



**Law
Commission**
Reforming the law

INTIMATE IMAGE ABUSE

Summary of the Consultation Paper






THIS SUMMARY




This summary is intended to provide an overview of the key issues that we discuss in our Intimate Image Abuse Consultation Paper. It explains what the project is about and provides some context to the consultation. For those with a particular interest in the issues raised in this summary, we encourage you to read the relevant parts of the full Consultation Paper, which provides significantly more detail.

This is particularly true for organisations that are planning to prepare an institutional response to this consultation. It is also possible to engage with some of the key issues in this review by reading the summary alone, and responding to its questions. This may be particularly useful for members of the public who would like to share their views on some of the main issues, but are less interested in the more detailed and technical questions.



RESPONDING TO OUR CONSULTATION

<p>Who are we?</p> 	<p>The Law Commission of England and Wales is an independent body established by statute to make recommendations to Government to reform the law in England and Wales.</p>
<p>What is it about?</p> 	<p>The Law Commission is 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.</p>
<p>Why are we consulting?</p> 	<p>We are seeking views on whether the criminal law should be reformed in the ways we provisionally propose. We want any recommendations we ultimately make to have as strong an evidence base as possible. Therefore, consultation is a crucial pillar of our work.</p>
<p>Who do we want to hear from?</p> 	<p>We would like to hear from as many stakeholders as possible, including law enforcement, criminal law practitioners, human rights and civil liberties groups, and people who have been victims of intimate image abuse and the service providers who support them.</p>
<p>Where can I read the full Consultation Paper?</p> 	<p>The full Consultation Paper is available at our website: https://www.lawcom.gov.uk/project/taking-making-and-sharing-intimate-images-without-consent/</p>

<p>What is the deadline?</p> 	<p>The deadline for responses is 27 May 2021.</p>
<p>How to respond?</p> 	<p>If you are responding to the full length Consultation Paper we would appreciate responses using the online response form available at: https://consult.justice.gov.uk/law-commission/intimate_image_abuse</p> <p>If you are responding to the Summary Consultation Questions, please use the online response form available at https://consult.justice.gov.uk/law-commission/summary_intimate_image_abuse</p> <p>Otherwise, you can respond: by email to imageabuse@lawcommission.gov.uk</p> <p>by post to Intimate Image Abuse Team, Law Commission, 1st Floor, 52 Queen Anne’s Gate, London, SW1H 9AG.</p> <p>(If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically).</p>
<p>What happens next?</p> 	<p>After analysing all the responses, we will make recommendations for reform, which we will publish in a report. It will be for Government to decide whether to implement the recommendations.</p> <p>For further information about how the Law Commission conducts its consultations, and our policy on the confidentiality and anonymity of consultees’ responses, please see page i of the Consultation Paper.</p>

INTRODUCTION

How did this project come about?

The origins of this project stem from 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 reform of the communications offences. In 2019, the Law Commission accepted a reference from the Ministry of Justice to conduct a project assessing the adequacy of the criminal law in relation to the non-consensual taking, making and sharing of intimate images.

What have we been asked to look at?

We have been asked to consider the existing criminal law in respect of the non-consensual taking, making and sharing of intimate images, and to assess whether the law deals adequately with these behaviours.

What is not within the scope of this project?

The review will not make recommendations about the existing law on the creation and dissemination of indecent images of children. Platform liability, or the responsibilities of companies that host websites or social media sites where harmful or illegal content may be shared, also remains outside the terms of our reference. The Government is conducting active policy work on platform liability and therefore our review will remain focused on the liability of individuals.

The Commission is also undertaking a separate but related project reviewing the communications offences under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003. As part of that project, in September 2020 we published a consultation paper entitled Harmful Online Communications: The Criminal Offences.¹ One aspect of that project is cyberflashing: the unsolicited sending of sexual images using digital technology. Although cyberflashing involves the sharing of intimate images, they are usually images of the perpetrator rather than images of the victim. We therefore consider this behaviour within the Harmful Online Communications project rather than within this project. We have provisionally proposed that the exposure offence found in 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.

¹ <https://www.lawcom.gov.uk/project/reform-of-the-communications-offences/>

What is ‘intimate image abuse’?

The increased use of smartphones and online platforms has made it easier to take photographs or film, alter or create images and send images to our family and friends or the public at large.

The Office for National Statistics Internet Access Survey recorded that in January to February 2020, **96%** of households in Great Britain had internet access.²

In 2016 it was estimated that **3.5 million** photos were shared every minute.³

However, this also means that it is now easier to take or make images of others or to distribute images of others without their consent (whether the images were taken consensually or non-consensually in the first place). This is particularly concerning when those images are ‘intimate’ in nature, such as where the person is naked, engaging in a sexual act or when the image is taken up a person’s skirt or down a female’s blouse. There is also an increasing prevalence of threats to share intimate images.

We have adopted the term intimate image abuse as an inclusive term which encompasses first, the nature of the images we consider in the Consultation Paper and secondly, the range of harmful behaviours demonstrated by perpetrators. We classify the conduct of perpetrators into three separate categories of taking, making and sharing an intimate image, 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**. We also consider the issue of threats to take or share intimate images.

Examples of intimate image abuse

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. However, as we set out in the Consultation Paper, these are not the only forms of behaviour which fall under the category of intimate image abuse.

Taking intimate images of victims without their consent can happen in public places (like on public transport) as well as places which are neither public nor private (such as a school or office).⁴

2 Office for National Statistics, Internet access – households and individuals, Great Britain: 2020 available at <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2020#internet-access-households-and-individuals-data>

3 <https://www2.deloitte.com/uk/en/pages/press-releases/articles/3-point-5-million-photos-shared-every-minute.html>

4 Alisdair Gillespie, ‘Tackling Voyeurism: Is the Voyeurism (Offences) Act 2019 A Wasted Opportunity?’ (2019) 82 Modern Law Review 1107

In the Consultation Paper we look at four types of non-consensual ‘taking’: voyeurism, upskirting, downblousing and the recording of rapes and sexual assaults. We set out the various ways in which an ‘image’ may be taken, including the use of ‘smart home’ devices, CCTV, installing cameras in toilets and changing rooms and the use of drones.

We also look at **making** of intimate images which broadly includes sexualised photoshopping and deepfakes. Sexualised photoshopping very often involves the victim’s head 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 a sexual act. Deepfakes currently include either ‘mapping’ a victim’s face onto a porn actress’s face to make it appear as though the porn actress’s body is the victim’s body, or where the victim is stripped of their clothes to make it appear as though the victim is naked.

The **sharing** of intimate images also occurs in a variety of different ways. The most common method is through social media sites such as Facebook, Instagram, Twitter or channels such as YouTube and commercial pornography sites. Images are also routinely shared via private messaging services, emails, Snapchat or simply shown to others. The behaviours most prevalent under non-consensual sharing are sharing following a relationship breakdown, coerced sharing in the context of an abusive relationship, celebrity ‘leaks’, hacking devices and taking content from the victim’s private accounts.

Finally, we also consider **threats** to take, make or share intimate images. Threats to share intimate images are by far the most common type of threat.⁵ Whilst we found no examples of threats to take, we acknowledge that this may occur as part of a pattern of stalking or harassment or domestic abuse. Threats to make an intimate image were also not very common.



5 Cyber Civil Rights Initiative (June 2017), Data and Society Research Institute (December 2016)



Impact of COVID-19

The world is currently 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, more than a hundred thousand people have lost their lives to the virus. The restrictions on individual freedoms during periods of lockdown have driven people to spend greater amounts of time at home and online.

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.⁶ 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.⁷ The 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.⁸

6 Tiffanie Wen, 'How coronavirus has transformed the way we communicate' (9 April 2020) BBC, <https://www.bbc.com/worklife/article/20200408-coronavirus-how-lockdown-helps-those-who-fear-the-phone> (last visited 23 October 2020).

7 Natalie Sherman, 'Zoom sees sales boom amid pandemic' (2 June 2020) BBC News, <https://www.bbc.co.uk/news/business-52884782> (last visited 23 October 2020).

8 Lucy Holden, 'Sex in lockdown: from the joy of sexts to Zoom and Houseparty orgies' (25 April 2020) The Times, <https://www.thetimes.co.uk/article/sex-in-lockdown-from-the-joy-of-sexts-to-zoom-and-houseparty-orgies-3kwgwsd68> (last visited 23 October 2020).

There has been a rise in ‘sexting’ (sharing intimate pictures as part of a sexual conversation) as well as individuals appearing nude or engaging in sexual acts during video calls.⁹

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. 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.¹⁰

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, for example a ‘screenshot’ of another person, who is nude or engaging in a sexual act on camera.

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.¹¹ 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 future, this increase in opportunities for committing intimate image abuse is likely to continue.

What is currently covered by the criminal law?

1. **Voyeurism** – there are four offences of voyeurism under section 67 of the Sexual Offences Act 2003 (SOA 2003). These relate to observing, recording, and operating or installing equipment to observe or record another doing a private act for the purpose of obtaining sexual gratification.

539



In 2018-2019 there were 539 offences of voyeurism prosecuted (Crown Prosecution Service: Violence Against Women and Girls Report)

9 Anna Iovine, ‘Sexting and nudes are on the rise during quarantine’ (14 April 2020) Mashable, <https://mashable.com/article/sexting-nudes-increase-coronavirus-quarantine/?europa=true> (last visited 23 October 2020).

10 Drew Harwell, ‘Thousands of Zoom video calls left exposed on open Web’ (3 April 2020) The Washington Post, <https://www.washingtonpost.com/technology/2020/04/03/thousands-zoom-video-calls-left-exposed-open-web/> (last visited 23 October 2020).

11 Sophie Mortimer from the Revenge Porn Helpline told us there was an 87% increase in cases from 2019 to 2020.

2. **Sharing of private sexual images ('the disclosure offence')** – section 33 of the Criminal Justice and Courts Act 2015 (CJCA 2015) prohibits the non-consensual disclosure of private sexual photographs or films with the intention of causing the person depicted distress.



In 2020 the Revenge Porn Helpline helped remove **139,935** images



In 2018-2019 **376** cases were prosecuted for disclosing private sexual photographs and films with intent to cause distress



Up to **70%** of calls to the Revenge Porn Helpline were from women

3. **Upskirting** – this refers to the non-consensual taking of pictures or videos of someone's genitalia or buttocks underneath their outer clothing in public. This is an offence under section 67A of the Sexual Offences Act 2003.

16



Crown Prosecution Services (CPS) figures show that in 2019 ten men were convicted of 16 upskirting offences, and three of those men received prison sentences

4. **Some forms of sextortion** or webcam blackmail – sextortion tends to be defined as using intimate images to extort the victim for money or using the image to extort the victim for more images (or both). It can include forms of threats. Whilst some of this behaviour is prosecuted as blackmail,¹² the law was not designed to deal with this conduct.

12 The National Crime Agency uses the blackmail provisions to prosecute some forms of sextortion; see <https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/kidnap-and-extortion/sextortion-webcam-blackmail>

9000



It was reported that in early 2020 more than 9,000 people had been targeted in ‘sextortion’ scams during the six-week lockdown period. Some police forces had reported a six-fold increase in online blackmail attempts within a week.¹²

“Police forces

across the UK have reported an increase in ‘sextortion’ scammers exploiting the lockdown to either claim to have **hacked** into victims’ phones to access embarrassing pictures or to try to **‘sting’** them by enticing them into performing sex acts on webcams.”¹³



Majority of men who call the Revenge Porn Helpline are victims of **‘sextortion’**.



1304



In 2017, 1,304 cases of sextortion were reported to the National Crime Agency by police forces across the UK.

What are the limitations and gaps in the current law?

1. The **motivations vary** for each of these offences. For example, the voyeurism offence is limited to sexual gratification whilst the disclosure offence in section 33 of the CJCA 2015 is limited to causing distress. The blackmail offence requires a demand with menaces with a view to gain or an intention to cause loss. We heard from various stakeholders that this can lead to inconsistent protection for victims as the conduct is not always

limited to these motivations. It may be done as a joke or a prank, (and in the case of voyeurism and blackmail,¹⁵ to cause distress or to coerce or control) but the harms caused are still serious.

13 <https://www.telegraph.co.uk/news/2020/05/01/surge-sextortion-blackmailers-online-prompts-alert-national/>

14 <https://www.telegraph.co.uk/news/2020/05/01/surge-sextortion-blackmailers-online-prompts-alert-national/>

15 Theft Act 1968, section 21.

“[The] officer the day after I made my report [said] it’s very unlikely there’ll be a prosecution because it’s very difficult to prove those [people’s] intent to cause distress. And people can just lie and say the phone was taken out [of] their hands or that their iCloud was hacked. And then [in] which case no one’s accountable.”

**Ruby – victim survivor
(#MyImageMyChoice coalition)**

“After I was upskirted, there was a big conversation, that it wasn’t about sexual gratification – it’s about a power game... The range of intent is far broader than we realise... The culture around this is so much more complex... The concept of motivation needs to be broadened.”

**Gina Martin – victim survivor
and activist**

“Intentions shouldn’t be an important factor in relation to the current law which sets out for experiencers (victims) to prove intent. Even if photos are shared as a joke the fact is the harm has been done.”

**Folami Prehaye – Experiencer, Activist
and Founder of Victims of Image
Crime: Speak Out! (VOIC)**

2. There is inconsistency between the **nature of the images** covered:
 - i. The upskirting offence is limited to an image taken underneath the clothing of a person where the purpose is to observe or record their genitals or buttocks, whether exposed or covered with underwear. This excludes ‘downblousing’, which usually involves taking an image from above, down a female’s top in order to capture their bra, cleavage and/or breasts.
 - ii. The voyeurism offence is limited to private acts in a place where there is a reasonable expectation of privacy. This means that certain acts will not be adequately covered, such as images taken of a person breastfeeding in public, recording of rapes or sexual assaults in a public place or someone who is nude or semi-nude against their will in public. The recording or streaming of sexual assaults and the subsequent sharing of such recordings is a particularly horrific form of intimate image abuse which seems to be on the rise.¹⁶

¹⁶ Sun investigation and see also McCann and Sinaga [2020] EWCA Crim 1676.

iii. The disclosure offence is also limited in scope because it requires the image to be private and sexual. A number of victim support groups and academics told us that the wording of section 33 of the CJCA 2015 was too narrow. We heard from Revenge Porn Helpline and the Muslim Women’s Network about cases involving Muslim women where the victim and her community saw the image as private and sexual, but it did not fall within the definition of private and sexual for the purpose of the disclosure offence. We heard of one victim who was pictured lying in bed without her hijab, exposing her bare shoulders. This image was then non-consensually shared by her ex-partner. To the victim and her community such images are private and sexual.

“In my opinion the criminal law should address any sharing of images which invades privacy, it doesn’t necessarily have to be sexual. [The person] could be half naked [but it] can still have devastating effects [because it] depends person to person.”

David Canham – victim survivor

iv. Altered images are also not covered by any of these provisions, despite causing the same level of harm as unaltered images, especially to vulnerable groups such as teachers (who are often targeted for deepfake or photoshopped images) or women from particular religious or cultural backgrounds.

“... when I see those [deepfake] videos it makes me really nervous because I know how fast technology can advance... it just makes me feel very violated because I haven’t consented to this in any way and I feel very helpless, there’s nothing I can do.”

**Gibi – victim survivor
(#MyImageMyChoice coalition)**

3. **The sharing of images is not adequately covered.** The disclosure offence does not cover conduct where the perpetrator has shared the image with the person depicted in the image. We heard from victim stakeholder groups of cases where, when a relationship has ended, the perpetrator has sent an image to the victim as means of causing them distress. The disclosure offence also does not cover the sharing of altered images which appear sexual or nude. The voyeurism and upskirting offences do not cover sharing in any form. The conduct is limited to ‘observing’ and ‘recording’.

4. **Threats to share** are not currently covered under the disclosure offence. Whilst threats to share, as a form of extortion, may in some cases be prosecuted as blackmail, this offence was not designed to cover the range of behaviours that would amount to a threat, for example, where a threat was made for revenge, or to humiliate, coerce, control or distress the victim.
5. The protection for victims is inconsistent in relation to **anonymity and other ancillary orders**. Whilst the voyeurism and upskirting offences provide victim anonymity, the disclosure and blackmail offences do not. Victim support groups told us that the lack of anonymity orders creates a barrier to victims reporting the matter to the police. Even where the matter is reported, the lack of anonymity can cause victims to be re-traumatised, and in some cases may cause victims to withdraw their complaint. Although an offender who has been convicted of the disclosure offence may pose a continuing risk of sexual harm, the CJA 2015 does not provide the same legal protection to the public as provided by the Sexual Offences Act 2003 under Schedules 3 and 5, which allow for notification requirements (known as the sexual offenders' register) and the availability of Sexual Harm Prevention Orders.

6. Whilst voyeurism and upskirting have provisions governing **lack of consent**, the disclosure offence does not define consent. While many intimate images are taken and shared consensually, apparent consent may have been coerced or obtained under duress, especially in the context of domestic abuse.¹⁷ The Justices' Clerks' Society noted that magistrates and jurors struggle with the concept of consent in sexual relationships in relation to the disclosure offence. Stakeholders argued that clarity was needed on this point.

Gaps in the current law

Motivations

Not always done to cause distress or for sexual gratification

Nature of the image

Does not cover some images taken in public places

Sharing of images

Altered images not covered nor is sharing with the depicted person

Threats to share

Blackmail provisions limited to demand with menaces

Anonymity and other ancillary orders

Not available for all victims

Consent

Consent not defined under the disclosure offence

¹⁷ Antoinette Raffaella Huber, 'Women, Image Based Sexual Abuse and the Pursuit of Justice' (2020) *Doctoral Thesis, Liverpool John Moores University*, <http://researchonline.ljmu.ac.uk/id/eprint/12955/> (last visited 28 May 2020) 139-142.

What would our provisional proposals include?

Our provisional proposals would also include these non-consensual behaviours:

1. **Downblousing** – taking an image, usually from above, down a female’s top in order to capture their bra, cleavage, and/or breasts.
2. **Sharing of altered images** – including sexualised photoshopping and deepfakes.
3. **Sharing an intimate image of the depicted person with the depicted person** – for example, for the purpose of causing the victim distress, either as means to exert control and power or leading to a further threat of some sort.
4. **Threats to share** – this would cover instances where a perpetrator either intends to cause a victim to fear that a threat to share their intimate image will be carried out or they are reckless as to whether the victim would fear that the threat would be carried out.
5. **Recordings of or streaming rapes or sexual assaults** – including but not limited to cases where the victim is incapacitated whilst being attacked.
6. **Sextortion** - using an intimate image to extort the victim for money or more images (or both).¹⁸



18 Sometimes covered under blackmail, Theft Act 1968, s 21.

PREVALENCE OF THIS BEHAVIOUR



Downblousing

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. 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.¹⁹



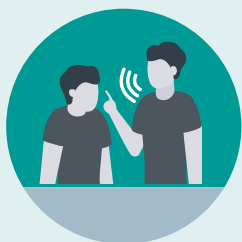
Deepfakes

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.²⁰



Recording of rape and sexual assaults

A Sun newspaper article revealed that videos of these attacks are increasingly ending up on hardcore pornography websites, making the consequences for victims even more devastating.



Threats

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.²¹

19 Vijay, 'Upskirt and Downblouse image sharing website hacked, data of 180,000 members of The Candid Board leaked' (9 September 2020) Techworm, <https://www.techworm.net/2017/01/upskirt-downblouse-image-sharing-website-hacked-data-180000-members-candid-board-leaked.html> (last visited 3 October 2020)

20 Henry Ajder, Giorgio Patrini, Francesco Cavalli and another, 'The State of Deepfakes: Landscape, Threats, and Impact' (September 2019) Sensity (formerly Deeprace), available at <https://sensity.ai/reports/>

21 Refuge, 'The Naked Threat' (July 2020), p.4 available at <https://www.refuge.org.uk/wp-content/uploads/2020/07/The-Naked-Threat-Report.pdf>

HARMS CAUSED BY INTIMATE IMAGE ABUSE



One of the main concerns surrounding intimate image abuse is the minimisation of the impact on victims and the terminology adopted. Understanding the nature and seriousness of the harm caused is necessary to assess the adequacy of the protection provided by the current criminal law. As noted by Citron and Franks, criminal sanctions and penalties are warranted (as opposed to just civil remedies) where the seriousness of the harms caused can be conceptualised not just as harms to an individual but to society as whole.²² In the Consultation Paper we categorise harms into three main categories: (i) harms suffered by individual victims, (ii) harms caused to particular groups and (iii) harms caused to society. Within each category of harm, there are further sub-categories.

Harms caused to individuals

1. **Psychological or emotional** – many victims report feeling embarrassed, ashamed, and stupid for allowing the abuse to happen. The experience can be deeply traumatising. Victims frequently report feeling anxious, depressed, and having post-traumatic stress disorder (PTSD), which worsens over time.²³ The harm is ongoing and can take victims years to overcome, sometimes even lasting a lifetime. The abuse has been described in many cases as being akin to sexual assault and rape.
2. **Physical** – many victims have difficulty concentrating at school or work and struggle to sleep. For some this develops into severe insomnia. Victims also report a general worsening of their physical health. Some are forced to change their appearance and withdraw from both public and online spaces. There have been reports of self-harm and suicidal thoughts. In some extreme cases victims have taken their own lives.
3. **Financial** – many victims also suffer financial harm, through time off work or loss of employment. Due to withdrawing from online space this also impacts networking opportunities for further employment such as on LinkedIn or Twitter. Victims go to great lengths to remove the digital footprints created through the non-consensual sharing of these images.

22 Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 Wake Forest Law Review 345, pg 436.

23 Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 Wake Forest Law Review 345, pg 435.

“I have been very paranoid and nervous and fearful... And it’s taken me a long time to keep doing the things that I love, and learning to adjust so that I can feel safe, going out into public, doing things like that... It’s influenced everything in my life. Where I live, and what I do, and how I act, so it’s really like a constant pressure... it’s been quite traumatizing, even for me.”

Gibi – victim survivor
(#MyImageMyChoice coalition)

“If I were gonna explain to someone who had no experience with this, the daily impact that it had, the daily impact included very quickly becoming bed-ridden, because I couldn’t move, I couldn’t think, I couldn’t function without this being at the very forefront of all of my thoughts. It was like my body shut down in sort of a state of shock.”

Chrissy – victim survivor
(#MyImageMyChoice coalition)

“I immediately felt sick when I saw the videos... I mean, my first thought was ‘This can’t be of me, surely. I would’ve known, surely that these had been taken.’... And I got back and watched them and yeah, it was me, and I didn’t really know what to do. I was very confused, I didn’t understand how videos like that could be taken without me knowing.... And I immediately burst into tears. I was incredibly upset, I was embarrassed, I felt like everyone would be talking about me and that everyone had seen them.”

Ellesha – victim survivor
(#MyImageMyChoice coalition)

“Intimate Image Abuse can for some be like a life sentence. I’m talking from personal experience and from those I have supported/currently support. For many it feels like everyone has seen your intimate photos/content. This experience can induce heightened anxiety attacks and hyper-vigilant reactions to daily life routines and does not go because you have made a complaint or your perpetrator has been convicted. The trauma doesn’t just go away.”

**Folami Prehaye – Experiencer,
Activist and Founder of VOIC**

Societal harms

As well as harming particular groups, intimate image abuse has a wider societal impact. It undermines the development of relationships and sustains a culture where consent is routinely ignored. It leads to a withdrawal by individuals from society (both online and offline) which means contributions that individuals make are lost. It also leads to the targeting of particular groups which means subordination and marginalisation remain entrenched.

All of these harms form part of the justification for why the current law ought to be reformed.



Impact on particular groups

Women

- Research shows 90% of victims are women (Cyber Civil Rights Initiative Research)
- Mental health impact akin to victims of sexual assaults and rape
- Anxiety, depression, PTSD, low self-esteem, high levels of stress, difficulty being in public, trust issues, suicidal thoughts (Revenge Porn Helpline, Women's Aid and Refuge, research by McGlynn, Rackley, Johnson)

Men

- Men more likely to be victims of sextortion and victimisation by women in a relationship
- Often unable to report the abuse due to shame and helplessness (Galop and Mankind)

Religious groups

- Most common incidents involve threats to share and sharing on social media (including altered images)
- Devastating impact on women; victims can be sentenced to a life of shame and seclusion; forced to flee country in some cases; extremely distressing
- Images perceived as sexual when taken as a whole not only to victim but also to their community (even if not sexual by conventional western standards) (Muslim Women's Network, Privacy International, Revenge Porn Helpline)

LGBTQ+

- Research shows LGB people 4x more likely to be victims of revenge porn than heterosexual people (Data Society and Research Institute)
- RMIT University of Australia research found 36% of LGB participants had experienced intimate image abuse compared to 21% of heterosexual participants
- LGBTQ+ victims suffer emotional trauma, depression, hopelessness and isolation, homophobic and transphobic abuse

Teachers

- Most common situations involve ex-partners non-consensually sharing images at the school where the victims teach and students upskirting or photoshopping images to make them appear sexual
- Some teachers have become seriously ill; threat to reputation is enormous; may lose their job and struggle to find another one
- Humiliation is profound; deeply traumatic; likely to impact victim's authority and level of respect shown in classroom (Professionals Online Safety Helpline; Revenge Porn Helpline)

Children and young people

- Children aged under 18 and young people aged 18-24
- 36% of victims in 2016 of the disclosure offence were under 19 and 39% were aged between 20-29
- Children and young people reluctant to report the matter; laugh it off; minimise the abuse; school experience is tainted; struggle to develop romantic relationships; victim blaming especially where victim is a girl
- Groomed by social norms to tolerate violation of privacy; self harm and in extreme cases suicide (Elena Sharratt (SWGFL) research, Cyber Civil Rights Initiative)

Sex workers

- Images are used to 'out' them to friends, family or employers
- Apart from the shame and humiliation there is an increased risk of being cut off from community, physically assaulted, or even killed
- Trauma puts them at real risk of further psychological harm (Revenge Porn Helpline)

People with disabilities

- 56.1% of Australians with a disability reported being victims of intimate image abuse (Research by Henry, Powell and Flynn)
- Disability charity Sense told us that people with complex disabilities may not recognise the abuse or understand that something is wrong
- May have a skewed or incomplete picture of what is normal or acceptable behaviour in relationships (Sue Larner, Sense)

OUR PROVISIONAL PROPOSALS

There is a critical need for reform in this area for three compelling reasons. First, the existence of gaps and lacuna in the law due to the evolution of technology. Secondly, the patchwork of different offences, many of which 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.

Our provisional proposals would provide a more unified and structured approach. We conclude that reforming the criminal law will provide more effective protection and must ensure that appropriate orders are available to the courts in dealing with these offences.

Four new offences

We provisionally propose four new and comprehensive offences:

1. **a ‘base’ offence:** it would be an offence for a person (D) intentionally to take or share an intimate image of the depicted person (V), where V does not consent, and D does not have a reasonable belief in consent. There would be no additional intent element for this offence.

Summary Consultation Question 1

Do consultees agree that there should be a base offence with no additional intent?

2. **an ‘additional’ more serious offence:** it would be an offence for D intentionally to take or share an intimate image of V, where V does not consent, with the intention to humiliate, alarm or distress V. There would be no requirement for the prosecution to prove that D did not have a reasonable

belief in consent because such a belief would be inconsistent with the purpose of humiliating, alarming, or distressing the victim.

Summary Consultation Question 2

Do consultees agree that there should be an additional offence where the defendant intended to humiliate, alarm or distress the victim?

3. **a further ‘additional’ more serious offence:** it would be an offence for D intentionally to take or share an intimate image of V, where V does not consent and D does not have a reasonable belief in consent, and D’s purpose was to obtain sexual gratification, for D or another.

Summary Consultation Question 3

Do consultees agree that there should be a further additional offence where the defendant’s purpose was to obtain sexual gratification?

4. **an offence of threatening to share an intimate image:** it would be an offence for D to threaten to share an intimate image of V where D intends to cause V to fear that the threat will be carried out or D is reckless as to whether V will fear that the threat will be carried out.

Summary Consultation Question 4

Do consultees agree that there should be an offence of threatening to share an intimate image?

What is the definition of ‘intimate’?

Understanding what is meant by the term ‘intimate’ will be crucial to our proposed offences. We have identified three categories of ‘intimate’.

Sexual by nature or circumstances

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. For the purposes of sharing this includes images which have been altered to appear sexual.

Nude or semi nude

this includes breasts, buttocks, genitals, whether exposed, covered by anything worn as underwear, or partially exposed (including breastfeeding). For the purposes of sharing this also includes images that have been altered to appear nude or semi nude.

Private

this includes toileting which means urinating or defecating. For the purposes of sharing this also includes images that have been altered to appear private. We seek consultees' views on whether other private images should be included.

Summary Consultation Question 5

Do consultees agree that images which:

- (i) show something that a reasonable person would consider to be sexual because of its nature; or
- (ii) taken as a whole, are such that a reasonable person would consider them to be sexual

should be included within the definition of an intimate image?

Summary Consultation Question 6

Do consultees agree that the definition of an intimate image should include nude and semi-nude which includes a person’s genitals, buttocks, or breasts whether exposed or covered with anything worn as underwear.

For downblousing this would include partially exposed breasts.

For the sharing offences, this would also include altered images.

Summary Consultation Question 7

Do consultees agree that the definition of an intimate image should include toileting images?

Summary Consultation Question 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 anything worn as underwear, should be included within the definition of an intimate image?

Images that are intimate within particular religious groups

We have heard evidence that people from some religious groups 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 when in public pictured not wearing a hijab while in an intimate setting with a man who is not her husband (for instance 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.

Women victimised in these ways report feeling violated, exposed and humiliated.²⁴ 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.²⁵

As such, victims suffer similar levels and forms of harm to those experienced when images which are sexual by 'Western' standards are taken or shared without consent. The non-consensual taking or sharing of such images 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.

While there was broad support from stakeholders for including these kinds of images, there are serious difficulties with this: it may be difficult to draw the boundaries of intimate in this context. Another difficulty is that many people in society may not understand that these images are intimate within certain religious groups or realise the harm sharing such an image could cause to the depicted person.

24 Nazmin Akthar (Muslim Women's Network); and Elena Sharratt (PhD Candidate, University of Exeter).

25 Carmel Glassbrook (Professionals Online Safety Helpline (POSH)); Zabaida Anwar (Victim Support); and Nazmin Akthar (Muslim Women's Network Group).

However, where a perpetrator takes or shares such an image without consent in order to obtain sexual gratification, clearly the perpetrator understands 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.

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.

Summary Consultation Question 9

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.

What do we mean by 'taking' and 'sharing'?

Taking

For the purpose of the voyeurism offences, 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. The same approach to defining the relevant term 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 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'.²⁶ 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.

26 CPS '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 8 October 2020).

We are inclined to follow this approach for the offences we propose. We do not think that ‘taking’ will need to be defined in law. However, we do invite consultees’ views on whether the current voyeurism or ‘upskirting’ offences, or the taking offence in section 1 of the Protection of Children Act 1978, fail to capture any forms of ‘taking’ that ought to be criminalised.

Summary Consultation Question 10

Are there any forms of ‘taking’ that the current voyeurism or ‘upskirting’ offences, or the taking offence in section 1 of the Protection of Children Act 1978, fail to capture?

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 photocopier. 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 propose that ‘taking’ should be limited to situations where, but for the acts of the perpetrator, the image would not otherwise exist, regardless of how that image was taken. We conclude in the Consultation Paper 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 the latter type of copying is more akin to retaining or possessing an image, or in some instances, making an image.

Summary Consultation Question 11

Do consultees agree that a ‘taking’ offence should only include behaviour where, but for the acts of the perpetrator, the image would not otherwise exist?

Sharing

Section 33 of the CJCA 2015 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(1) CJCA 2015 states that a person ‘discloses’ something if, he or she ‘gives’, ‘shows’ or ‘makes it available’ to the person. Section 34(2) further states that an image is ‘disclosed’ whether or not it is given, shown or made available for reward, and whether or not it has previously been given, shown or made available to the person.

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.

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.

Summary Consultation Question 12

Do consultees agree that ‘sharing’ an intimate image should capture:

- i. sharing intimate images online, including posting or publishing on websites, sending via email, sending through private messaging services, and live-streaming;
- ii. sharing intimate images offline, including sending through the post or distribution by hand; and
- iii. showing intimate images to someone else, including storing images on a device for others to access and showing printed copies to another/others.

Are there any other forms of sharing that consultees think should be included in the definition of ‘sharing’?

Intimate images taken or previously shared in a ‘public place’

Some exemptions will apply for images that are taken in a public place or have previously been shared in a public place. For more details, please see chapter 11 of the full Consultation Paper.

What is the role of consent?



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. Sections 75 and 76 of the SOA 2003 contain a series of rebuttable and irrebuttable presumptions in relation to capacity, deception and voluntariness. 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.

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 abuse offences. We therefore provisionally propose that sections 74 to 76 of the SOA 2003 should apply to our provisionally proposed offences.

Summary Consultation Question 13

Do consultees agree that the consent provisions in sections 74 to 76 of the Sexual Offences Act 2003 should apply to intimate image offences?

Proof of actual harm

Proof of actual harm is not a requirement of the voyeurism, upskirting or disclosure offences. Requiring the prosecution to prove that the victim was harmed by the abuse risks retraumatising victims, it would act as an unnecessary barrier to prosecution and sufficient culpability is ensured through other elements of our proposed offences. Accordingly, we provisionally propose that intimate image offences should not require proof of actual harm.

Summary Consultation Question 14

Do consultees agree that proof of actual harm should not be an element of intimate image abuse offences?

Making intimate images

Under our provisional proposals, sharing without consent or threatening to share altered intimate images including photoshopped images and deepfakes would constitute an offence. In order to determine whether ‘making’ an intimate image should be a criminal offence (without sharing it or threatening to share it), we are seeking consultees’ views on the prevalence, motivations and harms associated with ‘making’ an intimate image.

Summary Consultation Question 15

- i how prevalent is making intimate images without consent, without subsequently sharing or threatening to share the image?
- ii what motivates individuals to make intimate images without consent, without sharing or threatening to share them?
- iii how, and to what extent, does making intimate images without consent (without sharing or threatening to share them) harm the individuals in the images?

Are these sexual offences?



Intimate image abuse sits on a continuum of sexual abuse. This means that whilst much of the behaviour constitutes a form of sexual offending, not all of this conduct would be categorised or punished as a sexual offence. The term intimate image abuse is an overarching and inclusive term to reflect not only the nature of the images but also the range of harmful behaviours demonstrated by perpetrators.

Ancillary orders

In light of the fact that much of this behaviour constitutes sexual abuse, we provisionally propose that the following ancillary provisions ought to be available (in addition to the ones more generally available to the court):

- a. lifetime anonymity for all victims of the new intimate image abuse offences;
- b. notification requirements (known as the ‘sex offenders’ register’) which should be automatically triggered 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;
- c. Sexual Harm Prevention Orders where it is considered necessary to protect the public, or particular members of the public from sexual harm.

Summary Consultation Question 16

- i. should anonymity orders be available for all victims?
- ii. should notification requirements be triggered where the defendant’s purpose was obtaining sexual gratification when an appropriate seriousness threshold is met?
- iii. should Sexual Harm Prevention Orders be available under all four offences where it is necessary to protect the public from sexual harm?

Reasonable excuse

There will be instances where, even in the absence of consent, the defendant's act will not warrant criminalisation because the conduct is not considered to be morally wrongful or harmful or the harm is minimal. The conduct can in essence be justified because it is in pursuance of a legitimate aim or for the 'public good' or in the 'public interest'. We provisionally propose that a defence of 'reasonable excuse' should be available, and should include:

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.

Summary Consultation Question 17

Should there be a defence of reasonable excuse available which includes:

- i taking or sharing the defendant reasonably believed was necessary for the purposes of preventing, detecting, investigating or prosecuting crime;
- ii taking or sharing the defendant reasonably believed was necessary for the purposes of legal proceedings;
- iii sharing the defendant reasonably believed was necessary for the administration of justice;
- iv taking or sharing for a genuine medical, scientific or educational purpose; and
- v taking or sharing that was in the public interest?

