Intimate Image Abuse – Policy Briefing on Law Commission Consultation

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The Law Commission launched its intimate image abuse consultation in February 2021. Its remit is to conduct a review of the existing criminal law and make recommendations for reform as it relates to the taking, making and sharing of intimate images without consent. **The deadline for responses is 27 May 2021** (info on how to respond is available here).

The consultation is a comprehensive account of the current law and its failings and inadequacies. It recognises the significant harms of image-based sexual abuse. **We welcome the overall approach which would replace the current piecemeal and ad hoc legal regulation with a comprehensive set of criminal laws.** The Law Commission has produced a summary of their recommendations here. This briefing focuses on some of the key issues to be considered.

Key points and recommendations

1. Definition of intimate image

- **Extend definition of intimate image** to better protect **black and minoritised women** whose intimate images of them not wearing their chosen or expected cultural or religious attire are taken and/or shared (question 10, para 6.125)
- Include **altered/deepfake intimate images** (question 21, para 7.138)
- No need for specific **downblousing** provision as image of involuntarily exposed breast/bra would be covered by proposed definition of an intimate image (question 17, para 7.48)
- A separate specific provision in different legislation covering images of **breastfeeding** women would be more suitable than incorporating it here (question 33, para 11.109)
- Ensure **sharing OnlyFans (or similar) content without consent is criminalised**: the new law must include images originally shared (including for financial gain) to a specific group of people (even a large group) (question 34, para 11.138).

2. A straightforward single offence

- We recommend one comprehensive, straightforward offence of taking/sharing intimate images without the need to prove specific motivations of perpetrators (questions 27-31, para 10.73, 10.79, 10.87, 10.93, 10.95).

3. No unnecessary hierarchy of offences or between victim-survivors

- We do not think there should be a more 'serious' offence requiring proof of specific motives (question 27-31, para 10.73, 10.79, 10.87, 10.93, 10.95).

4. Introduce statutory civil offence and new court orders

- New powers to civil and criminal courts to order images deleted and removed are vital to give victim-survivors greater choices for redress and justice, and grant.

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5. No proof of harm

- We support the Law Commission's proposal that any criminal offence should not require proof of specific harms experienced by a victim-survivor (question 24, para 9.12).

6. Automatic anonymity for all those reporting any form of intimate image abuse

- Automatic anonymity is vital in order to encourage victim-survivors to report their abuse and continue cases (question 43, para 14.85).
- We also support Law Commission recommendations for further measures to protect complainants during any trial process (questions 44 and 45, paras 14.89 and 14.93).

7. Provide sustained and effective resourcing to support organisations

- New laws must be accompanied by an increase in secure funding for organisations to support victim-survivors and prevention/education initiatives, such as the **Revenge Porn Helpline** and specialist organisations supporting **black and minoritised women** who experience higher levels and distinctive forms of abuse.

8. Establish a regulatory body/agency

- We need a regulator with powers to order social media and porn companies to take down images, as well as supporting and funding educational and preventative initiatives.

Intimate image abuse can shatter lives. Its harms can be constant, isolating and life-ending. Despite six years of piecemeal reform, the current law is failing victim-survivors. Now is the time to properly tackle this pernicious form of abuse. It is time now for justice for victim-survivors of intimate image abuse.

It is vital that the new law is comprehensive and straightforward. The new law must eliminate current hierarchies between victim-survivors and not introduce any more. It must not bake-in already outdated assumptions about motives. It must follow best practice internationally and introduce new civil order to get material taken down and deleted. It must provide victim-survivors with appropriate and diverse avenues of redress, recognition and support.

Why is the Law Commission consulting on this area of law?

Confusing and piecemeal law:

For many years, we have argued that the current law on the taking and sharing of intimate images is inconsistent, outdated and confusing. In particular, there are:

- Different laws and requirements depending on whether an image is *created* without consent or *distributed* without consent
- Differing motives are required depending on the offence. You have to prove the motive of causing distress for the sharing offence, but sexual gratification for voyeurism.
- Differing categorisation of offences – some are sexual offences, such as voyeurism, which means they come with special protections and automatic anonymity for victims, but others are not. Victims whose images are shared without consent are not automatically entitled to anonymity.
- Considerable gaps in the law – for example, no clear criminal offence covering cyberflashing.

Gaps in the law:

There are also considerable gaps in the law meaning that despite a few recent changes such as the law on upskirting, the criminal law still fails to adequately respond to all forms of image-based sexual abuse. For example:

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- There is no law covering altered (photoshopped) images or deepfake pornography.
- There is no law covering cyberflashing (sending unsolicited penis images).
- There is no law covering taking or sharing images where the motives are for a 'laugh', to gain kudos or 'lad points', to boost their status amongst groups, or for financial gain.
- There is no law covering the taking or sharing of intimate images of women who were not wearing expected or chosen religious or cultural attire.

Government action:

Following a sustained period of advocacy and research from an extensive coalition of politicians, policy-makers, survivors and academics, in 2019 the Government asked the Law Commission to investigate this area of law.

What is intimate image abuse?

Not 'revenge porn':

The term 'revenge porn' generally refers to a malicious ex-partner sharing sexual images without consent. It does not, therefore, cover all forms of abuse such as upskirting, voyeurism or men sharing images amongst themselves to boost their status or a 'laugh'. The term therefore skews debate and is one of the reasons why the law is so limited. Further, many victim-survivors find the term fails to explain or understand their experiences and it can actively hinder their recovery as it is a victim-blaming term.

Image-based sexual abuse:

Due to the problem with the term 'revenge porn', we developed the concept of 'image-based sexual abuse' in 2016 to better explain the nature and extent of these abuses. This term covers all forms of taking, making and sharing nude or sexual images without consent, including threats to share and altered images. For a detailed discussion, see our research here.

Intimate image abuse:

This term is also used to cover the taking, making and sharing of nude or sexual images, as well as including images such as those taken of women without their expected religious or cultural attire. The Revenge Porn Helpline uses the term intimate image abuse in their work.

Intimate image abuse is:

The taking, making or sharing of nude, sexual or other intimate images without consent, including threats to share and altered images such as deepfakes.

How to define an intimate image: protecting 'intimate privacy'

Why the definition of an intimate image is so important and how we can make a decision

How the law defines what is an 'intimate image' will determine the whole reach and scope of the law. It is vital therefore that we get this definition right. We have to draw the line somewhere and if we are to get the law changed, we have to ensure there is broad support for proposed reforms.

The definition must be broad enough to include the types of intimate images that when taken or shared without consent cause serious harm and trauma. **We think this means ensuring the scope of the current law includes intimate images of women from minoritised cultural communities**.

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But the law must also not be so wide as to include actions that while being wrong, unethical and very troubling, should not be criminalised. We shouldn't criminalise all creepy and problematic behaviours. So, the law, for example, should not include so-called 'tribute' images, cleavage shots or images of buttocks in tight jeans or leggings.

Protecting 'intimate privacy'

What principles should help us make these decisions? We think we should focus on protecting 'intimate privacy'. This means our right to control the boundaries of our intimate lives, of our sexual autonomy and sexual expression, of what people know about our intimate experiences. Key here is power, control, choice and autonomy over our intimate lives; particularly important for women, specifically black and minoritised women, and other marginalised groups and sexual minorities who are particularly subject to having their intimate lives scrutinised and subjected to abuse.

What is an intimate image?

How does the current law define an intimate image?

Definitions vary between the different intimate image offences, but, in general, the current law covers:

- Sexual acts (where not ordinarily seen in public)
- Exposed genitals or pubic area
- Genitals, buttocks or breasts exposed or covered only with underwear (usually in a private place)
- Toileting

What does the current law *not* cover?

- Images of someone in a state of undress, showering or bathing
- Downblousing (as usually not in a private place)
- Breastfeeding in public (as not in a private place)
- Intimate images of LGBT+ people who may not be 'out' and a transgender person prior to transition
- Images of black and minoritized women without their chosen or expected cultural or religious attire

What does the Law Commission propose?

In essence, the Law Commission proposes to include within definition of intimate image:

- Sexual images: sexual by nature or reasonable person assume sexual
- Nude or semi-nude images: 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), and images taken down the depicted person's top
- Breasts, to include chest area of transgender women, excluding images of men's chest area
- Some private images (eg toileting)

Images of women not wearing their chosen or expected religious/cultural attire

The Law Commission make *no* recommendation on religious/cultural images but seek views on whether to include images of people not wearing their chosen or expected religious/cultural attire.

The Law Commission give three examples of material that *might* be considered for inclusion within 'intimate image':

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- (1) A Muslim woman who wears a hijab when 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/ankles exposed (para 6.105).

Law Commission response:

- They acknowledge that the taking/sharing of some of these images can cause significant harms.
- They propose to include *some* of these images in a more the 'serious' offence which would require proof of intention to cause distress or seeking sexual gratification (see further below on their proposed hierarchy of offences).
    - An image taken or shared without consent of a woman depicted not wearing hijab and 'only' exposing her hair would not, Law Commission propose, meet sufficient level of harm to warrant criminalisation (para 6.117).
- They recommend only including these images in the more serious offence as that 'would limit criminalisation to cases where sufficient culpability could be demonstrated' (para 6.122).

Law Commissions' concerns with criminalising non-consensual taking/sharing of these images

- *Vagueness of possible definition:* They reject the idea of a definition of intimate based on the subjective view of the person in the image (ie that they consider the image intimate), on the ground that this would be too vague and that it would be difficult to establish an understanding between the victim and perpetrator that the image was "intimate" and therefore should not be taken/shared (para 6.119 ff).
- *Lack of societal awareness of harm of these images*: They argue that the harm of the taking/sharing of these images 'may not be widely understood' and that therefore there 'may not be broad enough societal condemnation of this behaviour to justify criminalisation' (para 6.118).

Our response to the Law Commission's arguments

Is there evidence public do not understand harms?

- We query whether there is evidence suggesting that the public *do not* understand that the taking/sharing of these types of intimate images can cause significant harm.

Expressive role of criminal law

- If there is a lack of awareness, the criminal law plays a vital role in educating society of the harms experienced by specific individuals and/or groups. Offences around stalking, coercive control and non-consensual sharing of intimate images are good examples of where legislation has played an active role in changing society's understanding of specific behaviours.

New offences adopted where no public consensus on criminalisation

- There are also actions that are criminalised where there is an evident lack of consensus on the harms (obscenity or drug offences for example), but the Government at the time takes the view that criminalisation is the right course of action.

Problems of creating hierarchy between victim-survivors

- If minority religious/cultural intimate images are only included in the more 'serious' offence, this creates a worrying hierarchy that suggests these religious/cultural contexts require a higher threshold to prosecute.

- This is difficult to justify where such individuals and groups are already subject to higher levels of discrimination, marginalisation, hate crime and online abuse.
- It is also difficult to justify including some images within the definition of an intimate image (breastfeeding/downblousing), but excluding these images where there is greater evidence of demonstrable harm.

The intersectional experience of harm

- It is vital to recognise the intersectional experience of harms; victim-survivors from religious, black and minoritized groups are already subject to higher levels of online abuse

We recommend adapting the Australian civil law regime

Australia currently provides protection in these circumstances as part of its civil law regime, with section 44B of the Enhancing Online Safety Act 2015 prohibiting "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.

We recommend adopting the Australian provisions for the criminal context in England & Wales - replacing 'consistently' with commonly or usually – so as to include images which have the potential to cause significant harms.

Advantages of this approach

- It is specific to the cultural or religious context and so does not rely extending the scope of the law on 'private' or intimate images more generally.
- It therefore is more likely to gain support as it avoids fears over 'slippery slope' or over-criminalisation that may come with a broader definition.

Disadvantages of this approach

- We recognise that this approach separates out some images of black and minoritized cultural groups from a more general approach to 'intimate images'.
- The proposed law would also require various thresholds to be satisfied (which makes prosecutions and investigations more challenging) including (a) *consistently* wearing specific attire (b) and *in public* (which can be challenging to define, particularly quasi-public settings such as large parties, schools) and (c) reasonable expectation of privacy.

Include altered (photoshopped) images and deepfake intimate images

Current Law does not cover altered images and deepfakes:

At the moment, if someone takes an ordinary, non-sexual image and uses technology such as photoshopping or artificial intelligence apps to alter it to make it sexual and pornographic without that person's consent, this is not a criminal offence.

Significant harms of deepfake and altered images:

In our research, victim-survivors and stakeholders told us that having such images created and shared without their consent can be devastating and the trauma as significant as where 'real' images are taken or shared. As one stakeholder said: 'it's still a picture of you …. It's still abuse'. Other victim-survivors speaking out recently have also revealed the harmful impact of this abuse.

Accordingly, our research report *Shattering Lives and Myths: a report on image-based sexual abuse* recommended reforming the law to include deepfakes. Many others have also recommended this change, including Parliament's Women & Equalities Select Committee report on public sexual harassment in 2018 and a coalition of MPs in 2019.

Law Commission recommend including deepfakes (question 21, para 7.138)

The Law Commission acknowledges the harms of altered images and deepfakes and recommends including them within the definition of 'intimate image'.

We recommend supporting Law Commission proposal to include altered/deepfake images

In 2017, we argued that 'sexualised photoshopping' must be seen as a form of image-based sexual abuse and should be covered by the criminal law. Therefore, we support the Law Commission's approach which follows existing practice in Scotland, Australia and many other jurisdictions around the world.

Images taken in public/semi-public including 'downblousing' and breastfeeding

Law Commission propose a requirement to prove 'reasonable expectation of privacy'

Where an image is taken in public or semi-public, it will only be covered by the criminal law if the person had a 'reasonable expectation of privacy' in relation to the specific circumstances surrounding the taking of the image.

The Law Commission is rightly concerned to exclude from the criminal law circumstances where an individual might be said to be *voluntarily* nude, such as if they are streaking at a sports game, or part of a naked public protest.

In addition, the Law Commission proposes to make it clear that there are exceptional situations where it can always be *assumed* that there is a 'reasonable expectation of privacy' such as:

- Images of sexual assault or where someone is nude/semi-nude in public against their will
- In a changing room
- Upskirting and downblousing and
- Breastfeeding.

'Downblouse' images

Downblousing is the taking of images, usually from above, down a woman's top in order to capture her bra, cleavage and/or breasts, often taken in public spaces such as supermarkets, shopping centres and public transport. It is vital that we understand that this term covers three different types of image:

(a) An image of a woman who is voluntarily choosing to show some underwear and/or cleavage (though she may not be expecting to having images of her underwear/cleavage taken and/or shared);
(b) an image taken *down* a woman's top showing partially exposed breasts and/or underwear (eg from a balcony or standing position on public transport of a seated woman);

(c) An image of a woman's breasts which exposes the breasts in a manner not of her choosing, such as if she was wearing a loose-fitting top and an image revealed her breasts as she bent down.

Image (a) should not be covered by the criminal law, even if the woman did not expect her image to be taken, this is similar to other 'creepshots' taken in public that are not and should not be criminalised.

The Law Commission proposes to include image (b) within the scope of the criminal law, though it appears that the only difference between (a) and (b) is the angle of the image, rather than any difference in the extent of breast disclosed or voluntary nature of exposure.

Image (c) is similar to upskirting in that nudity/underwear revealed would not otherwise have been so had the image not been taken, and the woman did not choose to reveal her breasts/underwear.

Image (c) would also be similar to a situation such as where an image captures a man's exposed genitals during him voluntarily taking part in a sports match in public (as happened in one US case). Note that in cases (c) there would only be criminal liability if the taking of the intimate image was intentional (and there were no other defences).

Current law does not cover downblouse images

Downblousing is not covered by current voyeurism laws (as not usually in a private place) or non-consensual distribution (as only covers sexual images or exposed genitals or pubic area).

Law Commission proposal

- Include images that are "nude" or "semi-nude" including images of a person's partially exposed breasts, including those taken *down* their top (images (b) and presumably (c) above).
- They state that any definition will need to be very specific, as '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' (para 6.56) (ie not include (a) images).

Law Commission justification

- Images being taken of women's breasts, including downblousing, is a common experience for many women (1 in 5 in an Australian survey reporting images of their cleavage without consent) (para 7.35-7.47).
- Some evidence of harm and some other jurisdictions cover downblousing.

We recommend only including downblousing images where the victim's breasts are involuntarily exposed (ie (c) above)

- We recommend that only downblousing images of type (c) are included (where involuntary exposure).
- We do not think this requires a specific exemption. But rather the images would fall within the nude or semi-nude requirement of an 'intimate image'.
- We think the general provision meaning that images taken in public are only covered where there is a 'reasonable expectation of privacy' should apply.
- This approach has the benefit of clarity and consistency. A specific exemption risks an assumption that all downblousing is covered which misleads the public, victims and criminal justice personnel regarding the scope of the law.
- If there is an assumption that all such images are covered (as when the Law Commission consultation was first published), this may undermine the general public acceptance of the need for legislation in this area, with the argument of the law going 'too far'.

Images of breastfeeding

Law Commission proposal

- To include (some) images of breastfeeding as they might be considered 'intimate' on the basis that the woman's breasts are 'partially exposed' (following the definition of semi-nude) (para 11.39).
- A woman breastfeeding in public is 'voluntarily' exposing her breast which is why taking an image without consent will only be covered if she has a 'reasonable expectation of privacy'.
- To include specific provision stating that a breastfeeding woman always has a 'reasonable expectation of privacy'.

Law Commission justification

Breastfeeding 'can be an inherently private act. It is at least as inherently private as changing one's clothes' (para 11.41).

Concerns with specific provision on breastfeeding

- We do not object to there being a provision in legislation that a woman automatically has a reasonable expectation of privacy where she exposes her breast during breastfeeding.
- Nonetheless, we do not think this should be justified as an 'inherently private' act. Breastfeeding in public should be normalised as it is entirely acceptable.
- There is a risk, as with downblousing, that it is assumed that the legislation covers *all* images of breastfeeding (which it wouldn't) thereby misleading the public, victims and criminal justice personnel.
- There is also the risk of undermining the focus of the legislation on intimate image abuses where the significant harms to individuals is well-established.

We recommend that consideration is given to specific proposals criminalising taking an image of a breastfeeding woman without her consent that are currently being debated

- This could include all such images (including where a breast is not exposed), as well as avoiding assumptions around the 'private' nature of breastfeeding; though we note that current proposals are limited to proof of specific motives of sexual gratification or causing distress.

OnlyFans: onward sharing of images previously disclosed to public/semi-public with consent

The 'OnlyFans' issue

If someone shares an intimate image with their closed group of subscribers for a fee, and the image gets shared on without consent, should this be a criminal offence (eg OnlyFans images being shared onwards without consent of the performer)?

Current law provides defence where shared for 'reward'

- There is currently a defence to the offence of non-disclosure of a sexual image if a defendant reasonably believed the image had previously been shared for 'reward' and they had no reason to believe that the disclosure for reward was not made with consent.
- This *excludes* the OnlyFans scenario.

Current law semi-public sharing

If someone shares an intimate image with their closed/private group of social media followers (as opposed to a fully public account), and the image gets shared on, this is only a criminal offence if it can be proven that the perpetrator intended to cause distress to the victim (which is difficult to prove).

Law Commission position

- Initially shared to the public as a whole with consent:
    - Where an image has been shared in 'public' with consent, onward sharing without consent should not be criminalised.
- Therefore, the proposed law would *not* cover situations where the image:
    - has been shared, or defendant reasonably believes the image has been shared, in a place (offline or online) where members of the *public* have access; and
    - either the person in the image consented to the previous sharing, or the defendant reasonably believed that the person depicted consented to the sharing.
- But does this cover the OnlyFans scenario?
    - It is not clear: 'determining whether the original disclosure was made to the *public* will be a question of fact depending on the facts of each case'
- What does 'place where members of the public have access' mean?
    - Law Commission says it includes open magazines and websites.
    - They also suggest that a private facebook group is not public.
    - But, what about a Facebook group of thousands? Still not public at large, but semi-public?
    - And what about OnlyFans and similar sites where shared to (possibly large) number of subscribers? Still not public at large; but perhaps semi-public?
- Initially shared *without* consent and onward sharing (eg onto a porn or 'revenge porn' site):
    - Only an offence if can be proven that defendant had no reasonable belief that consensually shared (eg where finds image on a 'revenge porn' website) (para 11.120).

Challenges of the Law Commission's approach

- There is a lack of clarity regarding when image is shared in 'public' or 'private' and therefore the law would provide no guidance to public, eg whether sharing intimate image with 3,000 Facebook friends, or 20,000 OnlyFans subscribers, is public or private;
- Individuals should be able to determine the scope of their privacy and therefore ability to constrain who sees intimate images.

Our approach and recommendations

- We agree that where images are shared with the public at large, it should not be a criminal offence to further share those images.
- We agree that sharing commercial pornographic images should not be an offence.
- We think that sharing for reward should not be the determining factor in any decision, as there are many ways to make financial gains indirectly; and sharing an image by choice for financial gain should not compromise rights to privacy.

We think the law needs to be clear that everyone has a reasonable expectation of privacy when sharing images with a closed/limited group of people, even if that is a large group, such as OnlyFans. Consent to sharing with a closed/limited group (even if large) does not mean consent to images then being further shared.

Intimate image definition: further issues

Some further issues arise relating to the definition of intimate image including:

- **trans women:** We agree that the 'chest area of trans women, women who have undergone mastectomy and girls starting puberty' should be included within an 'intimate image'. This is vital as such images can be as harmful as the other forms of nude or sexual images included (question 3, para 6.62);
- **type of underwear:** We agree that any garment which is being worn as *underwear* should be treated as underwear for this definition. This is vital to ensure there are not arbitrary distinctions in the law such as an upskirt image where a woman happens to be wearing bikini bottoms as her underwear (question 4, para 6.71);
- **black strips across nipples:** We agree that nude or sexual images which have been slightly altered to supposedly make them acceptable to share, such as black strips across nipples, should also be included. This is vital to protect the sexual autonomy and privacy of victim-survivors (question 5, para 6.75);
- **identifying victim in image:** We agree that the law must not only cover images where the victim-survivor is identified. This is the case in many US states and means that if the woman's head is not included, for example, she is not covered by the criminal law. This would seriously limit the scope of the law (question 6, para 6.79).
- **undressing, showering or bathing where not nude or semi-nude:** We do not think that these images (eg a photo of someone showering behind frosted glass which is not semi/nude) need to be included. While disturbing, the behaviour and images are not sufficiently culpable or harmful to warrant an extension of the criminal law. We must be mindful of the limits of the *criminal* law in particular. Note, however, that if such images are taken as part of a pattern of conduct, they can come within the criminal law of harassment (question 8, para 6.89).

Recommend a straightforward single offence - rejecting proposed hierarchy between victims

Law Commission proposal

The Law Commission propose a hierarchy of offences based on perpetrators' motives:

- a 'base' offence which covers the non-consensual taking or sharing of an intimate image; and
- additional 'more serious' offences where it can be proven that the offender was motivated by an intention to humiliate, alarm or distress the victim or to obtain sexual gratification (for him or another). They seek views on whether to include intention to make a gain and/or coercive control.

Law Commission justifications

- They suggest that the more 'serious' offence is a 'specific and malicious type of behaviour which warrants separate and more serious treatment by the criminal law' (para 10.70);
- A more 'serious' offence would provide options for longer prison sentences;
- Follows current practice where there are motive requirements.

Reasons against introducing a hierarchy of offences

It sends the wrong message to victim-survivors

- It suggests that some breaches of an individual's sexual autonomy and privacy are more 'serious' than others and creates an unjustified hierarchy between victim-survivors.

- The hierarchy of offences also risks sustaining a narrative and focus on 'revenge porn'; that the 'worst' cases are those where malicious ex-partners take or share images. The creation of a hierarchy of offences risks undoing the work to educate the public that image-based sexual abuse happens in many different ways, for many different motives, and all of which are potentially seriously harmful.

No evidence harms worse when perpetrated for sexual or causing distress motives

- There is no evidence that victim-survivor's experience graver harms when the defendant acts with the specific purposes to cause distress, for sexual gratification or for financial gain. In fact, victim-survivors experience considerable harms when their images are taken or shared by those seeking to boost their social status, such as via private social media groups or by 'collectors'.

Motives are rarely clear-cut and easily identifiable.

- Evidence suggests that there is rarely a single, clearly identifiable motive for perpetrating image-based sexual abuse. Motives are overlapping, inter-connected and also closely linked to overarching cultural attitudes of entitlement, dominant masculinity and power. Seeking to separate motives does not reflect the reality of these abusive practices and risks undermining our developing understanding of motives. It also risks minimising the reality of cultural attitudes around dominant masculinity and entitlement which underpin much image-based sexual abuse. It risks individualising the motives.
- Moreover, motives can vary and change over time. Introducing specific motive requirements risks the law becoming dated and ineffective as new harmful cultures and motivations emerge.

It undermines the core wrong of non-consent

- The core wrong of these offences is non-consent. Creating an offence that is more 'serious' if perpetrated for a specific motive undermines this key point. Public education and cultural change needs to focus on challenging all non-consensual conduct, regardless of motives.

Requiring motives and creating hierarchy is out of step with other criminal and sexual offences

- There is no general requirement in the criminal law to specify particular motives for criminal offences. The criminal law is generally concerned with an individual's intention to carry out the particular act (eg punch/kill) rather than *why* they have done a particular act. The why (ie motive) only, and rightly, becomes relevant in terms of evidence and sentencing.
- The vast majority of sexual offences, for example, do not specify a motive. The 'guilty mind' (ie fault) is the intention to commit the non-consensual act.
- Where there are criminal offences that might be considered hierarchical, they are based on different levels of harm (such as with assault offences), as opposed to motivations.

Hierarchy would make any new law unnecessarily complicated

- Introducing more than one offence, with different thresholds, will make the law unnecessarily complex, requiring enhanced police and prosecutor understanding, as well as making the law more difficult to understand by victims and the public at large.
- The key message – of a new straightforward, comprehensive law outlawing non-consensual acts – risks being undermined.

We recommend one comprehensive, straightforward offence, rejecting the proposed hierarchy.

Our view is that the 'base' offence effectively and comprehensively covers all forms of intimate image abuse. More serious culpability and responsibility for criminal acts is better reflected in sentencing decisions unconstrained by assumptions that one motivation is 'worse' than another.

The law is currently confusing and complicated. Any new law must be as straightforward as possible.

Recommend new statutory civil claim and court orders

The Law Commission does not make any recommendations in relation to the civil law (as it is outside its remit), though it is briefly mentioned in an appendix. We recommend that in adopting legislation, England & Wales should follow the examples in North America and Australia by including civil law options and orders.

Why civil remedies are important

- Recognises victim-survivors' desire for avenues of support and redress beyond the criminal law.
- Ability to take fast, effective and at times pre-emptive action to have images removed and limit further distribution with minimal additional stress to victims.
- Potential to reduce the burden on the criminal justice system by providing a complementary avenue for victim-survivors to pursue.
- Provide comprehensive response to problem of intimate abuse.
- Addresses the borderless nature of online distribution channels by targeting both content hosts and individuals that share images without consent.

What has been done elsewhere?

- To date, 6 US states and 4 Canadian provinces have included a civil claim alongside a criminal offence in legislation addressing intimate image abuse.
- In the UK, the Protection from Harassment Act 1997 includes both a criminal and civil response to harassment/stalking.

We recommend the introduction of statutory civil claim:

Any new legislation should include a statutory civil claim together with criminal offences, providing that a person must not take, make or share an intimate image of another person knowing that the person depicted in the image did not consent.

We also recommend the introduction of a variety of court orders to limit distribution

It would be a huge step forward if courts were able to make a wide range of orders (in both criminal and civil cases), as is commonplace in other jurisdictions. These should include orders:

- prohibiting the offender from distributing the intimate image.
- Requiring offender to delete any images.
- requiring the offender to take down or disable access to an intimate image
- requiring the provider and/or end user of a social media service, relevant electronic service or designated internet service to remove an intimate image from the service
- requiring a hosting service provider who hosts an intimate image to cease hosting the image.

Agree victim-survivors should not have to prove harm

The current law does not require proof of harm

There is no requirement under English law to prove that a victim-survivor has suffered any specific harm. This is the right approach because intimate image abuse is wrongful whatever the consequential harms because it is fundamentally a breach of an individual's privacy, sexual autonomy and dignity (for more detail on this argument, see our research in 2017 here and our work on the harms of image-based sexual abuse here).

However, in some other countries, such as New Zealand, there is a requirement for the victim-survivor to come forward and give evidence about their harm and how serious it is. This is another invasion of the victim-survivor's privacy and risks re-traumatising them.

We support Law Commission's proposal that any criminal offence should not require proof of specific harms experienced by a victim-survivor (question 24, para 9.12).

Agree victim-survivors be granted automatic anonymity

Current law is confusing as only some victim-survivors get anonymity:

There is currently no automatic anonymity for someone reporting to the police that their sexual images have been *shared* without their consent. This means that anyone and everyone can report their name and the details of their experience. However, if a report relates to upskirting or voyeurism, or any other sexual offence, then there is an automatic right to anonymity.

Why is anonymity so important?

In our research in 2019, victim-survivors told us that the lack of anonymity means they are less likely to report to the police. It also means victim-survivors are understandably less likely to continue their cases. This is supported by campaigns including #NoMoreNaming endorsed by celebrities and MPs, as well there being clear public support for anonymity.

We support the Law Commission's proposal to grant anonymity

We therefore endorse the Law Commission proposal to grant anonymity to all those reporting any form of intimate image abuse (question 43, para 14.85).

Further court orders such as special measures at trial:

We also support Law Commission recommendations for further measures to protect complainants during any trial process (questions 44 and 45, paras 14.89 and 14.93)

Recommend sustained and effective resourcing of support organisations

In our research in 2019, we recommended that more services are needed to help victim-survivors get images and videos taken down and to provide long-term and specialist support. This requires investment in well-resourced technical and specialist expertise equipped to support victim-survivors of intimate image abuse, including those supporting LGBTQ+, disabled and black and minoritised women.

Any legal change must therefore be accompanied by a commitment to increase and prioritise secure funding for organisations such as the Revenge Porn Helpline and specialist organisations supporting black and minoritised women who experience higher levels and distinctive forms of abuse to support victim-survivors and prevention/education initiatives.

Recommend establishing a new regulatory agency/office

A number of jurisdictions/provinces (including Australia, Manitoba, Nova Scotia) have established a statutory body tasked with supporting victim-survivors and ensuring effective regulation and law enforcement. In our 2019 research report, we recommended the establishment of an Office for Online Safety.

Role of eSafety (or similar) regulator may include:

- Power to order take-down of images and enforce civil orders
- Providing specialist advice, support and assistance to victim-survivors to get images/videos returned, destroyed, deleted from the internet
- Providing information about legal remedies and protections available when there has been a non-consensual distribution of an intimate image or when a person believes that an intimate image is about to be distributed without consent
- Resourcing specialist support services for victim-survivors, including counselling and legal advocacy
- Provides and champions public information and educational initiatives to challenge cultural attitudes and behaviours that sustain online and image-based sexual abuse

Benefits

- Supports victim-survivors to 'reclaim control'
- Provides a holistic and comprehensive response to combating image-based sexual abuse

We recommend an organisation is established, or tasked with, powers such as those above to order take-down of material, as well as supporting victim-survivors, enabling education and public information and overseeing effective regulation and law enforcement.

References and research

- McGlynn, Clare and Rackley, Erika (2016) Not 'revenge porn', but abuse: let's call it image-based sexual abuse *EverydayVictimBlaming.com* 9 March 2016.
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- Rackley, E., McGlynn, C., Johnson, K., et al (2021) "Seeking Justice and Redress for Victim-Survivors of Image-Based Sexual Abuse", *Feminist Legal Studies* (in press)
- Henry, N, McGlynn, C, Flynn, A, Johnson, K, Powell, A, Scott, A (2021). *Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-consensual Nude or Sexual Imagery.* Routledge.

Sources of support and advice

Revenge Porn Helpline http://www.revengepornhelpline.org.uk/

Women's Aid https://www.womensaid.org.uk/information-support/

Rape Crisis https://rapecrisis.org.uk/get-help/want-to-talk/

Victims of Internet Crime (VOIC) https://voic.org.uk/

Galop – The LGBT+ anti-violence charity

SurvivorsUK | We challenge the silence to support sexually abused men

About us

Professor Clare McGlynn QC (Hon) is a Professor of Law at Durham University with over twenty years' experience working closely with politicians, policy-makers and the voluntary sector to influence and shape law reform relating to sexual violence, pornography and online harms. She has played a key role across the UK in developing new criminal laws on extreme pornography and intimate image abuse, giving evidence before select committees of the Scottish and UK Parliaments and advising ministers and MPs across the political spectrum. In addition, she has addressed policy audiences and advised governments across Europe, Australia and North America, as well as working with social media companies including Facebook and TikTok to develop their policies. Together with Erika Rackley, she developed the concept of image-based sexual abuse to develop a better understanding and response to these abuses, and has published many research articles and blogs to progress reform. She is a co-author of the recently published books *Cyberflashing: recognising harms, reforming laws* (2021) and *Image-Based Sexual Abuse: a study on the causes and consequences of non-consensual imagery* (2021).

Professor Erika Rackley is a Professor of Law at the University of Kent. Her scholarship with Clare McGlynn on the harms of image-based sexual abuse and pornography has shaped legislation and policy in England & Wales and Scotland, and has been widely cited and discussed in government, parliamentary and policy/NGO reports and the media.

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