not consented to the taking or sharing of an intimate image?
Let us consider two examples.

\begin{example}

\textbf{Example 1}

D, is a GP who recently met V through a social networking app. D and V take a
number of consensual sexual and nude images of each other. V sends D a flirty
"dick pic" and D notices an aberration on the penis. He forwards the picture to his
NHS email account, and then sends it without any identifying information to a friend
who is a urologist, asking him for his professional opinion. The urologist states the
aberration may be malignant. D sends V a message asking him to seek urgent
medical attention. V is outraged and reports the matter to the police. D admits the
non-consensual sharing with his urologist friend but claims that it was for a genuine
medical purpose.

\end{example}

\begin{example}

\textbf{Example 2}

E is developing a compound made from natural ingredients to deal with erectile
dysfunction. The compound aims to boost testosterone production in men,
particularly those over 35. As part of her research E has 5 male volunteers, aged
between 30-60 and during the trial process she has been taking images of the
men’s penises before and after the drug has been administered to demonstrate its
effect. All the volunteers have given their consent for the images to be taken for
research purposes. During an academic conference E shares the anonymous
images and her findings with those who are attending. Three of the five volunteers
state that it was never their intention to consent to the public disclosure of their
images. D states it was for genuine scientific and educational purposes.

\end{example}

13.97 In the above examples, D and E should have sought consent to the sharing of the
intimate images from the persons depicted in them. Their failure to do so may have
civil or disciplinary consequences. However, the sharing of the images was for a

\textsuperscript{61} Mental Capacity Act 20015, s 32.
genuine medical, scientific or educational purpose; such purposes benefit both individuals (as in Example 1) and society (as in Example 2).

13.98 Moreover, the wrongs and harms described in Chapter 5 are weakly or minimally present. Although the non-consensual sharing does violate the victims’ sexual and bodily privacy, sexual autonomy and sexual freedom, infringe upon their dignity, and may cause some psychological harm, the anonymisation of the images mitigates both the wrongfulness and harmfulness of the conduct to some extent.62

13.99 In sum, although the MCA 2005 provides a defence for acts in connection with the care or treatment of adults lacking capacity which would be available to those taking or sharing intimate images without consent, there are four other situations in which no such defence is available:

(1) research involving adults lacking capacity that is permitted under the MCA 2005 (which would be for a genuine medical or scientific purpose);

(2) treatment involving children lacking capacity for which consent has been provided by someone with parental responsibility (which would be for a genuine medical or scientific purpose);

(3) research involving children lacking capacity for which consent has been provided by someone with parental responsibility (which would be for a genuine medical or scientific purpose);

(4) conduct for a genuine medical, scientific or educational purpose where consent was not sought from the depicted person.

Accordingly, we provisionally propose that the defence of reasonable excuse should be available in these circumstances.

The public interest defence

13.100 In this section, we argue that acting in the public interest might constitute a reasonable excuse for conduct that would be otherwise be criminal under our base offence. This would ensure compliance with Article 10 of the European Convention on Human Rights (“ECHR”) which protects freedom of expression.

13.101 One of the most important aspects of the offences we provisionally propose is the protection they afford to the right to private life under Article 8 of the ECHR: as we note below, people’s images – especially intimate images – constitute a fundamental aspect of their personality and so the taking or sharing of their image without their consent clearly intrudes on their right to private life. The question that falls to be considered is therefore whether there are any circumstances in which an interference in someone’s Article 8 right (by taking or sharing their intimate image without consent) can be justified on the basis of another’s Article 10 right to freedom of expression.

13.102 The answer to that question depends in very large part upon the extent to which the public interest is engaged. We cannot preclude the possibility that an intimate image

62 We discuss images taken where the person depicted is not identifiable in Chapter 6 from para 6.76.
of a person may engage the public interest (and it is worth recalling for these purposes that “intimate” is defined more broadly than “nude”). Our base offence is complete at the point an image is taken or shared without the consent of the subject (and where the defendant did not have a reasonable belief in consent): there is no scope for a defendant to argue that the image was nonetheless taken or shared in good faith. Absent a public interest defence, therefore, there would be no scope within the ordinary course of a trial for the competing demands of Articles 8 and 10 to be weighed in the balance. This in contrast to role of the civil courts in hearing defamation cases, where the court is able to hear extensive argument on the balance between these rights.

13.103 In this section, we will first consider the requirements under ECHR law. Specifically, we will briefly address Article 8 – though, as we foreshadowed in Chapter 1, the fact that Article 8 is engaged in the context of intimate images is not a particularly controversial proposition – before considering Article 10 and, particularly, how these competing rights should be balanced.

13.104 Second, we will consider whether and how other jurisdictions have incorporated a public interest defence into equivalent legislation. Third, in light of the first two sections, we will argue that the public interest could form the basis of a defence of reasonable excuse.

European Convention on Human Rights

13.105 Article 8 ECHR states:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

13.106 Article 10 ECHR states:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
13.107 Before addressing Articles 8 and 10 in any detail, it is important to note that they are, in this context, countervailing rights: many of the same considerations apply with respect to each right. Indeed, the European Court of Human Rights (“ECtHR”) has asserted that:

In cases which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the news report, or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserve equal respect… Accordingly, the margin of appreciation should in theory be the same in both cases.63

13.108 Further, as will be seen from Articles 8(2) and 10(2), both rights are qualified rights. Interference in each right is permitted to the extent that the interference pursues a legitimate aim – such as, relevantly, the protection of the rights and freedoms of others – and goes no further than is necessary in a democratic society (ie proportionate to achieving the aim). The extent to which the Article 8 right protects people from having intimate images taken or shared without their consent is therefore contingent on the extent to which the Article 10 right can be claimed. As with Article 8, so it is with Article 10: protection of Article 8 rights constitutes a legitimate aim for the purposes of interfering with freedom of expression. The two rights act against each other with equal force.

13.109 To assess each right in isolation would not be, for our purposes, a particularly revealing exercise. The better question in the context of our offences is how we mediate these rights and whether we can be sufficiently confident that the outcome of that balancing exercise will always favour the Article 8 right. Were that the case, there would be little need for a public interest defence. However, as will be seen, it is possible to envisage circumstances – and, though perhaps rare, not even particularly extraordinary circumstances – where the balance would favour Article 10 (ie that the right to freedom of expression trumps the right to private life).

13.110 Nonetheless, before addressing the balancing exercise, it is necessary to consider certain relevant characteristics of each right in turn.

Article 8

13.111 It is clear that Article 8 can be engaged by the taking and sharing of intimate images. The ECtHR has repeatedly held that the right to respect for one’s private life extends to aspects relating to one’s physical, psychological and moral integrity, including the right to protect one’s image. As stated in Von Hannover v Germany (No 2):

Regarding photos, the Court has stated that a person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers. The right to the protection of one’s image is thus one of the essential components of personal

63 Couderc and Hachette Filipacchi Associés v France [2015] ECHR 992 (App No 40454/07) at [91].
development. It mainly presupposes the individual’s right to control the use of that image, including the right to refuse publication thereof.64

13.112 Furthermore, it is in the nature of non-consensual intimate images that, quite apart from whether they engage the public interest, they can amount to an intrusion into a person’s private life.65 We say “can”, rather than “will”, because in theory an image could be intimate but, owing to the circumstances in which the image was taken, might not meaningfully be described as “private” (for example, a public act in a public forum). However, this is a distinction that might not be relevant in practice. As we note in Chapter 11, our offence would only apply to voluntary sexual or private acts (or voluntary nudity or semi-nudity) in public places where the person had a reasonable expectation of privacy in relation to the taking of the image. It is difficult to envisage a scenario where there would be a reasonable expectation of privacy for an act that was nonetheless found to be essentially public in nature. In any case, for the purposes of assessing whether a person’s freedom of expression requires a statutory defence, it is enough to note that the Article 8 right does regularly (even if not invariably) weigh heavy on the other side of the scales.

13.113 It is worth noting, too, that Article 8 gives rise not only to the negative obligation not to interfere in private life, but also to a positive obligation on the state to ensure that an individual’s Article 8 rights are protected. Exactly how that positive obligation manifests itself is primarily a matter for the state rather than the ECtHR, but that protection does need to be effective. This means that, in practice, Article 8 may require a criminal law response:

While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is, in principle, within the State’s margin of appreciation, effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.66

13.114 This is worth bearing in mind. As we will see in the following analysis of Article 10, criminal sanctions constitute a particularly severe form of interference in the freedom of expression. The protection for Article 8 rights is therefore strong, and justifiably so, but it does mean that we have to exercise particular caution with respect to its effect on freedom of expression.

Article 10

13.115 On the basis that they criminalise certain forms of gathering and sharing information, our proposed offences would constitute an interference in Article 10.

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64 Von Hannover v Germany (No 2) [2012] ECHR 228 (App No 40660/08) at [96].

65 PG and JH v the United Kingdom [2001] ECHR 550 (App No 44787/98) at [58].

This conclusion is supported by two relevant considerations. First, photographs constitute a form of expression for the purposes of Article 10. Second, criminal sanction is a clear and direct form of interference in that expression.

As to the first point, the ECtHR has explicitly recognised that photographs constitute a form of expression. As per the Court in Verlagsgruppe News GmbH v Austria, “freedom of expression extends to the publication of photos”.

Regarding the second point, in the recent case of Miller, Mr Justice Knowles noted that

The approach of the [ECtHR] has essentially been to find any State activity which has the effect, directly or indirectly, of limiting, impeding or burdening an expressive activity as an interference.

Sanctions are a direct impediment, whether criminal or otherwise; the ECtHR has held that non-criminal sanctions constitute an interference. On this basis, any limitation imposed as a result of criminal sanctions will undoubtedly be considered an interference with Article 10(1).

In order to comply with Article 10, any interference with the right to freedom of expression must satisfy the following criteria:

(1) the interference must be prescribed by law;
(2) the interference must seek to pursue one of the legitimate aims listed in Article 10(2); and
(3) the interference must be necessary in a democratic society.

The first two criteria we will address in this subsection. The third criterion – in which we assess the necessity and proportionality of the interference – is the heading under which we will conduct the balancing exercise between Articles 8 and 10.

Prescribed by law

An interference will be “prescribed by law” where:

(1) the interference in question has some basis in domestic law;
(2) the law is adequately accessible; and
(3) the law is formulated so that it is sufficiently foreseeable.

As we noted in our report on the Protection of Official Data,

67 Verlagsgruppe News GmbH v Austria [2006] ECHR 1094 (App No 10520/02) at [29]. See also Von Hannover v Germany [2004] (App No 59320/00) at [59].
In *Sunday Times v United Kingdom*, it was held that for a law to be compliant with this aspect of the Convention right, the citizen must be able to foresee, if necessary with “appropriate advice”, the legal consequence a given action may entail.\(^{70}\)

13.124 For the purposes of this consultation paper, we take the view that these criteria would be satisfied by our provisionally proposed offences were they to be contained in public legislation and drafted with sufficient specificity.

**Legitimate aim**

13.125 The criminal offences we propose are designed to protect victims from a form of abuse that carries with it a range of significant harms and affects their personal integrity and bodily privacy. As we concluded in our Harmful Online Communications consultation paper:

> In our view, criminal laws to protect people, and society, from such harms may constitute measures in pursuance of the legitimate aims of public safety, protection of health or morals, or protection of the reputation or rights of others.\(^{71}\)

13.126 Of particular relevance, however, are the Article 8 rights of those whose image has been taken or shared. As we note above, those rights are clearly engaged and the protection of the Article 8 rights (especially given the positive obligation of states to protect Article 8 rights) will constitute a legitimate aim.

**The balance between Articles 8 and 10: is the interference necessary?**

13.127 The criteria for the balancing exercise are now reasonably well established in case law, albeit that the considerations are not entirely discrete (as will be seen, many of them point back to the public interest criterion). The ECtHR, in *Von Hannover v Germany (No 2)*, set out the following criteria:

1. whether there was a contribution to a debate of general interest (in *Couderc and Hachette Filipacchi Associés v France*, the Court referred to a “contribution to a debate of public interest”, rather than general interest, but the analysis reveals that there is no substantive difference between the two);\(^{72}\)

2. the degree of notoriety of the person concerned and the subject of the report;

3. prior conduct of the person concerned;

4. the circumstances in which the photos were taken; and

5. the content, form and consequences of the publication.\(^{73}\)

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\(^{70}\) *The Sunday Times* v the United Kingdom, [1979] ECHR 9 (App No 6538/74), 2 EHRR 245 at [49].


\(^{72}\) *Couderc and Hachette Filipacchi Associés v France* [2015] ECHR 992 (App No 40454/07) at [97] to [103].

\(^{73}\) *Von Hannover v Germany (No 2)* [2012] ECHR 228 (App No 40660/08) at [108] to [113].
13.128 The Court will also examine “the way in which the information was obtained, its veracity, and the gravity of the penalty imposed.”

13.129 Some of these criteria well be more or less relevant, depending on the context. However, of these criteria, the most fundamental is the first, and it will be of relevance in all cases. As per the Court in Von Hannover v Germany (No 2), the “essential criterion is the contribution made by photos or articles in the press to a debate of general interest.” If we cannot establish that an intimate image could ever engage the public interest, then the argument in favour of a public interest defence would have little purchase.

13.130 For the sake of clarity, each of these elements is intensely fact-dependent. Any conclusion we reach as to the potential scope of an Article 10 claim should not be read as an assertion about all claims; we are not, for example, claiming that there might be a public interest in any intimate image – quite clearly this is not the case. Our concern lies in establishing whether there is a realistic prospect of someone being able raise a successful Article 10 claim, not whether all defendants could raise such a claim.

13.131 Given the fact-dependence of these criteria, and given that on any given set of facts some criteria may be more or less relevant, there is little to be gained by analysing each exhaustively.

**Contribution to a debate of public interest**

13.132 The ECtHR has long asserted that “there is little scope under Article 10(2) … for restrictions on political speech or on debate of questions of public interest.” This is particularly true in respect of the press. In Goodwin v United Kingdom, the ECtHR noted that “freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance.”

13.133 In Bladet Tromsø and Stensaas v Norway, the ECtHR stated that:

> The most careful scrutiny on the part of the Court is called for when… the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern.

13.134 There is, however, no immutable definition of the public interest. The dichotomy here is between those matters that are in the public interest – which is to say, matters of importance or value to the public – and those that merely engage the curiosity of the public:

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74 Satakunnan Markkinaporssi Oy and Satamedia Oy v Finland [2017] ECHR 607 (App No 931/13) at [165].

75 Wingrove v United Kingdom [1996] ECHR 60 (App No 17419/90) at [58].


78 See, for example, Von Hannover v Germany (No 2) [2012] ECHR 228 (App No 40660/08) at [114].
the public interest cannot be reduced to the public’s thirst for information about the private life of others, or to the reader’s wish for sensationalism or even voyeurism.\textsuperscript{79}

13.135 This is not to say that freedom of expression has no bearing on matters of entertainment, but such matters will not justify an interference in a person’s Article 8 rights.

13.136 As to whether intimate images could ever engage the public interest, there are two matters that require consideration.

13.137 First, one might argue that an article will always be sufficient – that photographs are “nice to have” but never strictly necessary. Such a proposition finds little support in case law. In \textit{Krone Verlag GmbH & Co KG v Austria}, the ECtHR dismissed as insufficient the Austrian court’s argument that the applicant “had no legitimate interest in publishing the picture as it had no information value \textit{per se}.”\textsuperscript{80} In \textit{Jersild v Denmark}, the Court remarked:

In considering the "duties and responsibilities" of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media... The audiovisual media have means of conveying through images meanings which the print media are not able to impart.\textsuperscript{81}

13.138 This point was echoed in the House of Lords by Lord Hoffman in \textit{Campbell v MGN Ltd}:

From a journalistic point of view, photographs are an essential part of the story. The picture carried the message, more strongly than anything in the text alone, that the Mirror’s story was true.\textsuperscript{82}

13.139 An important caveat to this general proposition was, however, raised in \textit{Tammer v Estonia}, confirming that the private life disclosed must be relevant to the public interest claimed.\textsuperscript{83} The mere fact that the article as a whole engages the public interest does not justify any image being published, no matter how unnecessarily intimate.

13.140 However, even if we were to accept that \textit{publishing} intimate images could never engage the public interest – which, for the avoidance of doubt, we do not – it doesn’t really protect the photographer who shares the photographs with the journalist. In any case, quite apart from the photographer’s Article 10 rights, the ECtHR has long held that restrictions on the ability of the press to \textit{gather} information require careful

\textsuperscript{79} \textit{Couderc and Hachette Filipacchi Associés v France} [2015] ECHR 992 (App No 40454/07) at [101].

\textsuperscript{80} \textit{Krone Verlag GmbH & Co KG v Austria} [2002] ECHR 159 (App No 34315/96) at [37].

\textsuperscript{81} \textit{Jersild v Denmark} [1994] ECHR 33 (App No 15890/89) at [31].

\textsuperscript{82} \textit{Campbell v MGN Ltd} [2004] UKHL 22 at [77].

\textsuperscript{83} \textit{Tammer v Estonia} [2001] ECHR 83 (App No 41205/98) at [68].
This also means that it would be difficult – without more – to argue that Article 10 would protect the freedom to share the images, but not the freedom to take them.

13.141 Second, while we may sensibly entertain the notion that full nudity will rarely engage the public interest, a photograph showing that someone was nude (albeit edited appropriately) may well engage the public interest, particularly where that which rendered the image “intimate” was the same matter that engaged the public interest.

13.142 Consider the following example. If a politician were covertly photographed engaging in sexual activity with a foreign intelligence officer, we might recoil if the photographs were shown unedited, but there may well be a public interest in the photographs being shared in such a way that they are still, under the terms of our proposed offence, intimate. This may well be the only way of lending credibility to a story that could otherwise be dismissed as conspiracy. The more broadly “intimate” is defined, the less scope there is for arguing that there is no public interest in seeing them.

13.143 Of course, the Tammer v Estonia caveat that we noted above is helpful here. There is a balance to be struck with Article 8, so if the photograph interferes with the Article 8 right more than is necessary to meet the Article 10 right, then the balance would favour Article 8 rather than protecting the publication of the image. Again, the mere fact of there being a public interest in the article and some photographic element does not mean that any image may be published, no matter how intimate or graphic.

13.144 Nonetheless, the possibility that an intimate image may engage the public interest is difficult to discount.

How well known is the person concerned and what is the subject of the report?

13.145 The notoriety of the person affects the analysis of both Article 8 and Article 10. The ECtHR has held that a distinction has to be made between private individuals and those acting in the public sphere. One reason for this was noted in Petrenco v Moldova:

the former, unlike the latter, have voluntarily exposed themselves to a close scrutiny of their actions by both journalists and the general public and must therefore show a greater degree of tolerance.

13.146 Put simply, those factors that inform the scope of a public individual’s right to privacy will be different, or of different weight.

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84 See, for example, Guseva v Bulgaria [2015] ECHR 171 (App No 6987/07) at [53].
85 Other factors may be relevant that mean the Article 10 rights of the sharer are protected and not those of the taker – motive could be one example, or obligations of confidentiality – but on the assessment of public interest, the starting position must be that the public interest in the press receiving information and the public interest in the press imparting that information must point in the same direction.
86 See Fressoz and Roire v France [1997] ECHR 194 (App No 29183/95) at [54].
87 Von Hannover v Germany (No 2) [2012] ECHR 228 (App No 40660/08) at [110].
88 Petrenco v Moldova (20928/05) [2010] ECHR 419 (App No 20928/05) at [55].
13.147 The Article 10 argument is generally weaker in the case of private individuals. As the Court noted in Von Hannover:

While in the former case [public individual exercising public function] the press exercises its role of “public watchdog” in a democracy by imparting information and ideas on matters of public interest, that role appears less important in the latter case [private individual in private capacity].89

13.148 What is interesting for the purposes of our offence is that, given the nature of the images in question, even images of public figures will – to some extent – likely be images of them in a private rather than public capacity. This is not to deny the potential for public interest in those images.

Prior conduct of the person concerned

13.149 One factor that will be taken into consideration is the extent to which the subject of the image has cooperated in the past and whether the image has already appeared in previous publications. However, it is clear that such a factor does not remove all protection that would otherwise be afforded under Article 8.90 As per the Court in Couderc and Hachette Filipacchi Associés v France, an “individual’s alleged or real previous tolerance or accommodation with regard to publications touching on his or her private life does not necessarily deprive the person concerned of the right to privacy.”91 This caveat is of particular relevance and importance in the context of intimate images and the exercise of individual autonomy in determining if and how those images are taken and shared.

The circumstances in which the photos were taken

13.150 Relevant to the extent to which those taking or publishing photographs can rely on their Article 10 right will be the manner in which the photograph was taken (ie through subterfuge, bad faith, or without consent).

13.151 Consent is clearly a relevant factor in our offence given that it features in both the conduct and fault elements of the offence. However, consent also raises a particular problem in the context of the press and information in the public interest. Any obligation to secure consent prior to publication will amount to prior restraint. This raises similar issues to those raised by a prior notification requirement (albeit to an even greater degree), which was addressed in Mosley v The United Kingdom:92

Finally, the Court has emphasised that while Article 10 does not prohibit the imposition of prior restraints on publication, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest… The Court would, however, observe that prior restraints may be more readily justified in cases which demonstrate no pressing need for immediate

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89 Von Hannover v Germany (No 2) [2012] ECHR 228 (App No 40660/08) at [110].
90 Von Hannover v Germany (No 2) [2012] ECHR 228 (App No 40660/08) at [111].
91 Couderc and Hachette Filipacchi Associés v France [2015] ECHR 992 (App No 40454/07) at [130].
92 Mosley v The United Kingdom [2011] ECHR 774 (App No 48009/08).
publication and in which there is no obvious contribution to a debate of general public interest.\textsuperscript{93} ...

[I]t is generally accepted that any pre-notification obligation would require some form of “public interest” exception… Thus a newspaper could opt not to notify a subject if it believed that it could subsequently defend its decision on the basis of the public interest. The Court considers that in order to prevent a serious chilling effect on freedom of expression, a reasonable belief that there was a “public interest” at stake would have to be sufficient to justify non-notification, even if it were subsequently held that no such “public interest” arose.\textsuperscript{94} ...

[A]ny pre-notification requirement would only be as strong as the sanctions imposed for failing to observe it. A regulatory or civil fine, unless set at a punitively high level, would be unlikely to deter newspapers from publishing private material without pre-notification.\textsuperscript{95}

Although punitive fines or criminal sanctions could be effective in encouraging compliance with any pre-notification requirement, the Court considers that these would run the risk of being incompatible with the requirements of Article 10 of the Convention. It reiterates in this regard the need to take particular care when examining restraints which might operate as a form of censorship prior to publication. It is satisfied that the threat of criminal sanctions or punitive fines would create a chilling effect which would be felt in the spheres of political reporting and investigative journalism, both of which attract a high level of protection under the Convention.\textsuperscript{96}

13.152 It is also worth noting the concerns raised by the Guardian (as intervenor in \textit{Mosley}) about the ease with which any notified person could secure an injunction, which imports both delay and significant cost.

13.153 As a way of protecting public interest expression absent a public interest defence, we do not therefore square the circle by relying on prior consent.

\textit{Content, form, and consequences of publication}

13.154 The ECtHR affords particular latitude to journalists in determining how to cover a particular subject, recognising that it is a matter of professional judgment. As noted by the Court in \textit{Couderc and Hachette Filipacchi Associés v France}, “Article 10 of the Convention also leaves it for journalists to decide what details ought to be published to ensure an article’s credibility”.\textsuperscript{97}

13.155 However, such freedom is not without responsibility. Again, as per the Court in \textit{Couderc and Hachette Filipacchi Associés v France}, “[w]herever information bringing

\begin{flushleft}
\textsuperscript{93} Above at [117].
\textsuperscript{94} Above at [126].
\textsuperscript{95} Above at [128].
\textsuperscript{96} \textit{Mosley v The United Kingdom} [2011] ECHR 774 (App No 48009/08) at [129].
\textsuperscript{97} \textit{Couderc and Hachette Filipacchi Associés v France} [2015] ECHR 992 (App No 40454/07) at [139]. See also \textit{Fressoz and Roire v France} [1997] ECHR 194 (App No 29183/95) at [54].
\end{flushleft}
into play the private life of another person is in issue, journalists are required to take into account, in so far as possible, the impact of the information and pictures to be published prior to their dissemination.\footnote{Couderc and Hachette Filipacchi Associés v France [2015] ECHR 992 (App No 40454/07) at [140].}

13.156 This element hints at one of the recurring themes within these criteria, which is the requirement of good faith on the part of the person claiming the Article 10 right. We saw it earlier in the previous criterion, too: images obtained through subterfuge or bad faith will weigh against the Article 10 right.

**Gravity of penalty imposed**

13.157 As we noted above, any form of sanction can constitute an interference in Article 10, including non-criminal sanctions. In *Karsai v Hungary*, it was held that:

> In the present case, it is true that the applicant was subjected to civil-law, rather than criminal, sanctions. However, it considers that the measure imposed on the applicant, namely, the duty to retract in a matter which affects his professional credibility as a historian, is capable of producing a chilling effect.\footnote{Karsai v Hungary [2009] ECHR 1974 (App No 5380/07) at [36].}

13.158 It is noteworthy that the sanction that could be imposed for our proposed offence is a potentially serious criminal sanction. Of course, as we have already noted, this is justified by the positive obligation under Article 8; for the purposes of the balancing exercise, however, it does constitute a significant interference in Article 10.

**Does Article 10 necessitate a public interest defence?**

13.159 Our provisional view is that some form of public interest defence is required to ensure adequate protection of Article 10 rights. It is not difficult to conceive of a situation whereby an intimate image might engage the public interest; or, at the very least, we cannot be confident that no such situation could exist. That such a public interest matter – were it to exist – might be shared accurately and in good faith, albeit without consent, seems entirely plausible. It in no way belittles the respect for Article 8, or ignores the harm that can afflict individuals whose image is taken or shared, to recognise that these situations may exist and, in rare circumstances, sway the balance in favour of Article 10.

13.160 However, such behaviour (both the taking of the image and its publication) would be caught by our base offence, no matter that the conduct was carried out in good faith. Absent the ability of the defendant to raise the public interest as a defence, there would be no forum in the ordinary course of a trial in which the Article 10 issue could be raised. If a prosecution were to go ahead where Article 10 really was in issue, this would leave any subsequent conviction open to appeal. We take the view that an action taken in the public interest could be a reasonable excuse for the purpose of our proposed offence.
Comparative defences

13.161 Before considering the form that such a public interest might take, it is worth considering some relevant statutory defences for the purposes of comparison.

England and Wales

13.162 In England and Wales, the disclosure offence provides a defence in relation to journalistic material. Section 33(4) CJCA 2015 states:

It is a defence for a person charged with an offence under this section to show that –

(a) the disclosure was made in the course of, or with a view to, the publication of journalistic material, and

(b) he or she reasonably believed that, in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest.

13.163 The explanatory note to this section states:

The defence in subsection (4) applies to those directly engaged in journalism and to their sources because the defence applies both to disclosure in the course of publication of journalistic material and to disclosure with a view to such publication. In either case the defendant needs to show that he or she reasonably believed that there was, in all the circumstances, a public interest in the publication in question. Subsection (7)(b) defines "publication" as disclosure to the public at large or to a section of the public.100

13.164 The CPS guidance101 on the disclosure offence states:

It is recognised that occasionally there would be circumstances where such pictures will evidence a story of genuine public interest. The defence therefore ensures that the freedom of the press to publish such stories is not fettered.

In relation to the defence relating to disclosures for journalistic activity, a defence will be established where it can be shown that the photograph or film was disclosed in the course of or with a view to the publication of journalistic material (for example by the journalist or by a journalist's source). If that is the case, the journalist must also show that he or she had a reasonable belief, in the particular circumstances, that there was a legitimate need for the public to have access to the journalistic material.

The guidance also points prosecutors to more general prosecutorial guidance on cases which involve the media.102

100 Explanatory Notes to the Criminal Justice and Courts Act 2015 para 337.
13.165 “Journalistic material” is not defined in the disclosure offence. It is, however, defined in section 13 of the Police and Criminal Evidence Act 1984 (“PACE 1984”) as “material acquired or created for the purposes of journalism”. “For the purposes of journalism” is not defined in PACE 1984.

13.166 It is arguable that the defence, based on the explanatory note and CPS guidance, does not extend to those who are not directly engaged with journalism as an occupation or as a profession. However, the civil courts have adopted a much broader and more flexible approach. Publication on a matter of public interest is not restricted to professional journalists and any defences arising out of defamation cases have extended to citizen journalists, bloggers and regular contributors.103

13.167 The test in section 33(4), therefore, is not whether an individual is a journalist but whether the disclosure was for the purposes of publishing journalistic material. Furthermore, the courts are not required to consider whether the material was in the public interest (i.e. a true public interest defence) but merely that the defendant reasonably believed the publication was or would be in the public interest. The Parliamentary debates do not address why this test was adopted.

13.168 Lord Faulks,104 on introducing a number of amendments to the disclosure offence in the House of Lords, stated that

where an individual adduces sufficient evidence that the disclosure in question took place in the course of, or with a view to, the publication of journalistic material and they reasonably believed that, in the particular circumstances, the publication of that journalistic material was, or would be, in the public interest it will be for the prosecution to prove the contrary.

13.169 Whilst the Lords acknowledged that the test was a “stringent” one and likely only to be used in rare cases, they agreed that the test was “necessary” in order to ensure the offence did not “inappropriately interfere with press freedom”.105

13.170 Lord Faulks emphasised however that the defence was likely only to be used in rare cases.

This defence will, in the rare cases to which we expect it to apply—and rare they will be—enable journalists and their sources to disclose images, for example with a view to publishing a commercial newspaper story, if they genuinely and reasonably believed there was a legitimate public interest in the publication.

13.171 What is striking about this defence and particularly its focus on journalistic material is that it is, in one sense, more restrictive than Article 10 might require. Of course, in practical terms, it is not clear that the requirement of “journalistic material” adds terribly much to the public interest approach. Those who are most likely to be able to invoke the public interest successfully would presumably also be able to claim that

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104 Hansard (HL), 20 October 2014, vol 756, col 524.

105 Hansard (HL), 20 October 2014, vol 756, col 524.
their purpose was journalistic, at least in the sense of publicly holding someone to account. Absent a clear definition of journalism, there is a risk that the defence will fall victim to circular reasoning along these lines.

13.172 The more significant limitation in terms of Article 10, however, is that the defence would not protect the Article 10 rights of someone who published in the public interest but happened not to do so for the purposes of journalism. While much of the ECHR case law on the matter concerns press freedom, and it is clear that press freedom is of particular importance, it seems unlikely that the ECtHR would be quick to dismiss an Article 10 application that could establish that a disclosure was in the public interest merely because it was not also journalistic.

Scotland

13.173 Under section 2(3)(d) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, it is a defence where “the defendant reasonably believes the disclosure was in the public interest.”

13.174 Unlike its counterpart in the disclosure offence found in section 33 of the CJCA 2015, the provision does not refer to journalistic material or the purposes of journalism.

13.175 The explanatory note simply states that:

It is anticipated that there will be few occasions on which disclosure of intimate photographs or images could be reasonably believed to be in the public interest in terms of the defence at subsection (3)(d), bearing in mind that what is of interest to the public is not the same thing as to what is in the public interest; this will be a matter for the courts to assess in the particular circumstances of a case.106

13.176 Prior to the introduction of the Bill containing the Scottish disclosure offence, the Scottish Government ran a consultation on the non-consensual sharing of intimate images seeking feedback on whether there should be any statutory defences. Whilst there were a limited number of responses to this consultation question, concerns were raised by consultees over any proposals for a "journalistic exemption".107 These were summarised in the report as follows:108

… any attempt to mirror the "journalistic exemption" (as provided in England and Wales under section 33 of the Westminster Criminal Justice and Courts Act 2015) could hinder prosecutions and would not meet the intent of the proposal. Whether there could be any justified and legitimate need for journalists to share such images was also questioned.

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106 Explanatory Notes to the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 para 16.
108 Above.
In their report, the Justice Committee of the Scottish Parliament also noted that they had received evidence that the “public interest” defence was unnecessary and may encourage “spurious defences”.\footnote{Citing the written submission of Prof Lillian Edwards.} The Faculty of Advocates said that if the intention of this provision was to allow for the publication of journalistic material, this should be made expressly clear, and that there might be benefit in using terminology consistent with English law.\footnote{Scottish Parliament Justice Committee, \textit{Stage 1 Report on the Abusive Behaviour and Sexual Harm (Scotland) Bill}, (21 January 2016) SP Paper 885.1 para 83, \url{https://www.parliament.scot/S4_JusticeCommittee/Reports/JS042016R02Rev.pdf} (last visited 24 February 2021).}


We anticipate that it is only in very limited circumstances that legitimate journalism in the public interest would involve the publication of intimate private images without the subject's consent.

Despite these observations, the Bill was passed without any amendments to this provision. At the time of writing, we are not aware of any reported cases on this defence\footnote{Data obtained directly data from the Scottish Government on the disclosure offence shows that between 2017-2019, 81 people were prosecuted under Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s2, and 67 of those pleaded guilty (83% of cases).} nor is there significant academic analysis of it.

\textbf{Western Australia}

In Western Australia, section 221(3)BD also introduces a defence that allows for the distribution of intimate images for the purposes of media activity.\footnote{Criminal Code 1913, s 221(3)BD.}

It is qualified by the requirement that the defendant did not intend to cause harm and the defendant reasonably believed the distribution to be in the public interest.

It is a defence to a charge under subsection (2) to prove that —

\begin{itemize}
\item[(c)] the person who distributed the image —
\begin{itemize}
\item[(i)] distributed the image for media activity purposes; and
\item[(ii)] did not intend the distribution to cause harm to the depicted person; and
\item[(iii)] reasonably believed the distribution to be in the public interest.
\end{itemize}
\end{itemize}
13.182 “Media activity purposes” are defined under section 221BD(1) as, the purposes of collecting, preparing for the distribution of, or distributing — (a) material having the character of news, current affairs or a documentary; or (b) material consisting of commentary or opinion on, or analysis of, news, current affairs, or a documentary.

13.183 The defence does not appear to be limited to professional journalists.

Reasonable belief vs true public interest defence

13.184 It is noteworthy that none of the comparable versions of this defence—in the existing disclosure offences in England and Wales, Scotland, and Western Australia—is a “true” public interest defence:

A true public interest defence is a justification of conduct and not an excuse for it. It is a finding by the court that the disclosure was in fact in the public interest, not merely that the person making the unauthorised disclosure believed it to be in the public interest. Such a defence would be available even if the motive of the defendant were entirely one of malice or self-interest. For similar reasons, it would be no defence that the defendant believed that he or she was acting in the public interest but, in fact, was not.114

13.185 Instead, as we discussed in the context of law enforcement and administration of justice above, they are “reasonable belief” defences, which are available if the defendant reasonably believed that the disclosure (of the journalistic material containing the image) was in the public interest.

13.186 However, there are examples of true public interest defences in the criminal law. For example, the Data Protection Act 2018 contains both a defence based on reasonable belief for the purposes of journalism (section 170(3)(c)) and also a defence that the disclosure was justified as being in the public interest (section 170(2)(c)). The legal burden is on the defendant to prove the defence on a balance of probabilities.115

13.187 If the defence finds its justification in Article 10, the starting point would naturally be a true public interest defence. Whilst good faith and respect for professional expertise are clearly relevant in much of the ECHR case law, the overriding factor is not a matter of belief (reasonable or otherwise) in the public interest, but a direct appeal to the actual public interest.

13.188 This represents a high bar for the defendant to meet, certainly relative to proving reasonable belief and especially given the amorphous nature of the “public interest”. Were Article 10 the only determinative factor, it would be easy to regard compliance with Article 10 as the “floor” and argue that it is within our gift to accord even greater scope to Article 10 rights by requiring only reasonable belief in the public interest. However, this is not the situation in which we find ourselves. Article 8 constrains the Article 10 right. Given that the careful balancing act between the two is predicated on

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the public interest, and that the balance would clearly be tipped in favour of Article 10 by a defence requiring proof of something less than the public interest, it is not entirely clear that a defence founded in the public interest based solely on reasonable belief would constitute a proportionate interference in Article 8 ECHR.

13.189 Interestingly, the public interest defence in defamation is an even higher bar, requiring proof both that the statement, or part of it, related to a matter of public interest and that the defendant reasonably believed that publishing the statement was in the public interest. Section 4(4) of the Defamation Act 2013 provides:

In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate.

13.190 It is worth bearing in mind that defamation under the Defamation Act 2013 is not a criminal offence; this is a form of civil sanction. So, whilst it engages many of the same issues as our proposed offence with respect to Articles 8 and 10, the fact that the interference in Article 10 is not in the form of criminal sanction will shift the balance away from Article 10 to a degree.

13.191 That said, this form of defence actually reflects well a number of the elements that we identified in the Article 8/10 jurisprudence, such as the public interest, good faith, and scope for journalistic judgment. This was the position adopted in the Supreme Court in Serafin v Malkiewicz & Ors. As per Lord Wilson:

Its three requirements that the statement should have been on a matter of public interest, that the defendant should have believed that publication of it was in the public interest and that the belief should have been reasonable, all of which have to be established by the defendant, are intended, and may generally be assumed, to ensure that operation of the section generates no violation either of the claimant’s right under Article 8, or of the defendant’s right under Article 10.

It is not so clear, however, that such a high bar would be suitable in the criminal context.

CONCLUSION

13.192 We provisionally propose that a defence of reasonable excuse should be available in the context of our provisionally proposed base offence, which should include a non-exhaustive list of examples for the court to consider. We would welcome examples from consultees of circumstances other than those we deal with above which would warrant the application of a defence of reasonable excuse.

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116 Defamation Act 2013, s 4(1).
117 Serafin v Malkiewicz & Ors [2020] UKSC 23 at [74].
Consultation Question 42.

13.193 We provisionally propose that there should be a defence of reasonable excuse available in the context of our provisionally proposed base offence which includes:

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

(2) taking or sharing the defendant reasonably believed was necessary for the purposes of legal proceedings;

(3) sharing the defendant reasonably believed was necessary for the administration of justice;

(4) taking or sharing for a genuine medical, scientific or educational purpose; and

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

Do consultees agree?
INTRODUCTION

14.1 The first Part of this consultation paper outlined the existing law that relates to intimate image abuse and demonstrated the need for a new set of more comprehensive offences covering a broader range of harmful behaviours.

14.2 The second Part of this consultation paper considered what these new more comprehensive offences should be. We considered the nature of the image and what images ought to be deemed “intimate”. We looked at the conduct and fault elements of any new offence. We also considered when taking and/or sharing an intimate image without consent should be criminalised and whether there are circumstances which do not warrant criminalisation.

14.3 In this chapter we first set out our provisionally proposed new framework of offences that cover taking and sharing intimate images without consent, and threats to share such images.

14.4 In the second section of this chapter we address whether these offences should be considered sexual offences and suggest that whilst much of this behaviour sits on a “continuum” of sexual abuse and may have sexual elements, not all of it is explicitly sexual. There are some instances of taking or sharing intimate images without consent that are not sexual in nature, but may involve nudity or a private act (such as using the toilet), as well as instances where the purpose of the perpetrator is not sexual.

14.5 In the third section of the chapter we address the need to extend protections afforded to victims of sexual offences to victims of taking and sharing intimate images without consent. We received an overwhelming preliminary response from stakeholders of the need for victims of intimate image abuse to have the same protections afforded to victims of sexual offences, such as automatic anonymity and special measures at trial. Further, we were told that there is a need for notification requirements and Sexual Harm Prevention Orders (“SHPOs”) to be available in appropriate cases.

THE PROVISIONALLY PROPOSED OFFENCES

14.6 In this consultation paper we have made the case for a new unifying framework that criminalises taking, sharing and threatening to share intimate images without consent.

14.7 We have provisionally proposed four categories of offences.

(1) a “base” offence of taking or sharing an intimate image without consent, without a reasonable belief in consent, but with no additional intent element.
(2) an “additional” more serious offence of taking or sharing an intimate image without consent, with an intention to humiliate, alarm or distress the depicted person.¹

(3) an “additional” more serious offence of taking or sharing an intimate image without consent, without a reasonable belief in consent, for the purpose of obtaining sexual gratification, for oneself or another.

(4) an offence of threatening to share an intimate image.

14.8 These offences are designed to capture the range of behaviours that constitute intimate image abuse, while making the law governing this behaviour clearer and more consistent. The additional offences ensure that more culpable behaviour is dealt with appropriately. We outline the provisionally proposed offences in detail below.

The “base” offence

14.9 Under the “base” offence, it would be an offence for a person (D) intentionally to take or share an “intimate” (sexual, nude, semi-nude or private) image of someone else (V) if—

(a) V does not consent; and

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

The offence includes two additional elements which only apply when there is a public element to the image.

14.10 First, where an intimate image is taken or shared without consent and:

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

(b) the victim is, or the defendant reasonably believes the victim is, voluntarily engaging in a sexual or private act, or is voluntarily nude or semi-nude.

Under these circumstances, D has not committed an offence unless V had a reasonable expectation of privacy in relation to the taking of the image.

14.11 Secondly, where an intimate image has been shared without consent and:

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

¹ This offence would not include a requirement that the prosecution prove that the defendant had no reasonable belief in consent. We explain this at para 14.13 below.
either the person depicted in the image consented to that previous sharing, or the defendant reasonably believes that person depicted in the image consented to that previous sharing.

Under these circumstances, D has not committed an offence. As with the “without consent” circumstance element discussed in Chapter 8, the legal burden of proof for both tests would be on the prosecution.2

The first “additional” offence: An intention to humiliate, alarm or distress

14.12 Under the first “additional” offence, it would be an offence for a person (D) intentionally to take or share an “intimate” (sexual, nude, semi-nude or private) image of another person (V) if—

(a) V does not consent; and

(b) D does so with the intention of humiliating, alarming or distressing V.

14.13 In this offence there would be no requirement that the prosecution prove that the defendant does not reasonably believe that V consents, as such a belief would be inconsistent with the intention of humiliating, alarming or distressing the victim.

14.14 The offence would also include the two “public” elements outlined at paragraphs 14.10 and 14.11 above. Simply, prosecutors will need to apply one of those additional elements if either the intimate image was taken in a place to which the public has access, or if the intimate image was previously shared in public.

The second “additional” offence: An intention to obtain sexual gratification

14.15 Under the second “additional” offence, it would be an offence for a person (D) intentionally to take or share an “intimate” (sexual, nude, semi-nude or private) image of another person (V) if—

(a) V does not consent;

(b) D does not reasonably believe that V consents; and

(c) D does so with the intention that they or a third person will, for the purpose of obtaining sexual gratification, look at the image.

The offence would also include the two “public” elements outlined at paragraphs 14.10 and 14.11 above, in the same way.

The threatening to share offence

14.16 Under the threatening to share offence, it would be an offence for a person (D) to threaten to share an intimate image of another person (V), where—

(a) D intends to cause V to fear that the threat will be carried out; or

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2 See paras 11.102 and 11.137 above for further detail.
(b) D is reckless as to whether V will fear that the threat will be carried out.

14.17 The offence would also include the two “public” elements outlined at paragraphs 14.10 and 14.11. As these additional elements can apply when an image is shared (when either the image was taken in public or previously shared in public), they can apply in the same way when there is a threat to share.

14.18 We provisionally proposed that this offence is only committed when the victim is both the person depicted in the image and the recipient of the threat.

Definition of the image

14.19 We provisionally proposed that “image” should include both photographs and videos.

14.20 We have used the term “intimate” as an umbrella term to encompass the types of images that fall within our provisionally proposed offences. “Intimate” includes images that are sexual, nude, semi-nude or private.

14.21 We have described a sexual image as an image which 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.

14.22 We have defined “nude” and “semi-nude” as images of a person’s genitals, buttocks or breasts, whether exposed or covered with anything worn as underwear, or images of a person’s partially exposed breasts, taken down their top. Where a nude or semi-nude image has been altered so that the depicted individual’s breasts, genitals and/or buttocks are not exposed (for example by an emoji or black strips), this should be caught within the category “nude or semi-nude” provided that the depicted person is exposed to a similar degree as they would be if they were wearing underwear.

14.23 We have defined “private” as including images of people using the toilet. We have asked for consultees’ views on whether “private” should also include images of people undressing, showering or bathing where their genitals, buttocks and breasts are not exposed or covered only with underwear.

14.24 Images which have been digitally altered to appear intimate (for instance images which have been photoshopped to appear sexual or nude and “deepfake” pornography) will be included as part of the sharing and threatening to share offences.

14.25 We have also asked for consultees’ views on whether and to what extent images which are considered intimate within particular religious groups should be included in intimate image offences, when the perpetrator is aware that the image is considered intimate by the person depicted.

14.26 Finally, we have asked for consultees’ views on whether the image must also depict something that is not of a kind ordinarily seen in public.

Definitions of “taking” and “sharing”

14.27 The current voyeurism and “upskirting” offences do not define “taking”. We have asked for consultees’ views on whether taking should be defined and whether any forms of taking are missing from the current offences. We considered whether some
forms of copying, such as a taking a screenshot during a video call or downloading an image, can amount to “taking”. We provisionally concluded that some limited forms of copying should be captured within our new framework and proposed that our taking offence should only include such behaviour where, but for the acts of the perpetrator, the image would not otherwise exist.

14.28 We provisionally proposed that “sharing” an intimate image should capture:

(1) sharing online, including on websites, via email, live-streaming and through private messaging services;

(2) sharing offline, including through the post or distribution by hand; and

(3) showing to someone else, including images stored on a device and printed copies.

14.29 As stated above, we provisionally proposed that images which have been digitally altered to appear intimate should be included as part of the sharing and threatening to share offences.

Reasonable excuse

14.30 We provisionally proposed that a defendant should be not convicted of the base offence where there is a reasonable excuse for their conduct, and that the following (non-exhaustive) conduct should amount to a reasonable excuse for behaviour that would otherwise be prohibited:

(1) taking or sharing the defendant reasonably believed was necessary for the purpose of preventing, detecting, investigating or prosecuting crime;

(2) taking or sharing the defendant reasonably believed was necessary for the purpose of legal proceedings;

(3) sharing the defendant reasonably believed was necessary for the administration of justice;

(4) taking or sharing for a genuine medical, scientific or educational purpose; and

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

CAN THESE BEHAVIOURS BE CONSIDERED SEXUAL OFFENCES?

What makes an offence “sexual”??

14.31 Currently, the “taking” offences – voyeurism and “upskirting” – are contained in sections 67 and 67A of the Sexual Offences Act 2003 (“SOA 2003”). However, the disclosure offence appears in a separate piece of legislation: section 33 of the Criminal Justice and Courts Act 2015 (“CJCA 2015”). Thus, while “taking” offences are included with the SOA 2003 framework of sexual offences, the disclosure or “sharing” offence is not. This inconsistency has been criticised by many stakeholders including
academics, Parliamentarians, lawyers, campaigners and victims of intimate image abuse.

14.32 We observe that an offence does not have to be included within the SOA 2003 to be considered a “sexual” offence and that there are offences falling outside the SOA which can be classified as sexual in nature. However, there are three legitimate concerns that require exploration. First, such offending may be committed by an offender with a sexual motivation or amount to sexual exploitation of the victim. Secondly, the offence may result in sexual harm to a victim. Thirdly, the categorisation of an offence as “sexual” acts as a preferential passport to access procedural safeguards such as special measures, and triggers anonymity, notification requirements and powers to make ancillary orders which could benefit and protect victims of this offending. While in some cases victims may gain access to measures designed to support a complainant through the criminal process, the hurdles are greater than in those cases where a sexual offence has been charged. We consider these issues in detail later in this chapter.

14.33 In order to reach a view on whether taking and sharing intimate images without consent should be considered sexual offending we need to consider what it is that makes an offence “sexual”.

14.34 Many of the offences contained in the SOA 2003 are explicitly sexual in nature. Most involve some form of sexual violence (such as rape or sexual assault) or sexual activity (such as engaging in sexual activity in the presence of a child). However, as Clare McGlynn and others have argued, not all sexual offences require physical contact. Some have a sexual element not necessarily related to contact, such as voyeurism (observation or recording for the purpose of obtaining sexual gratification), exposure (the intentional exposure of the defendant’s genitals, intending that someone will see them and be caused alarm or distress) and grooming offences (including sexual communication with a child and meeting a child after said sexual communication).

14.35 As Erika Rackley and Kelly Johnson said to us during pre-consultation stakeholder engagement, “we know that sexual offences aren’t always motivated by sex. We know that rape isn’t always about sexual gratification”. While a perpetrator’s purpose may—and for some offences must—be taken into account, an offence is not a sexual

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3 See for example Youth Justice and Criminal Evidence Act 1999, s 62, which defines sexual offences for the purposes of Part 2 of the Act more broadly.
4 See Part 2 of the Youth Justice and Criminal Evidence Act 1999.
6 See Sexual Offences Act, s 80.
7 For example, Sexual Harm Prevention Orders (sections 343 to 358 of the Sentencing Code 2020).
9 For example, the voyeurism offence in section 67(3) of the SOA 2003 requires the act to be done “with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at an image of B doing the act”. This is also required in one of the “upskirting” offences, section 67A(3)(a) of the SOA 2003. The offence of causing a child to watch a sexual act, in section 11 of the SOA 2003, must also be done for the purpose of obtaining sexual gratification.
offence merely because of the motive. The offences currently in the SOA 2003 reflect this. A number of provisions, such as rape and sexual assault, do not require proof that the defendant’s purpose was to obtain sexual gratification for the offence to be made out. Other offences in the SOA 2003 have a non-sexual additional intent element, such as exposure, which requires that the perpetrator “intends that someone will see [his genitals] and be caused alarm or distress”.  

14.36 Sexual offences are often described as a violation of the victim’s sexual autonomy. “Autonomy” is often understood as relating to self-governance, or the ability of a person or entity to have the agency to act on their own values and interests. “Sexual autonomy” refers to the ability of a person to choose with whom, when, how and under what circumstances they engage in sexual activity. At the heart of this is the notion of consent: in order to preserve one’s sexual autonomy, any other person must obtain consent before engaging in sexual activity of any kind with that person. This allows them the agency to act on their own desires and interests.

14.37 Sexual offences can be considered a violation of a person’s sexual autonomy because the lack of consent removes a person’s ability to choose whether, with whom and under what circumstances to engage in sexual activity. In its review of sexual offences prior to the introduction of the SOA 2003, the Home Office emphasised that this criminal behaviour “is a violation of the victim’s autonomy and freedom to decide how and with whom she (or he) would want to share any kind of sexual experience”. Consent was highlighted as “the essential issue” in sexual offences.

14.38 The Scottish Law Commission also noted in their Report on Rape and Other Sexual Offences that the “wrong” done to the victim of a sexual offence such as rape or sexual assault is the failure to respect their sexual autonomy. It also took the view that obtaining consent is a “key element of giving effect to sexual autonomy”.

14.39 Danielle Citron has written about the way in which sexual offences can breach an individual’s sexual privacy, which “serves as a cornerstone for sexual autonomy and

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10 Sexual Offences Act 2003, s 66.
11 Sexual Offences Act 2003, s 66(1)(b).
14 As above.
15 See for example S J Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law (1998).
consent”. During pre-consultation stakeholder engagement, Citron reiterated to us that “sexual privacy is so important to autonomy, dignity, equality. That’s why its invasion is wrongful and abusive”.

**Intimate image abuse on a continuum of sexual abuse**

14.40 In Chapter 5 we discussed why intimate image abuse is a wrong worthy of criminalisation. We described intimate image abuse as a violation of the victim’s sexual privacy, sexual autonomy, dignity and bodily privacy.

14.41 In its review of sexual offences that preceded the SOA 2003, the Home Office recommended an offence of voyeurism and concluded that this “peeping behaviour” formed a “continuum of behaviour with other sex offences”. It concluded that this behaviour “was a violation not only of [victims’] privacy but of their sense of personal safety and integrity”. The idea that taking and sharing intimate images without consent falls on a “continuum” of sexual abuse, or sexual offending, is reflected both in academic literature and our discussions with stakeholders.

14.42 McGlynn, Rackley and Houghton have conceptualised the non-consensual creation and distribution of private sexual images as a range of behaviours that form a “continuum of image-based sexual abuse”. They also argued that image-based sexual abuse sits on a continuum with other forms of sexual violence. This rationale is based on Kelly’s description of a continuum of sexual violence on which the range of behaviours are united by a common thread of “abuse, intimidation, coercion, intrusion, threat and force” used to control (predominantly) women.

14.43 McGlynn, Rackley and Houghton use this concept of a continuum to reflect the wide range of behaviours associated with the non-consensual creation and distribution of private sexual images and the way those behaviours can vary in terms of context, motive, harm and victim experience. They argue that the common characteristics of such behaviour are:

1. the sexual nature of the imagery;

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(2) the gendered nature of this behaviour both in its perpetration and victim experience;

(3) the sexualised nature of what they term the “harassment and abuse”;

(4) the “harms as breaches of fundamental rights to dignity, sexual autonomy and sexual expression”; and

(5) the “minimisation of these forms of abuse in public discourse, law and policy”.24

14.44 The label of image-based sexual abuse McGlynn, Rackley and Houghton argue, best describes the wrongs suffered “as breaches of women’s rights to sexual freedom and sexual autonomy”.25 These behaviours have the effect of stifling the right of women in particular to express their sexuality, as they are told to stop taking or sending such images in order to prevent such abuse.26 As a result, McGlynn and Rackley argue, there is a “need to respond to the specific sexual harms perpetrated against women through the attack on their sexual self, sexual autonomy and agency”.27

14.45 As we detailed in Chapter 5, the harms caused by taking and sharing intimate images without consent can be significant and devastating. Research, including that carried out by Samantha Bates28 and Clare McGlynn and Erika Rackley,29 has suggested that the harms caused are analogous to the harms caused by sexual assault. McGlynn and Rackley have emphasised that victims of intimate image abuse experience these types of behaviours as a form of sexual assault.30

14.46 Many stakeholders also emphasised to us during pre-consultation engagement that these behaviours are forms of sexual abuse and should be categorised as such. For example, Antoinette Huber, who interviewed victims of disclosure of private sexual images without consent as part of her PhD thesis, emphasised that this behaviour constitutes a form of abuse and “becomes part of a pattern” of domestic or sexual violence. Lawyers from McAllister Olivarius said that victims they worked with would identify themselves as sexual offence complainants. Sophie Gallagher also told us

25 As above, p 43.
that in her discussions with victims it was clear that the impact is akin to other sexual
offences, including experiences of PTSD, shame and feelings of violation.

14.47 Similar arguments were made to Parliament in relation to the “upskirting” offence, in
support of its categorisation as a sexual offence. For example, in her written evidence
for the Voyeurism (Offences) Bill 2018, the then Police and Crime Commissioner
(“PCC”) for Northumbria, Dame Vera Baird QC argued that the violation of a person
“in an intimate way” makes “upskirting” closely related to rape and sexual abuse:

We do not regard a specific motive as the important characteristic of this behaviour.
More important is that this behaviour is done without the consent of the person being
photographed. Its impact is that it is a violation of her/him in an intimate way and is
thus more closely related to rape and sexual abuse that might at first be considered.
It appears to be based on the concerning notion that women’s bodies are public
property over which any one has a right to take advantage, for any motive, if they
can find a way of doing so ... .

14.48 Making a broader argument about all forms of intimate image abuse, based on sexual
privacy, Maria Miller MP stated in the House of Commons’ Second Reading of the
Voyeurism (Offences) Bill 2018:

Where sexual privacy is violated, it is difficult to see why it is not categorised as a
sex offence. Those issues, whether upskirting, revenge pornography or deepfake
porn, are not just privacy harms; they are non-consensual sexual activity that is
often very public, and they are not being sufficiently captured in law.

14.49 Finally, as is frequently noted in the literature, sexual violence is rarely committed
solely for the purpose of obtaining sexual gratification; often it is committed with a
desire to exert power or control, particularly of men over women. Parallel have
been drawn with experiences of taking or sharing intimate images without consent.
Academics have made reference to these behaviours as gendered phenomena which
are often experienced by women. McGlynn, Rackley, Johnson and others produced
findings that many perpetrators of what they term “image-based abuse” are motivated
by power and control. Citron has noted the way in which what she terms “non-
consensual pornography”:

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31 Hansard (HC), 12 July 2018, vol 644, col 60, written evidence submitted by Dame Vera Baird, QC, Police &
Crime Commissioner (PCC) for Northumbria.


33 For example, Kristine M Chapleau and Debra L Oswald, “Power, sex, and rape myth acceptance: Testing

34 For example, Nicola Henry and Anastasia Powell, “Beyond the ‘sext’: Technology-facilitated sexual violence
and harassment against adult women” (2015) 48 Australian and New Zealand Journal of Criminology 104; see also
Samantha Bates “Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health
Effects of Revenge Porn on Female Survivors” (2017) 12 Feminist Criminology 22, 39.

35 Clare McGlynn, Erika Rackley, Kelly Johnson and others, “Shattering Lives and Myths: A Report on Image-
Based Sexual Abuse” (July 2019) Durham University and University of Kent pp 10 to 11,
denies women and girls control over their own bodies and lives. Not only does it inflict serious and, in many cases, irremediable injury on individual victims, it constitutes a vicious form of sex discrimination.36

14.50 The idea that these behaviours form a continuum suggests that there are a range of experiences, contexts and motivations which lie at different points on this continuum.

14.51 Some of this behaviour is clearly sexual in nature. For example, images taken or shared of a person nude and posing in a sexually provocative way; images taken down a person’s top to reveal their breasts or up their skirt to try to capture their genitals; and images of a person engaged in sexual activity. As McGlynn has noted, “sexualised language is used to describe these images and threats”37 and it is clear from their content that they are sexual in nature. The way in which these images are taken or shared can also be explicitly sexual. For example, they could be taken non-consensually by a person for the purpose of obtaining sexual gratification; or shared on a pornographic website or on social media accompanied by sexualised language, for the purpose of allowing others to gain sexual gratification from the images.

14.52 However, there are other examples of taking or sharing images about which we have heard from stakeholders which are either less sexual in nature or not sexual at all, for example, the taking or sharing without consent of an image of someone using the toilet. While in some cases the depicted person may be semi-nude and/or the defendant may take or share the image for the purpose of obtaining sexual gratification, we have also heard of instances where this is not the case. For example, in some cases this type of image has been taken and shared “for a laugh”. There will also be cases where, although the depicted person is using the toilet, their genitals and other private body parts are not exposed.

14.53 So, while there is no doubt that many instances of taking and sharing intimate images without consent will be sexual in some way, either because of the nature of the image or the motive of the perpetrator, this is not necessarily the case for all of these behaviours. When stakeholders and academics describe these behaviours as sexual abuse or sexual offending, they are referring to the abuse of explicitly sexual images, or intimate images taken or shared with a sexual motive. They are not referring to images that pertain more to “private” acts, such as someone bathing or using the toilet (although, if such an image were to be taken for the purpose of obtaining sexual gratification, it may be considered sexual). The reality is that intimate image abuse varies significantly in terms of the content of the images, the context and the perpetrator’s purpose, so not all cases can be said to be sexual.

14.54 In the next section we examine why the disclosure offence in section 33 of the CJCA 2015 was not made a sexual offence.


Why was the disclosure offence not included in the Sexual Offences Act 2003?

14.55 In a House of Lords debate discussing the Criminal Justice and Courts Bill in 2014, before what was to be section 33 was introduced, Baroness Berridge and Baroness Morris of Bolton tabled an amendment to insert a new offence of disclosing intimate images into the SOA 2003. The amendment sought to make it an offence for a person to disclose a recording of another person doing a private act without consent with the intention that they or a third person will look at that image for the purpose of obtaining sexual gratification.38

14.56 The amendment was drafted somewhat narrowly, applying only where the perpetrator and victim were in a “private or confidential relationship”39 and where the perpetrator acted for the purpose of obtaining sexual gratification. However, the fact that it was to be included in the SOA 2003 is pertinent given that the disclosure offence was eventually not considered to be a sexual offence. Highlighting the contrast with a similar amendment tabled by Lord Marks of Henley-on-Thames,40 which introduced what eventually became the disclosure offence in section 33 of the CJCA 2015, Baroness Morris of Bolton said:

The amendments brought forward by my noble friend Lord Marks would classify the online posting of revenge pornography as an ordinary criminal offence. This fails to recognise the sexual nature of the crime and the impact that it has on the victim, which is a clear violation of the victim’s dignity ... ... the greatest betrayal is to choose to use naked or sexually explicit images that should be a private and deeply personal matter between a couple and which were never intended to be seen by anybody else. In this way, the perpetrator commits an act of sexual abuse against the ex-partner, specifically designed to subject them to humiliation and degradation.41

14.57 The amendment introduced by Baroness Berridge and Baroness Morris was met with significant criticism and was later withdrawn. However, criticism rested largely on the way in which the provision was drafted, rather than the fact it was characterised as a sexual offence. As Baroness Barker noted:

to respond to the noble Baroness, Lady Berridge, we have no problem with making this a sexual offence. Quite clearly it is. We do have a number of problems with the way in which her amendment is drafted.42

14.58 Why, then, was the disclosure offence later enacted not considered to be a sexual offence and incorporated into the SOA 2003? The answer seems to be that this

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39 Above. Specifically, “a private or confidential relationship where they retained a reasonable expectation of privacy with regard to disclosure beyond that relationship”.

40 Hansard (HL), 21 July 2014, vol 755, col 968. This amendment (amendment 37) was withdrawn in the same sitting.

41 Above, col 974.

behaviour, while malicious, was not considered to be sexual in nature. In a House of Lords debate on the Criminal Justice and Courts Bill, Baroness Thornton asked why the offence was not being included in the SOA 2003 and Lord Faulks responded:

… we do not think that it is appropriate to view it as a particular sexual offence in the same way as these other offences. Research in previous cases has shown that revenge porn—the emphasis here being on “revenge”—is perpetrated with the intention of making a victim feel humiliated and distressed rather than to obtain sexual gratification, which is what defines an offence as sexual. Of course, the definition says, “with the intention” of causing distress, so you do not have to have evidence of distress or some rather unnecessary distinctions about what is distress, or anger, and so on. Therefore, the intention is there, and revenge lies behind it. That is not to diminish the seriousness, but more accurately to characterise what is the mischief we are aiming at.43

14.59 This can be contrasted with the pathway of the “upskirting” offence, now contained in section 67A of the SOA 2003. While one limb of the “upskirting” offence requires that the perpetrator acted with the intention of causing humiliation, alarm or distress (similar to the additional intent element in the disclosure offence), rather than requiring that the perpetrator acted for the purpose of obtaining sexual gratification, it is still contained in the SOA 2003 and considered to be a sexual offence. In the House of Lords, the Minister was asked why “upskirting” was characterised as a sexual offence but the disclosure offence in section 33 of the CJCA 2015 was not. Lord Keen responded:

… revenge porn was not designated as a sexual offence because very often the act is not sexually motivated. Therefore, it would not easily fall within the category of sexual offences otherwise provided for in the context of notification, for example. So, again, one has to approach that issue with some care.44

14.60 So, while not all acts of “upskirting” are sexually motivated, a significant proportion are, which may have justified the inclusion of the offence in the SOA 2003.

Conclusion

14.61 We provisionally conclude that intimate image abuse sits on a continuum of sexual offending, from clear and serious sexual offending to offending that is not sexual by virtue of the image or the perpetrator’s motive.

14.62 As an example of serious sexual offending, the Revenge Porn Helpline provided us with the following description.

The Revenge Porn Helpline has been supporting the National Crime Agency on a significant case for over 18 months. One principal offender groomed, bribed and blackmailed both children and vulnerable young women to share intimate content. After they had shared relatively mild images, they were then threatened and coerced into sharing ever more extreme images. What started with topless images, moved through masturbation; self-harm; degrading words written on bodies; hitting and

43 Hansard (HL), 20 October 2014, vol 756, col 524.
44 Hansard (HL), 23 October 2018, vol 793, col 800.
hurting themselves, urinating, defecating and even eating their own faeces. The content was all recorded to be sold and shared further online. The NCA believe there are approximately 200 victims and the Helpline is supporting nearly half of these.

14.63 In the next section we consider some of the special measures and ancillary orders that are available in relation to sexual offences, and whether (and if so when) they should be available for intimate image offences.

THE NEED TO TRIGGER SPECIAL MEASURES AND ANCILLARY ORDERS

14.64 The majority of stakeholders to whom we spoke told us of the need to have certain special measures and ancillary orders available to ensure that complainants of non-consensual taking and sharing of intimate images are sufficiently protected and that the behaviour is dealt with appropriately. Many stressed, for example, the need for victims of all intimate image abuse to have automatic lifetime anonymity.

14.65 Other special measures or ancillary provisions include:

(1) special measures for witnesses at trial;

(2) the triggering of notification requirements (colloquially known as the “sex offenders’ register”) in certain circumstances; and

(3) ancillary orders imposed at sentence such as Sexual Harm Prevention Orders.

14.66 It was emphasised to us that these provisions are automatically available to complainants of sexual offences (although the position is more nuanced than this claim suggests). Because the disclosure offence is not in the SOA 2003, while the voyeurism and “upskirting” offences are, convictions for these offences can have different consequences for both the offender and the victim. First, perpetrators of voyeurism and “upskirting” may be subject to notification requirements if certain pre-conditions are satisfied. Secondly, a conviction for one of these offences may also lead to the imposition of a SHPO, as with other sexual offences, where the sentencing judge is satisfied that an order is necessary for the purpose of protecting the public or any particular members of the public from sexual harm from the offender. Thirdly, complainants of these offences are granted automatic lifetime anonymity, in line with other sexual offences. These ancillary provisions are unique to offences in the SOA 2003 and so do not apply to the disclosure offence in section 33 of the CJCA 2015.

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45 See also Misconduct in Public Office (2020) Law Com No 397 and the discussion at paragraph 9.47.

46 For example, complainants of sexual offences will have automatic eligibility for special measures, but their imposition is at the judge’s discretion. Notification requirements are subject to the offence being listed in schedule 3 to the SOA 2003. Sexual Harm Prevention Orders are not automatic, but the power is available when dealing with an offence listed in schedule 3 (sexual offences) or schedule 5 (non-sexual offences) to the SOA 2003.

47 Sexual Offences Act 2003, ss 103A to 103K. A SHPO may also be imposed where it is necessary for the purpose of protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the defendant outside the UK.

14.67 We consider each of these ancillary provisions, along with special measures at trial, and their application to taking and sharing intimate images without consent in turn below.

**Automatic complainant anonymity**

14.68 Any proposal to extend automatic anonymity to complainants in intimate abuse cases raises important considerations of open justice and fairness. The Sexual Offences (Amendment) Act 1992 provides lifetime anonymity for victims of a sexual offence from the time that an allegation is made. For clarity, anonymity in this context means restricting reporting of an offence to ensure that the complainant is not identified to the public. It does not mean that a trial is held in private. Nor does it mean that the defendant is unaware of the identity of their accuser.

14.69 Section 1 of the 1992 Act builds on the original, limited restriction solely for rape cases and provides that once an allegation of a sex offence has been made, and until a person has been accused of the offence, there is a prohibition on the publication of material that is likely to lead to the identification of the complainant, in particular their name, address, place of education or work and any still or moving picture of them. Once someone has been accused of the offence, the only means of lifting the restriction is to apply to the court.

14.70 This provision does not just cover journalists, it prohibits any individual from publishing material from which there is a real risk, real danger or real chance that it may lead to the identification of the complainant.49

14.71 Objections can be made to imposing restrictions on the reporting of a complainant’s identity. The principle of open justice is fundamental and is not to be departed from without good reason. One practical concern is that in the case of a false allegation, a defendant may lose the opportunity to trace witnesses who could provide important exculpatory evidence regarding the complainant relevant to their case. More commonly it is argued that without anonymity for the defendant there is no parity of treatment and that this conflicts with the principles of open justice and fairness.

14.72 Automatic anonymity has its roots in the recommendation of the Heilbron Committee in its 1975 “Report of the Advisory Group on the Law of Rape”.50 The Heilbron Committee considered the arguments for and against complainant anonymity and the presumption of open justice. The Committee noted that the law made exceptions where it was in the public interest to do so. The Committee also observed that on a spectrum of potential restrictions, restricting press freedom to report a complainant’s identity was proportionate due to the public interest in reporting rape offences and convicting these offenders. Further, their reasoning was based on the special character of the offence and the nature of the distress and harm to the complainant.

14.73 There are other statutory exceptions to the principle of open justice that make specific provisions for anonymity. For example, section 122A of the Antisocial Behaviour,
Crime and Policing Act 2014,\textsuperscript{51} provides anonymity to victims of forced marriages. Section 4A of the Female Genital Mutilation Act 2003 also provides anonymity to victims of female genital mutilation. Both provisions prohibit the publication of any matter that would likely to lead members of the public identifying the alleged victim of an offence and the order lasts the lifetime of the alleged victim.

14.74 The question therefore is not whether anonymity can ever be justified but whether the public interest requires automatic (as opposed to discretionary) anonymity to be extended to victims of intimate image abuse. We will go on to consider the arguments for extending automatic anonymity in these cases. First, there is an inconsistent approach to the protection of complainants in intimate image abuse cases under the current law. As voyeurism and “upskirting” are both contained in the SOA 2003, victims of these “taking” offences have lifetime anonymity, whereas victims of the disclosure offence do not. This inconsistency attracted considerable criticism from stakeholders. Almost all stakeholders we spoke to during pre-consultation engagement took the view that all victims of taking and sharing of intimate images without consent should be afforded automatic anonymity in line with what is available to complainants of sexual offences. Prominent holders of this view include Clare McGlynn,\textsuperscript{52} Victims’ Commissioner Dame Vera Baird QC,\textsuperscript{53} Joint Association of Police and Crime Commissioners Victim’s Portfolio Lead and Police, Fire and Crime Commissioner for North Yorkshire, Julia Mulligan,\textsuperscript{54} and MPs Maria Miller and Wera Hobhouse.\textsuperscript{55}

14.75 Anonymity orders may be sought for complainants of non-sexual offences, under the two-stage test in section 46 of the Youth Justice and Criminal Evidence Act 1999. An application is required and must be decided by a judge. However, as Senior District Judge (Chief Magistrate) Emma Arbuthnot and Mike Fanning DDJ told us, such orders are infrequently sought, particularly in cases involving the disclosure offence.

14.76 In 2016, Lord Marks of Henley-on-Thames requested to move an amendment (among others) to the Policing and Crime Bill to add section 33 of the CJCA 2015 “to the list of sexual offences in respect of which a victim is entitled to anonymity”.\textsuperscript{56} He argued this

\begin{itemize}
\item This provision gives effect to schedule 6A to the Act.
\item See C McGlynn, Anonymity for Complainants of Image Based Sexual Abuse: focus on harms to victims, not motives of perpetrators (July 2016), \url{https://claremckglyn.files.wordpress.com/2016/07/mcglynn-anonymity-revenge-porn-11-july-2016.pdf} (last visited 25 February 2021); Centre for Gender Equal Media, Anonymity for Victims of Image-Based Sexual Abuse (including ‘revenge porn’) (May 2016) \url{https://claremckglyn.files.wordpress.com/2016/05/gem-anonymity-campaign-briefing-online.pdf} (last visited 25 February 2021).
\item See for example Sarah Bell, “Call for ‘revenge porn’ victims to be kept anonymous” (15 December 2015) BBC News \url{https://www.bbc.co.uk/news/magazine-35042309} (last visited 24 February 2021).
\item Hansard (HC), Voyeurism (Offences) (No. 2) Bill (Second sitting of Public Bill Committee), 10 July 2018, \url{https://hansard.parliament.uk/Commons/2018-07-10/debates/cdfb0727-2203-4205-82cf-49b09c92d695/Voyeurism(Offences)(No2)Bill(SecondSitting)} (last visited 24 February 2021).
\item Hansard (HL) 16 November 2016, vol 776, col 216.
\end{itemize}
was required because the disclosure offence falls “squarely within the category of sexual offences that are entitled to such anonymity.” However, others did not see the principled reason for this, particularly given the existing discretionary power for judges to impose restrictions on witness naming and other special measures available for vulnerable witnesses. The amendment was subsequently withdrawn.

14.77 The need for automatic complainant anonymity was also highlighted in relation to the “upskirting” offence as it was debated in Parliament. A number of Parliamentarians emphasised the importance of the fact that inserting the provision into the SOA 2003 would grant complainants anonymity, and thereby encourage complainants to report the crime. Baroness Gale in the House of Lords’ Second Reading of the Bill, for example, said:

I welcome the fact that the victims will be granted anonymity. This is essential to ensure reporting of the crime and should encourage women and girls to come forward. It is well known that victims of sexual offences can be reluctant to come forward. Hopefully this will go some way to helping them to do so, and hopefully the police and other bodies will have the necessary training and resources to deal with this new offence.

14.78 However, other MPs noted that such anonymity was not available to victims of the disclosure offence. During the House of Commons’ Second Reading of the Bill, Yasmin Qureshi MP raised this inconsistency, and Maria Miller MP responded:

I think an inconsistency in the law is emerging here that the Government need to look at much more closely. Mention has rightly been made of revenge pornography. When that offence was introduced back in 2014, the need for it was questioned somewhat by the CPS. We now have 500 cases a year successfully prosecuted and hundreds more that are not successfully prosecuted, for the very reason that has just been set out—it is probably mostly because anonymity is not afforded there. But I think some broader inconsistencies are coming out as a result of this Bill. We have said we are delighted that the Government have seen this as a sex offence and so there will be, in the case of upskirting offences, anonymity, but as has been pointed out, why is there not anonymity for people who are victims of revenge pornography? It is not entirely clear on what basis that has been decided, other than the fact that revenge pornography was not made a sex offence—again, for reasons that are entirely unclear.

14.79 In the House of Lords, Baroness Barker also pointed out this inconsistency and commented:

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57 Hansard (HC) 16 November 2016, vol 776, col 1439.
58 For example, see Baroness Williams of Trafford: Hansard (HC), 16 November 2016, vol 776, col 1444, and Lord Pannick at col 1470.
60 Hansard (HC) Voyeurism (Offences) (No. 2) Bill (Second sitting of Public Bill Committee), 10 July 2018 https://hansard.parliament.uk/Commons/2018-07-10/debates/cdfb0727-2203-4205-82cf-49b09c92d695/Voyeurism(Offences)(No2)Bill(SecondSitting) (last visited 24 February 2021).
It is somewhat difficult for some of us who are not lawyers to understand quite why two offences which appear to be very similar in perpetration and effect should be treated so differently.  

14.80 Secondly, other jurisdictions have taken steps to protect the identities of complainants in intimate image abuse cases. In New South Wales, The Stronger Communities Legislation Amendment (Miscellaneous) Bill 2020 was enacted on 27 October 2020. It amends the Criminal Procedure Act 1986 to include intimate image offences as "prescribed sexual offences", extending special arrangements for victims giving evidence to victims of those intimate image offences.  

14.81 Thirdly, there is a clear public interest in safeguarding complainants' identities to increase the likelihood that these crimes are reported and offenders prosecuted. The Revenge Porn Helpline told us that without automatic anonymity, complainants are "put off going to the police if they think there is any possibility of being named". Journalist Sophie Gallagher also told us that in her discussions with victims, several made clear that the lack of anonymity was a "barrier" to them reporting their experiences to police. For example, they may have been the only person who knew that their intimate image had been shared, and worried that if they reported it and this was then publicised, more people would know about the image. As she said, “up until that point they could control who knew about it; at least if they didn’t tell anyone, no one will know.” She added: “It feels insulting they do not get that anonymity.” Victims told her: “I was worried my name would be in the papers” and on the court papers, and as a result they were reluctant to give evidence on the record. Often the images involved in these cases are highly sensitive and private – they may be of someone engaging in sexual activity, for example. As Sophie Gallagher told us, many victims do not tell anyone about what happened to them, apart from perhaps their close friends – in some cases not even their family. It can be embarrassing and humiliating for the victim’s family, friends and colleagues, and even for strangers, to know about these images, particularly if they have been shared and can be viewed online and even downloaded.

14.82 For some victims, the risk of being named means a risk of people they know – including family, friends, members of their religious community and colleagues – being aware of their sexual images which may, if distributed, still be circulating online at the time of trial. Identifying the complainant can therefore cause additional trauma, humiliation and distress as friends, family, colleagues, employers as well as strangers can easily search for their images which can be shared, retained and re-shared.  

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62 Stronger Communities Legislation Amendment (Miscellaneous) Bill 2020 para 1.8(2) and Criminal Procedure Act 1986 s.3 (Definitions – prescribed sexual offences) and s.294B (Giving of evidence by complainant in prescribed sexual offence proceedings—alternative arrangements).

63 Harassment, Harmful Communications and Related Offences Act 2020, s 5 provides anonymity for “alleged victims” of an offence pursuant to s 2 (distributing, publishing or threatening to publish intimate image without consent with intent to cause harm or being reckless as to whether harm is caused) or s 3 (recording, distributing or publishing intimate image without consent).
online. As Galop told us, the lack of anonymity is especially devastating to LGBTQ+ victims who may be “outed” both in and out of court as a result of the proceedings.

14.83 The lack of anonymity could therefore have devastating consequences for complainants’ relationships and potentially threaten their employment and financial prospects. Complainants who have jobs involving children, for example teachers, may fear that publicity resulting in further sharing of their sexual images will impact on their reputation and may lead to the loss of employment.

14.84 There is a compelling argument that a guarantee of anonymity (that could be waived if the complainant chose to do so) would undoubtedly prove more effective than a discretionary power in persuading complainants to report such offences. It would also ensure a consistent approach towards all cases of intimate image abuse, and give complainants the confidence to support and co-operate with prosecution without fear of adverse publicity. Anonymity not only encourages victims to report these crimes, it also provides protection to those who may be at risk if their name or other information is publicised. While the option to grant anonymity is currently available to judges in non-sexual cases, it is rarely used, and so victims cannot be sure that they will be protected in this way. A waivable guarantee of anonymity would undoubtedly be more effective than a little-used discretionary power in persuading complainants to report their abuse. Extending anonymity to the sharing offence would also ensure a consistent approach towards anonymity in all cases of intimate image abuse.

Consultation Question 43.

14.85 We provisionally propose that victims of the new intimate image abuse offences should have automatic lifetime anonymity. Do consultees agree?

Special measures at trial

14.86 Provision is made for some witnesses to receive additional support in giving their evidence. Eligibility for these measures is determined by the particular characteristics of the witness such as their age or incapacity. Alternatively, a witness may be eligible for additional measures to improve the quality of their evidence if they are fearful or distressed about giving evidence.

14.87 Complainants in sexual offence cases are automatically eligible for special measures unless the witness informs the court they do not wish to be eligible. Evidence must nonetheless be adduced that the particular measure applied for will improve the quality of the witness’s evidence. The special measures available to complainants giving evidence in a case involving a sexual offence against them include:

64 Youth Justice and Criminal Evidence Act 1999, s 16.
65 Youth Justice and Criminal Evidence Act 1999, s 17.
66 Youth Justice and Criminal Evidence Act 1999, s 17(4).
67 Youth Justice and Criminal Evidence Act 1999, s 18(1)(b)
(1) giving evidence behind a screen to shield the witness from the defendant (section 23);

(2) giving evidence via live link to allow the witness to give evidence from outside the courtroom, either from another room within the court building or some suitable location (section 24);

(3) evidence given in private (section 25);

(4) removal of wigs and gowns (section 26); and

(5) video-recorded evidence in chief (section 22A).

14.88 Complainants in cases that do not involve sexual offences may still qualify if the judge is satisfied both that, taking into account all of the circumstances of the case, they would suffer fear or distress when giving evidence and that any measure adopted would improve the quality of their evidence.68 However, this creates an additional procedural and evidential hurdle for victims of the disclosure offence, because the defendant is not charged with a sexual offence.

Consultation Question 44.

14.89 We provisionally propose that victims of the new intimate image abuse offences should automatically be eligible for special measures at trial. Do consultees agree?

Restrictions on cross examination

14.90 There are also restrictions on cross-examination for trials involving sexual offences. These include:

(1) a prohibition on anyone charged with a sexual offence from cross-examining the complainant where self-represented;69

(2) restrictions on adducing evidence of or questioning the complainant about their sexual behaviour.70

14.91 These safeguards serve to protect the complainant from further indignity and distress and to minimise the perpetuation of myths surrounding the behaviour of complainants in sexual offence cases.

14.92 Restrictions on cross-examination can diminish the distress experienced by the complainant and have a positive impact on the quality of their evidence. In combination with automatic anonymity, complainants may feel more confident in

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69 Youth Justice and Criminal Evidence Act 1999, s 35.

70 Youth Justice and Criminal Evidence Act 1999, s 41.
reporting their abuse. For example, their initial statement to the police would be by way of a visual recorded interview which would stand as their evidence in chief and therefore reduce the time spent giving evidence in sensitive cases. They would also be reassured that they would not have to see the defendant while giving evidence or be cross-examined by the defendant. This may also promote more reporting and co-operation with prosecutions.

Consultation Question 45.

14.93 We provisionally propose that restrictions on the cross-examination of victims of sexual offences should extend to victims of the new intimate image abuse offences. Do consultees agree?

Notification requirements

14.94 Notification requirements – known colloquially as being placed on the “sex offenders’ register” – aim to protect the public and provide the police with an effective tool for the management of sex offenders in the community. The policy objectives of notification requirements are to protect the public and provide the police with an effective tool for the management of sex offenders in the community. Specifically, they are designed to “help the police to monitor the offender’s whereabouts and to identify suspects and quickly locate them if a crime is committed, and should also act as a deterrent to potential re-offenders”.  

14.95 Section 80 of the SOA 2003 triggers automatic notification requirements for individuals convicted of an offence contained in Schedule 3 of the SOA 2003 (or found to be not guilty of such an offence by reason of insanity, or found to be under a disability and to have done the act charged).

14.96 The offences listed in Schedule 3 have been described as “exclusively sexual offences”. However, this does not necessarily mean that to be included in Schedule 3, the offence must be contained in the SOA 2003. Offences that are not found in the SOA 2003 do appear in Schedule 3, including section 1 of the Protection of Children Act 1978, section 160 of the Criminal Justice Act 1988, and section 170 of the

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75 Offences relating to the taking, making, distributing, publishing and possession with a view to distribute, of indecent photographs of children.

76 Offence of possession of an indecent photograph of a child.
Customs and Excise Management Act 1979.\textsuperscript{77} In Scotland, the criminal courts can impose a notification requirement for any offence where the court determines there was a significant sexual aspect to the offender’s behaviour in the commission of the offence.\textsuperscript{78}

14.97 The disclosure offence found in section 33 of the CJCA 2015 does not appear in Schedule 3 of the SOA 2003, so an individual convicted of this offence is not subject to notification requirements. However, the voyeurism and “upskirting” offences do appear in Schedule 3, subject to conditions which reflect the seriousness of the offending behaviour, so convictions for these offences may trigger notification requirements.

14.98 These offence-specific conditions ensure that a minimum threshold of seriousness is met before the burden of notification is triggered. For voyeurism and “upskirting”, where the offender is over 18, these conditions are:

(1) For voyeurism:

(a) the victim was under 18, or

(b) the offender has been:

(i) sentenced to a term of imprisonment;

(ii) detained in hospital; or

(iii) made the subject of a community sentence of at least 12 months.\textsuperscript{79}

(2) For “upskirting”, the offence was committed for the purpose mentioned in section 67A(3)(a) (obtaining sexual gratification), and one of the relevant conditions is met. The relevant conditions are the same as for voyeurism above.

14.99 It is both the sexual nature and the seriousness of the offence which trigger notification requirements. This justifies the intrusion to an offender’s private life caused by notification and is based on the need for the police to know the whereabouts of the offender to avoid reoffending and to protect the public. In a House of Commons debate over the “upskirting” bill, then Minister Lucy Frazer MP stated:

Specifying the purposes allows us to ensure that serious sexual offenders are made subject to notification requirements—that is, they are placed on the register. Where offenders commit a sufficiently serious act for the purpose of obtaining sexual gratification, they will be placed on the sex offenders register, which assists the police with their management in the community. Specifying the purposes also

\textsuperscript{77} Penalty for fraudulent evasion of duty etc. in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (c. 36) (indecent or obscene articles), if the prohibited goods included indecent photographs of persons.

\textsuperscript{78} SOA 2003, Schedule 3, para 60.

\textsuperscript{79} SOA 2003, Schedule 3, para 34.
ensures that those who do not pose a further risk are not made subject to those requirements.  

14.100 As Chief Magistrate Emma Arbuthnot and District Judge Mike Fanning told us, notification requirements are essential, as future partners have a right to, and would want to, know if their partner has a history of disclosing private sexual images without consent before they send such images.

14.101 As noted above, an offence does not necessarily have to be in the SOA 2003 in order for it to be listed in Schedule 3. The Secretary of State has the power to amend Schedule 3 to apply notification requirements in the appropriate circumstances.

14.102 We consider that where a defendant is convicted of taking or sharing an intimate image without consent for the purpose of obtaining sexual gratification, a notification requirement should be applied, where an appropriate seriousness threshold is met.

Consultation Question 46.
14.103 We provisionally propose that notification requirements should be automatically applied for the offence of taking or sharing an intimate image without consent for the purpose of obtaining sexual gratification when an appropriate seriousness threshold is met. Do consultees agree?

Sexual Harm Prevention Orders
14.104 The Sexual Offences Act 2003 initially introduced the Sexual Offences Prevention Order (“SOPO”) which could be made on application or on conviction. The aim of this order was to “protect members of the public, or particular members of the public, from serious sexual harm from the subject of the order”.  

14.105 Following extensive consideration by the courts and significant criticism of their limited applicability, the Anti-Social Behaviour, Crime and Policing Act 2014 replaced SOPOs with Sexual Harm Prevention Orders. These are now made under sections 343-358 of the Sentencing Code 2020. These orders are applicable to any offence listed in Schedule 3 and Schedule 5 of the SOA 2003. The order can only be made where a judge considers it necessary to protect the public (or particular members of

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81 Sexual Offences Act 2003, s 130 allows for amendment of Schedules 3 and 5 by the Secretary of State.


84 Sexual Risk Orders also replaced Risk of Sexual Harm Orders, which relate to children. These will not be discussed here.
the public) within the UK – or children or vulnerable adults outside the UK – from sexual harm

14.106 Schedule 5 lists a range of offences not in the SOA 2003 for which SHPOs may be applied (such as murder, manslaughter, kidnapping, false imprisonment and outraging public decency). Some of the offences listed in Schedule 5 are in some ways comparable to our provisionally proposed offences and are sometimes utilised in cases of intimate image abuse, as we set out in Chapter 3. These include:

(1) sections 2 and 2A of the Protection from Harassment Act 1997;85

(2) sections 4 and 4A of the Protection from Harassment Act 1997;86 and

(3) section 127(1) of the Communications Act 2003.87

14.107 Placing an offence in Schedule 3 or Schedule 5 ensures that judges have discretion to impose an SHPO where the relevant criteria are satisfied. Notification requirements are not applied automatically for Schedule 5 offences but are triggered if a SHPO is imposed, for the duration of the order.88

14.108 As stated above, SHPOs can only be made where it is considered necessary to protect the public, or particular members of the public, within the UK (or children or vulnerable adults outside the UK) from sexual harm.89 “Sexual harm” for the purpose of making a SHPO is defined as:

physical or psychological harm caused—

(a) by the person committing one or more offences listed in Schedule 3 to the Sexual Offences Act 2003, or

(b) (in the context of harm outside the United Kingdom) by the person doing, outside the United Kingdom, anything which would constitute an offence listed in that Schedule if done in any part of the United Kingdom.90

14.109 A SHPO can include a number of prohibitions to prevent harm, such as on foreign travel, accessing particular types of places or coming into contact with particular individuals. It can also impose restrictions on internet access (or prohibit access to

85 Sexual Offences Act 2003, Schedule 5, para 56A. These are offences of harassment and stalking.
86 Sexual Offences Act 2003, Schedule 5, para 57. These offences involve harassment which causes another to fear violence will be used against him and stalking involving fear of violence or serious alarm and distress.
87 Sexual Offences Act 2003, Schedule 5, para 61A. This is the offence of sending by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character.
89 Sentencing Act 2020, ss 343(2), 346.
90 Sentencing Act 2020, s 344(1).
certain sites);\textsuperscript{91} require the subject to retain and display their internet history and make this available to police on request; restrict access to social media;\textsuperscript{92} and prohibit the possession of any device capable of storing digital images unless the subject makes it available on request for inspection by a police officer.\textsuperscript{93}

14.110 There have been instances in which the court has considered it appropriate to impose a SHPO in cases of voyeurism. For example, in \textit{R v Newton},\textsuperscript{94} the court considered a breach of a SHPO that had been imposed in 2014 after the defendant was convicted of voyeurism for placing a mobile device above the ceiling tiles in a women’s lavatory with the camera facing towards the lavatory.

14.111 In the case of \textit{R v Cheyne},\textsuperscript{95} the defendant pleaded guilty to two counts of voyeurism for taking images on his mobile phone of a woman changing in a cubicle. He was sentenced to 8 months’ imprisonment, suspended for 24 months, and a SHPO was imposed for five years prohibiting him from entering the sports hall where the offending happened and any unisex or female toilets or changing rooms. After it had transpired he spent those five years in Thailand and other countries, returning for health reasons and to renew his passport, the order was varied to include a prohibition on foreign travel.\textsuperscript{96}

14.112 Daniel Jones, received a SHPO for “upskirting” schoolgirls and women in supermarkets, shopping centres and train stations.\textsuperscript{97}

14.113 SHPOs have therefore clearly been deemed appropriate in serious cases of taking intimate images without consent.\textsuperscript{98} We provisionally propose that SHPOs should be

\textsuperscript{91} For example, in \textit{R v Jackson} [2012] EWCA Crim 2602, the defendant, who was convicted of voyeurism, possession of extreme pornography and making, possessing and distributing indecent photographs of children after concealing a video camera in his bathroom to take images of a 14 year old having a shower, had a SOPO imposed that prohibited him from (a) using any device capable of accessing the internet unless it had the capacity to retain and display the history of internet use, and unless he made the device available on request for inspection by a police officer; (b) deleting such internet history. (In this case he appealed the previous SOPO which was argued to be disproportionate; these were the prohibitions included in the revised order).

\textsuperscript{92} Although note the case of \textit{Hutchinson} [2015] EWCA Crim 947 where the Court acknowledged it was impracticable to impose a blanket ban on access to social media and to prohibit the possession of a device with a webcam, so made adjustments relating to history retention, prohibiting communication with children under 16 (knowingly) and prohibiting the defendant from visiting any internet site specifically intended for children.


\textsuperscript{94} [2017] EWCA Crim 874.

\textsuperscript{95} [2019] EWCA Crim 182.

\textsuperscript{96} In this case, his appeal against the variation was dismissed.


\textsuperscript{98} Criminal Behaviour Orders (CBOs) are another tool that can be imposed for the purpose of preventing an offender from engaging in behaviour which causes or is likely to cause harassment, alarm or distress to any person, prohibit the offender from doing anything described in the order.
available for all our provisionally proposed offences where they are considered necessary to protect the public from sexual harm. Including some or all of our provisionally proposed offences in either Schedule 3 or Schedule 5 could ensure the judge has the discretion to impose a SHPO where appropriate. The offences would not have to be included in the SOA 2003 to be included in Schedule 5. Nor, as we discussed above, would they have to be in the SOA 2003 to be included in Schedule 3.

Consultation Question 47.

14.114 We provisionally propose that Sexual Harm Prevention Orders be available for all of our provisionally proposed intimate image offences. Do consultees agree?

CONCLUSION

14.115 We demonstrate in this chapter that intimate image abuse is on a continuum of sexual offending, from clear and serious sexual offending to offending that is not sexual by virtue of the image or the perpetrator’s motive.

14.116 In light of the sexual nature of much of this offending, lifetime anonymity should be automatically available for victims of our provisionally proposed intimate image offences. This would ensure that victims of all forms of intimate image abuse were protected from being identified (rather than only those victims whose intimate images are taken for the purpose of obtaining sexual gratification). Victims of intimate image abuse should be automatically eligible for special measures provisions and there should be restrictions on the cross examination of these victims consistent with other sexual offences.

14.117 Notification requirements should be automatically applied to the additional offence of taking or sharing an intimate image without consent, where the offender’s purpose was to obtain sexual gratification and an appropriate seriousness condition is met.

14.118 In addition, Sexual Harm Prevention Orders should be available for all of our provisionally proposed offences where the risk of sexual harm can be demonstrated.
Chapter 15: Consultation Questions

Consultation Question 1.
15.1 We provisionally propose that an image which:

(1) shows something that a reasonable person would consider to be sexual because of its nature; or

(2) taken as a whole, is such that a reasonable person would consider it to be sexual,

should be included within the definition of an intimate image.

Do consultees agree?

Paragraph 6.46

Consultation Question 2.
15.2 We provisionally propose that the definition of an intimate image should include nude and semi-nude images, defined as images of a person’s genitals, buttocks or breasts, whether exposed or covered with underwear, including partially exposed breasts, whether covered by underwear or not, taken down the depicted person’s top.

Do consultees agree?

Paragraph 6.59

Consultation Question 3.
15.3 We provisionally propose that the chest area of trans women, women who have undergone a mastectomy and girls who have started puberty and are developing breast tissue should be included in a definition of a nude or semi-nude image.

Do consultees agree? Do consultees think there are additional examples that should be included in a definition of nude or semi-nude?

Paragraph 6.62
Consultation Question 4.

15.4 We provisionally propose that any garment which is being worn as underwear should be treated as underwear for the purpose of an intimate image offence.

Do consultees agree?

Paragraph 6.71

Consultation Question 5.

15.5 We provisionally propose that the definition of “nude or semi-nude” should include images which have been altered but leave the victim similarly exposed as they would be if they were wearing underwear.

Do consultees agree?

Paragraph 6.75

Consultation Question 6.

15.6 We consider that images where the victim is not readily identifiable should not be excluded from our offences.

Do consultees agree?

Paragraph 6.79

Consultation Question 7.

15.7 Can consultees provide us with examples of images depicting individuals in a state of undress, showering or bathing, where their genitals, buttocks and breasts are not exposed or covered only with underwear? Can consultees provide insight into the harm caused by the non-consensual taking or sharing of these kinds of images?

Paragraph 6.88
Consultation Question 8.
15.8 Do consultees think that images depicting individuals in a state of undress, showering or bathing, where their genitals, buttocks and breasts are not exposed or covered only with underwear, should be included within the definition of an intimate image?

Paragraph 6.89

Consultation Question 9.
15.9 We provisionally propose that “private” images should be captured by a sharing offence as well as a taking offence.

Do consultees agree?

Paragraph 6.92

Consultation Question 10.
15.10 We welcome consultees’ views on whether and to what extent images which are considered intimate within particular religious groups should be included in intimate image offences, when the perpetrator is aware that the image is considered intimate by the person depicted.

Paragraph 6.125

Consultation Question 11.
15.11 Are consultees aware of any images “of a kind ordinarily seen in public” that should be excluded from the scope of intimate image offences (other than images of people kissing)?

Paragraph 6.139
Consultation Question 12.
15.12 Do consultees think that there should be:
   (1) a “not ordinarily seen in public” element to intimate image offences; or
   (2) a list of images that should be excluded from intimate image offences, for example images of people kissing?

Paragraph 6.140

Consultation Question 13.
15.13 Are there any forms of “taking” that the current voyeurism or “upskirting” offences, or the taking offence in section 1 of the PCA 1978, fail to capture?

Paragraph 7.14

Consultation Question 14.
15.14 We provisionally propose that a taking offence should only include such behaviour where, but for the acts of the perpetrator, the image would not otherwise exist.
   Do consultees agree?

Paragraph 7.24

Consultation Question 15.
15.15 Do consultees have evidence of, or a comment on the prevalence of, installing equipment in order to take an intimate image without consent, where the taking did not then occur?

Paragraph 7.28
Consultation Question 16.

15.16 We provisionally propose that the behaviour prohibited by the current voyeurism and “upskirting” offences should be combined in a single taking offence. Do consultees agree?

Paragraph 7.34

Consultation Question 17.

15.17 We provisionally propose that taking or recording an image of someone’s breasts, or the underwear covering their breasts, down their top without consent (“downblousing”) should be a criminal offence. Do consultees agree?

Paragraph 7.48

Consultation Question 18.

15.18 We provisionally propose that it should not be an offence to possess an intimate image without consent, even when there was never any consent to possession. Do consultees agree?

Paragraph 7.86

Consultation Question 19.

15.19 We invite consultees’ views on the following three questions:

1. How prevalent is making intimate images without consent, without subsequently sharing or threatening to share the image?

2. What motivates individuals to make intimate images without consent, without sharing or threatening to share them?

3. How, and to what extent, does making intimate images without consent (without sharing or threatening to share them) harm the individuals in the images?
Consultation Question 20.
15.20 We provisionally propose that "sharing" an intimate image should capture:

(1) sharing intimate images online, including posting or publishing on websites, sending via email, sending through private messaging services, and live-streaming;

(2) sharing intimate images offline, including sending through the post or distribution by hand; and

(3) showing intimate images to someone else, including storing images on a device for another to access and showing printed copies to another.

Do consultees agree?

15.21 We invite consultees' views on whether there any other forms of sharing, not outlined in the paragraph above, that should be included in the definition of "sharing"?

Paragraph 7.124

Consultation Question 21.
15.22 We provisionally propose that a sharing offence should include images which have been altered to appear intimate (e.g. images which have been photoshopped to appear sexual or nude and images which have been used to create "deepfake" pornography).

Do consultees agree?

Paragraph 7.138
Consultation Question 22.
15.23 Can consultees provide us with examples, or comment on the prevalence, of:

1) images depicting sexual assault being shared with the person in the image;

2) intimate images that were taken without consent, or where the person in the image was assured that the image had been deleted, being shared with the person in the image; and

3) intimate images being shared with the person in the image by someone who did not take the image and was not originally sent the image with consent?

15.24 We invite consultees’ views as to whether there are there other examples of sharing an intimate image with the person in the image without consent, not included in the paragraph above, which should be criminalised?

15.25 Can consultees describe the harm that sharing an intimate image with the person in the image without consent can cause?

Paragraph 7.153

Consultation Question 23.
15.26 We provisionally propose that the consent provisions in sections 74 to 76 of the Sexual Offences Act 2003 should apply to intimate image offences. Do consultees agree?

Paragraph 8.27

Consultation Question 24.
15.27 We provisionally propose that proof of actual harm should not be an element of intimate image offences. Do consultees agree?

Paragraph 9.12
**Consultation Question 25.**

15.28 We provisionally propose that any new offences of taking or sharing intimate images without consent should have a fault requirement that the defendant intends to take or share an image or images without reasonably believing that the victim consents. Do consultees agree?

**Paragraph 10.40**

**Consultation Question 26.**

15.29 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if —

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

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

Do consultees agree?

15.30 We invite consultees’ views as to whether there are examples of behaviours which would be captured by this provisionally proposed offence, taking into account our provisionally proposed defences, which should not be criminalised?

**Paragraph 10.60**

**Consultation Question 27.**

15.31 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if —

(a) V does not consent; and

(b) D does so with the intention of humiliating, alarming or distressing V or with the intention that D or another person will look at the image for the purpose of humiliating, alarming or distressing V.

Do consultees agree?

**Paragraph 10.73**
Consultation Question 28.
15.32 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if —

(a) V does not consent;
(b) D does not reasonably believe that V consents; and
(c) D does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at the image of V.

Do consultees agree?

15.33 We invite consultees to provide examples where D intentionally shares an intimate image of V without V’s consent for the purpose of obtaining sexual gratification (whether for themselves or another).

Paragraph 10.79

Consultation Question 29.
15.34 We invite consultees’ views as to whether there should be an additional offence where the intent is to make a gain.

Paragraph 10.87

Consultation Question 30.
15.35 We invite consultees’ views as to whether there should be an additional offence of intentionally taking or sharing an intimate image without consent with the intent to control or coerce the person depicted.

Paragraph 10.93

Consultation Question 31.
15.36 We invite consultees’ views as to whether having a separate base offence and more serious additional intent offences risks impeding the effective prosecution of intimate image abuse.

Paragraph 10.95
Consultation Question 32.
15.37 We provisionally propose that where an intimate image was taken without consent in a private place, a reasonable expectation of privacy test should not apply. Do consultees agree?

Paragraph 11.81

Consultation Question 33.
15.38 We provisionally propose that where:

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

(2) the victim is, or the defendant reasonably believes the victim is, voluntarily engaging in a sexual or private act, or is voluntarily nude or semi-nude,

the prosecution must prove that the victim has a reasonable expectation of privacy in relation to the taking of the image.

Do consultees agree?

15.39 We provisionally propose that legislation implementing this test make clear that a victim who is breastfeeding in public or is nude or semi-nude in a public or semi-public changing room has a reasonable expectation of privacy in relation to the taking of any image. Do consultees agree?

Paragraph 11.108
Consultation Question 34.

15.40 We provisionally propose that it should not be an offence to share an intimate image without the consent of the person depicted where:

(1) the intimate image has, or the defendant 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 the defendant reasonably believed that person depicted in the image consented to that previous sharing.

Do consultees agree?

Paragraph 11.138

Consultation Question 35.

15.41 We invite consultees’ views as to whether threats to take, make or share an intimate image with the intent of coercing sexual activity should raise an evidential presumption that there was no consent to sexual activity.

Paragraph 12.21

Consultation Question 36.

15.42 We invite consultees to provide examples where threats to take, make or share intimate images have been used to procure or engage in sexual acts with a person with a mental disorder and information about the use of sections 34 to 37 of the Sexual Offences Act 2003 to prosecute such cases.

Paragraph 12.23

Consultation Question 37.

15.43 We invite consultees to provide examples where threats to take intimate images have been made.

Paragraph 12.116
Consultation Question 38.
15.44 We invite consultees to provide examples where threats to make intimate images have been made without an accompanying threat to share the image.

Paragraph 12.119

Consultation Question 39.
15.45 We invite consultees to provide examples where a threat to share an intimate image of V is not directed at V, but is made to a third party.

Paragraph 12.137

Consultation Question 40.
15.46 We provisionally propose that it should be an offence for D to threaten to share an intimate image of V, where:

(a) D intends to cause V to fear that the threat will be carried out; or

(b) D is reckless as to whether V will fear that the threat will be carried out.

Do consultees agree?

15.47 We provisionally propose that the same definition of “intimate image” is used for both the offences of sharing and threatening to share an intimate image (which will include altered images). Do consultees agree?

Paragraph 12.138

Consultation Question 41.
15.48 We invite consultees’ views as to whether the prosecution in a threatening to share an intimate image case should be required to prove that the person depicted did not consent.

Paragraph 12.143
Consultation Question 42.

15.49 We provisionally propose that there should be a defence of reasonable excuse available in the context of our provisionally proposed base offence which includes:

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

(2) taking or sharing the defendant reasonably believed was necessary for the purposes of legal proceedings;

(3) sharing the defendant reasonably believed was necessary for the administration of justice;

(4) taking or sharing for a genuine medical, scientific or educational purpose; and

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

Do consultees agree?

Paragraph 13.193

Consultation Question 43.

15.50 We provisionally propose that victims of the new intimate image abuse offences should have automatic lifetime anonymity. Do consultees agree?

Paragraph 14.85

Consultation Question 44.

15.51 We provisionally propose that victims of the new intimate image abuse offences should automatically be eligible for special measures at trial. Do consultees agree?

Paragraph 14.89
Consultation Question 45.
15.52 We provisionally propose that restrictions on the cross-examination of victims of sexual offences should extend to victims of the new intimate image abuse offences. Do consultees agree?

Paragraph 14.93

Consultation Question 46.
15.53 We provisionally propose that notification requirements should be automatically applied for the offence of taking or sharing an intimate image without consent for the purpose of obtaining sexual gratification when an appropriate seriousness threshold is met. Do consultees agree?

Paragraph 14.103

Consultation Question 47.
15.54 We provisionally propose that Sexual Harm Prevention Orders be available for all of our provisionally proposed intimate image offences. Do consultees agree?

Paragraph 14.114
Appendix 1: Civil remedies for intimate image abuse

1.1 During our pre-consultation discussions, we sought to understand how victims of intimate image abuse could seek redress using civil remedies and whether this provided for effective resolution. We engaged with a number of civil lawyers to discuss their work with cases involving intimate image abuse.

1.2 They told us that there are a number of ways in which this behaviour could be dealt with by the civil law, including the tort (or civil wrong) of breach of confidence (usually where the image is initially taken with consent and freely given to the perpetrator, who then disseminates it further without consent); a claim of copyright infringement or transfer of copyright; a civil claim under the Protection from Harassment Act 1997; a claim under the Data Protection Act 2018 (usually made against online platforms who host the image requesting removal, for example); and through the tort of the misuse of private information. Kingsley Napley said this was the main route used for a civil claim in this context – while it is not specific to intimate image abuse, it can encompass the misuse of a private image.

1.3 In many cases, civil lawyers could assist without the need to commence legal proceedings. As lawyers from McAllister Ollivarius told us, often they can simply send a “cease and desist” letter which can instil a constructive amount of worry in the perpetrator. A cease and desist letter is a request for the recipient to stop a certain action and to refrain from so acting in the future. The letter warns the recipient of the prospect of future civil proceedings if the request is not complied with, but not criminal action. Cease and desist letters can be in the form of a physical letter or can be communicated online, including through the use of text message or Snapchat if the perpetrator’s location is unknown.

1.4 The civil law has often been used as a stop-gap where the criminal law has failed in protecting victims of intimate image abuse. As Tim Thompson from Mishcon de Reya stated, “the problem for most victims is the inconsistent police response; the legislative framework doesn’t help”. Civil lawyers told us of many cases where people were forced to seek civil remedies in the absence of obtaining any result from the criminal justice system. As lawyers from McAllister Ollivarius explained, people “come to us having had no help within the criminal justice system”. Alexandra Whiston-Dew from Mishcon de Reya said that victims would call their advice centre after feeling as though the criminal justice process had failed them: “usually, they’ve already been to the police, feel they have to prove intention, been told by police to do x, y and z”.

1.5 The civil law can deal with this behaviour faster and sometimes more easily than the criminal justice process as the standard of proof is lower in civil law. It can also obtain results that victims want, such as an injunction stopping someone from disseminating images further, or an order requiring them to take the images down. As Professor Erika Rackley and Dr Kelly Johnson said, “the civil law can offer injunctions as well as compensation. Prison or criminal sanction isn’t always top priority – if you’ve lost your job or need help supporting, financial relief can be useful.” As lawyers from Kingsley Napley told us, ancillary orders that can be made by the Court upon judgment, such
as for forfeiture and destruction, can be very important where intimate image abuse is concerned, but are not being utilised as much as they should.

1.6 However, in our discussions with stakeholders it became abundantly clear that there are limitations of the civil law which prevent it from being an effective way to deal with these types of behaviours. The main barrier is that civil remedies are just too costly and slow for most victims. As Professor Rackley and Dr Johnson told us, although "civil law works, people can’t access it, and it denies a lot of individuals access to justice." Alexandra Whiston-Dew said that obtaining a privacy injunction:

Could be quick if they have money. We have done no injunctions for SPITE [Sharing and Publishing Images to Embarrass project] because of the cost, it involves too much work to be offered pro bono. Usually we suggest making a complaint with the platform, telling them the behaviour is unacceptable under their own terms. But it can take four to six weeks. Often, this civil remedy is only deployed for platforms not perpetrators.

1.7 Taking down images, while desirable for victims, is very difficult and expensive. This was emphasised by lawyers from Kingsley Napley, who also explained that the ability to take images down varies by the location of upload. It is particularly challenging to remove images when the perpetrator continues to upload images on different platforms and the perpetrator cannot be tracked down. Even if the victim is proactive about contacting platforms, this is often not enough to stop the spread of their images. Alexandra Whiston-Dew suggested that the criminal law should step in: "from a civil perspective, it is difficult to address taking down images, so if this could be addressed through the criminal regime that would be valuable."

1.8 Lawyers from McAllister Ollivarius said that using the laws of copyright to order the transfer of ownership of an image from the perpetrator who took the image to the person depicted, if the perpetrator took the image without consent “at least gives back some control”. Alexandra Whiston-Dew from Mischon de Reya said that due to jurisdictional differences, it is sometimes better to use copyright abuse (rather than, for example, a claim of harassment). However, as she explained, this is still often:

Not an effective tool; while online processes could flag the intimate image abuse as copyright abuse to escalate the issue, the images are very unlikely to get taken down using this route. Some platforms are not in the US, it is hard to get a response, they may not have the reputation of Facebook so don’t feel the damage of exposure. The international issue could perhaps be better addressed from criminal side than civil.

1.9 In some cases, it can be possible to obtain a Norwich Pharmaceutical order, which is an order applied for in the civil courts for disclosure. Where a third party is innocently involved (such as a social media platform), the court can order them to disclose information revealing who, for example, uploaded the image or images in question. However, as lawyers told us, this avenue is also very expensive. Virtual Private Networks (“VPN’s”) which can mask the users’ internet activity, can also make this difficult, and platforms may also delete identification when an image is uploaded, or have a three-month limit on retention of this information. Alexandra Whiston-Dew explained:
You need to instruct a civil lawyer, go through high court proceedings, then there is costs exposure if the court resists the order. Sometimes you have to reimburse the platform for the costs of obtaining material because there is an order made against an innocent third party. Costs paid to platforms can be in the thousands. The victim would need to have £50-60,000.

1.10 Civil law remedies also present an opportunity for a victim to obtain compensation, for example from the person who has disclosed an image without consent. In 2015, the High Court awarded compensation to a young victim of sexual abuse in a landmark judgment. Part of the case involved the grooming of the complainant by encouraging her to send explicit images thereby suffering psychological harm.¹ This judgment demonstrated the court’s recognition of the changing landscape of how sexual abuse is perpetrated. However, this route to redress is rarely successful or effective for victims of intimate image abuse. Andrew Lord, a lawyer at Leigh Day who specialises in civil claims with compensation in private law for victims of abuse, told us:

The difficulty with the civil regime is that ordinarily in context of other cases you may be able to go up against institutions with insurers. With this, it is members of the public – then you have a whole host of issues as to whether there are sufficient resources. Most of the time the other party will not have sufficient resources and so a civil claim is rarely going to be an available remedy.

1.11 Although he had clients who were victims of intimate image abuse, he has to date been unable to take forward a claim in this respect. One lawyer from McAllister Ollivarius noted that “the perpetrator often has no money to give, so the criminal law is so important.”

1.12 Most of the lawyers who work in this area expressed the view that the civil law was not fit for purpose in dealing with intimate image abuse and recognising the nature and impact of these behaviours and that the criminal law was best placed to address them. As Alexandra Whiston-Dew said, “victims may feel going to a police officer recognises the behaviour for what it is … the criminal avenue is often better as it’s what perpetrators are scared of, even when the victim has money.” Victims may not feel that the civil law would recognise the impact of the abuse. When asked why she did not go down the civil law route, voyeurism victim Emily Hunt responded: “this is a crime, so I wasn’t interested in taking civil action which risked my money, my house.”

1.13 In some cases, victims feel they have no choice but to go down the civil law route. As Tim Thompson from Mishcon de Reya told us, this shouldn’t be the case: “there is normally some avenue for criminal action; victims shouldn’t be having to work out how they can fund civil action.” This suggests a need to ensure that the criminal law is best able to address this behaviour, to avoid victims having to try to obtain a civil remedy that is either too costly or ineffective. As Professor Rackley and Dr Johnson said, “in this area, there’s a turn to the civil law because the criminal law is not working. If you reform the criminal law, the civil law doesn’t have to fill some of the gaps.” As it stands, without an effective and comprehensive criminal law addressing these behaviours, “people just live with it: some people change their names, some lose their

jobs and have to completely rebuild their lives. Then spend the rest of every week looking for more material.’

1.14 From our pre-consultation discussions with stakeholders, we conclude that civil remedies are costly, time-consuming and may not be effective or accessible to most or all victims. Seeking redress through the civil courts may require a victim to risk their financial security. It can be an ineffective tool when it results in victims tracking intimate images across multiple platforms rather than providing a single remedy. While compensation offers recognition of the wrong done to the victim, it requires the perpetrator to have sufficient financial assets to satisfy any judgment. Civil remedies cannot offer the same punitive element that the criminal law can provide. Nor does civil redress mark the conduct as morally repugnant and reprehensible to society in the same way as the criminal law.