



Submission to the UK Law Commission on Intimate Image Abuse Consultation

27 May, 2021

Introduction

Equality Now respectfully makes this submission in response to the UK Law Commission Consultation on Intimate Image Abuse. We are writing to provide information on intimate image abuse and respond to the Consultation Paper prepared by the Law Commission.

Founded in 1992, Equality Now is an international human rights organisation that works to protect and promote the rights of women and girls around the world in the areas of legal equality, harmful practices, sexual violence, and sex trafficking, with a cross-cutting focus on adolescent girls. Equality Now combines grassroots activism with international, regional and national legal advocacy to achieve legal and systemic change to benefit women and girls, and works to ensure that governments enact and enforce laws and policies that uphold their rights. Equality Now has a presence in Beirut, Nairobi, New York, New Delhi, London, Tbilisi and Washington, DC and partners and members in almost every country in the world.

We applaud the UK Government's and Law Commission's plans and efforts to address the gaps in the laws in England and Wales that aim to provide protection from intimate image abuse, in an age where technological advancements have made taking and sharing of such images easier and more prevalent. We also note that with increasing and intensifying misogyny online intimate image abuse disproportionately affects women and girls.¹

Background

Intimate image abuse can be broadly defined as the non-consensual distribution of sexually explicit images or videos of an individual.² It includes images taken consensually but

¹ Powell, A., Henry, N., & Flynn, A. (2018). Image-based sexual abuse. In Walter S. DeKeseredy & M. Dragiewicz (Eds.), *Routledge Handbook of Critical Criminology* (pp. 305–3015). Routledge available at https://www.researchgate.net/publication/324780124_Image-Based_Sexual_Abuse_in_W_DeKeseredy_M_Dr_agiewicz_Eds_Routledge_Handbook_of_Critical_Criminology_2nd_Edition

² Glossary on platform law and policy consolidated after IGF available at <https://www.intgovforum.org/multilingual/content/glossary-on-platform-law-and-policy-terms>

accessed and then shared without consent, as well as voyeurism³, sexual coercion and extortion (sextortion)⁴ and recordings of sexual assaults⁵ and image manipulation or alteration such as deepfakes.

Several gaps have been identified by the Law Commission including:

- “The existence of gaps and lacunae in the law due to the evolution of technology.”
- “The patchwork of different offences, many of which overlap but use different language and terminology.”
- “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.”
- There is no provision for altered or manipulated images (e.g. photoshopped images or deepfakes).
- There is no law providing for cyberflashing⁶ (i.e. sending unsolicited sexual images).
- There are no provisions taking into account taking and sharing of images where the motivation is other than to cause distress, e.g. it does not provide for situations where the taking and sharing of intimate images is motivated by the desire to gain popularity, done out of malice, for fun or for financial gain.
- There is no law providing for the taking or sharing of intimate images of people who are not wearing expected or chosen religious or cultural attire.

We agree with the list of gaps identified by the Law Commission, and applaud the process the Commission is undertaking in seeking to address them.

In consideration of the gaps identified we recommend that the Law Commission’s proposals be anchored on the **right to a reasonable expectation of privacy** that every individual has. This would ensure the right of the individual to be protected against intrusion into their personal life or affairs, or those of their family, by direct physical means or through publication. We believe that by focusing on protecting people’s intimate privacy the proposed law will also be protecting individuals’ sexual expression and control over their intimate lives.

Our Response

1. Definition of Intimate Image

The Law Commission provisionally proposes that the definition of an “intimate image” should include:

³ Hirschfeld, M. (1938). *Sexual anomalies and perversions: Physical and psychological development, diagnosis and treatment*. London: Encyclopaedic Press

⁴ Online sexual coercion and extortion refers to the broad category of sexual exploitation and abuse wherein abuse of power is exercised through threats or sharing of sexual images or information online as the means of coercion.

⁵ C. McGlynn, E. Rackley. More than ‘Revenge Porn’: Image-Based Sexual Abuse and the Reform of Irish Law. available at

<https://www.birmingham.ac.uk/Documents/college-artslaw/law/research/bham-law-spotlight-IBSA.pdf>

⁶ <https://bristoluniversitypress.co.uk/asset/9542/cyberflashing-policy-briefing-final.pdf>

- *“the chest area of trans women, women who have undergone a mastectomy and girls who have started puberty and are developing breast tissue should be included in a definition of a nude or semi-nude image”*
- *“nude and semi-nude images (defined as images of a person’s genitals, buttocks or breasts, whether exposed or covered with underwear, including partially exposed breasts, whether covered by underwear or not) taken down the depicted person’s top”*
- *“that any garment which is being worn as underwear should be treated as underwear for the purpose of an intimate image offence”*

We agree with the range of images to be included in the definition of “intimate image” because they are all situations that are generally considered intimate and private, and to which people would have a reasonable expectation of privacy. We believe that including this range of images would ensure the right of the individual to be protected against intrusion into their personal life or affairs, or those of their family, by direct physical means or by publication. Specifically, the inclusion of images of the chest and breast areas of girls who have started puberty in the definition of intimate image is welcome, as this will help to increase protection to adolescent girls who, being in that period of transition between childhood and adulthood often fall through the cracks in terms of legal protection.

We also agree with the Law Commission’s proposal that any garment which is being worn as underwear should be treated as underwear for the purposes of defining “intimate image”. This is vital to ensure there are no arbitrary distinctions in the law such as defining an upskirt image to only refer to an image where a woman is wearing bikini bottoms as her underwear.

Overall, we recommend that the definition of intimate image must be broad enough to include the types of intimate images that when taken or shared without consent invade a victim/survivor’s privacy. We propose that the overarching focus of the law should be on protecting people’s intimate privacy, and thus protecting their sexual expression and control over their intimate lives. This is particularly important for women and girls and should especially recognise the additional vulnerabilities faced by women as a result of race, ethnicity, class and other socio-economic factors, on top of sex and gender based discrimination. Moreover, publishing or sharing a person’s sexual activities or images should be considered an aggressive invasion of privacy *“because they can be much more intrusive and informative than words.”*⁷

We also agree with the Law Commission’s provisional proposal that *“legislation implementing this test makes clear that a victim who is breastfeeding in public or is nude or semi-nude in a public or semi-public changing room has a reasonable expectation of privacy in relation to the taking of any image”*.

In a similar vein, we agree with the Law Commission that where: *“an intimate image is taken in a place to which members of the public had access (whether or not by payment of a fee), and the victim is, or the defendant reasonably believes the victim is, voluntarily engaging in a sexual or private act, or is voluntarily nude or semi-nude, the prosecution must prove that the victim has a reasonable expectation of privacy in relation to the taking of the image”*.

⁷ Von Hannover v. Germany (2005) 40 EHRR 1

What constitutes a “private” or “public” image?

We note that there is a lack of clarity regarding what constitutes ‘public’ or ‘private’, in particular whether an image that is shared to a distinct online group is “public” or “private”. A specific example given in the Consultation Paper is that of social media platforms that operate on a subscription model such as OnlyFans. Although we agree as a general principle that where images are shared with consent with the public at large (e.g. in a publicly available online magazine), it should not be a criminal offence to further share those images, we urge the Law Commission to consider the following when dealing with situations as those presented on platforms such as OnlyFans:

1. Sharing one’s images by choice and with consent on a platform for financial gain should not be the determining factor in any decision on whether the image is “private” or “public”, and should not compromise one’s rights to a reasonable expectation of privacy.
2. Consent to sharing with a closed group (even if large) should not mean that one has consented to the images being further shared. Thus, where an image has been shared only with one’s subscribers, there should be a reasonable expectation that the image is not further shared with the general public.
3. The Terms of Use or Privacy Policies on the digital platform may inform the permissions to share and re-share images. We recommend that digital platforms be mandated to ensure clarity on these permissions (e.g. including age verification in order to protect children and young people) in their Terms of Use or Privacy Policies, and take action to ensure that their users do not breach them.

Intimate images taken or shared without consent which cause significant harm to victims/survivors for cultural or religious reasons

The Law Commission does not recommend including intimate images which cause significant harm for cultural or religious reasons in the definition of “intimate image” on the grounds that it *“recognise[s] 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”*. Further, the Commission asserts that there is limited societal awareness on harms experienced by specific groups. Instead, the Law Commission proposes to possibly include some of these images in a more “serious” offence (see below on hierarchy of offences) that would require proof of intention to cause distress or to seek sexual gratification, and *“limit criminalisation to cases where sufficient culpability could be demonstrated”*.

Our recommendations regarding these images are as follows:

1. We recommend that the law should provide for these images in the definition of “intimate image” and urge the Law Commission to consider adapting the provisions of Australia’s Enhancing Online Safety Act (2015) wherein Section 9B “intimate image” is defined 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.”⁸

In order for the definition to have wider application and include all such images which have the potential to cause significant harm, we recommend replacing ‘consistently’(highlighted above) with “commonly or usually”.

2. We do not agree that cultural or religious images should be included in a more “serious” offence. In the first instance, we do not think it is necessary to have a hierarchy of offences because it suggests that some breaches of an individual’s sexual autonomy and privacy are more ‘serious’ than others and creates an unjustified hierarchy between victims-survivors. In addition, as proposed by the Commission, a more “serious” offence would require proof of intention to cause distress, and this would present victims/survivors of this harm with additional hurdles in obtaining legal recourse and justice. We believe this approach will further marginalise cultural and religious communities that already face additional forms of discrimination and limitations to accessing legal recourse and justice.
3. We acknowledge that there may be a lack of societal awareness of harms experienced by specific groups. In this case, having a criminal law that addresses the harms could be in itself a means for raising awareness, in addition to being a means of accountability and enabling access to justice for victims/survivors. Many offences such as those around domestic violence, stalking, and coercive control are good examples where having the law has served to raise public awareness of the harms arising from these actions.

The definition of “sexual image”

The Law Commission provisionally proposes that *“an image which shows something that a reasonable person would consider to be sexual because of its nature and taken as a whole, should be included within the definition of an intimate image.”*

Should the definition of “sexual” be considered as that which a reasonable person considers sexual, we propose that the reasonable person in this instance be the victim/survivor and not the defendant. If it is the reasonable defendant, as is the case when the reasonable person standard is applied in criminal and civil law, this will leave victims/survivors less protected. The reasonable person is an objectively measurable standard against which legal concepts have to be understood and tested. The reasonable person is given the characteristics of the accused person and the reasonable person is also expected to have reasonable foreseeability based on their characteristics.

Although the reasonable person standard is gender neutral and should ideally encompass the experiences of a person and experiences of people similar to them, the challenge, as discussed in *Ellison v Brady*⁹ is that in reality *“...a sex-blinded reasonable person standard tends to systematically ignore the experience of women.”*¹⁰ The reasonable person standard also

⁸ see <https://www.legislation.gov.au/Details/C2018C00356>

⁹ *Ellison V Brady* [1991] 924 F2d 872

¹⁰ *Ibid* at para 3- 4

dissembles biases and reinforces social disadvantages¹¹. Basing the definition of a “sexual image” on what a reasonable defendant would consider sexual could discount what a victim/survivor would consider sexual. This will also potentially discount cultural and religious images which may not be considered sexual or intimate in nature, by those outside of the victim/survivor’s community. The objective of the offences should be to protect against intrusions into private or intimate moments of a victim’s life, recognising that the negative consequences on the victim/survivor’s dignity such as the harassment and humiliation often felt by victims in these situations is closely linked to their social identity.

Altered Images

The Law Commission acknowledges the harms of altered images and provisionally proposes *“that the definition of “nude or semi-nude” should include images which have been altered but leave the victim similarly exposed as they would be if they were wearing underwear”*, be included in the definition of ‘intimate image’.

We agree with this proposal. There is sufficient evidence to support that altered intimate images are just as harmful to victims/survivors and a violation of their privacy. To the untrained eye, it is very difficult to tell the difference between the fake and real images, and so the harm and harassment felt by victims/survivors is just as significant. With technological advancements, altered images (e.g. photoshops or deepfakes) are becoming increasingly prevalent. Compared to other images, they are easier and quicker to generate in large volumes. During 2019 Facebook announced it was contributing millions of British Pounds to a fund to improve its capabilities to identify and remove deepfakes¹² as part of its response to the growing scope and scale of altered images.

Thus, including altered images in the definition of “intimate images” would provide the much needed protection and legal recourse for victims/survivors of this form of image-based abuse.

2. The Acts

Defining “taking of an intimate image”

The Law Commission proposes that *“a taking offence should only include such behaviour where, but for the acts of the perpetrator, the image would not otherwise exist”*.

We recommend that the Law Commission considers its proposed definition of “taking of intimate images” be adjusted to include the range of circumstances where the perpetrator’s direct or indirect actions result in the images being taken, even if the perpetrator themselves does not directly take the images. For example, the perpetrator should be held responsible and deemed to have committed the crime of “taking” with regards to any intimate images taken by a victim/survivor as a result of online grooming or coercion by the perpetrator.

If the definition is understood to only refer to the direct acts of the perpetrator in “taking” the image, it would exclude many victims/survivors of intimate image abuse from obtaining recourse where they themselves participated in the taking of the image. Intimate images taken

¹¹ Dianna Young, “Claims for recognition and the generalized other: The reasonable person and judgment in Criminal Law,” *Canadian Journal of Law and Society* 23 (1-2) (2008)

¹² See <https://www.bbc.com/news/technology-51018758>

by victims/survivors themselves as a result of coercion and online grooming are on the increase, particularly affecting young people and adolescent girls.

In addition, the offence of “taking of intimate images” should also be clear that victims/survivors who were involved in “taking” of those images will not face any criminal sanctions.

Defining “sharing of an intimate image”

The Law Commission “*provisionally proposes that "sharing" an intimate image should capture:*

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

We agree with the proposal, and support that the definition of sharing should encompass any methods of media content sharing currently available. Methods of sharing should include through near-field communication (NFC), airdrop/bluetooth sharing, forwarding, and cloud storage, as well as sharing via smart-phone apps and social media platforms among others. At the same time, the law should be drafted in a manner that acknowledges that new methods of sharing may arise in the future, due to the ever-changing and evolving nature of technology and perpetrators’ behaviours online.

We also agree that the methods of sharing covered under the law should extend to non-digital methods such as sharing of printed copies in person, via post, or other means, including sharing as a result of grooming or coercion.

The Law Commission provisionally proposes that “*it should not be an offence to possess an intimate image without consent, even when there was never any consent to possession.*” We urge the Law Commission to consider the harm suffered from the perspective of every individual having the right to a reasonable expectation of privacy. The mere fact that a perpetrator has an intimate image of a victim/survivor, even without their knowledge is a violation of their right to privacy. Criminalising possession of intimate images unless there is explicit and ongoing consent without coercion or exploitation would compel people to be more cognisant of such images in their possession.

Threats to take and share intimate images without consent

The current legal framework does not criminalise threats to take and/or share intimate images without consent. Threats to share someone’s intimate images can cause considerable distress and anxiety to the victim/survivor. It is a tactic often carried out in abusive relationships to coerce and maintain a perpetrator’s control. According to a Survey by Refuge, 83% of survey participants said that threats to share an intimate image “impacted their mental health and

emotional wellbeing. More than 1 in 10 women felt suicidal as a result of the threat and 1 in 7 felt more at risk of physical violence”¹³.

Accordingly, we recommend that threats to take and/or share intimate images should be a criminal offence under the proposed offences and should raise an evidentiary presumption that where threats have been made then there was no consent from the victim/survivor.

We also recommend that it should not be a requirement of the crime to prove the intention of the perpetrator. Threats to share without consideration of the perpetrator’s intention are provided for in Section 44B (1) Australian Enhancing Online Safety Act¹⁴ which states that, “*A person (the first person) must not post, or make a threat to post, an intimate image of another person (the second person) on: (a) a social media service; or (b) a relevant electronic service; or (c) a designated internet service*”. The harm occurs regardless of the intention of the perpetrator.

The Law Commission also “*invites consultees’ views as to whether the prosecution in a threatening to share an intimate image case should be required to prove that the person depicted did not consent*”. We think that proof of consent in a “threatening to share” case should not be required because the mere fact that someone is threatening means consent has been withdrawn or consent was conditional. If Sections 74 to 76 of the Sexual Offences Act are to apply, a person consents if they agree by choice, and has the freedom and capacity to make that choice. If such a person is being threatened then there is no consent, and requiring the prosecution to prove that there was no consent would be redundant.

3. Consent

We agree with the Law Commission’s proposal that the definition of consent provided for in Sections 74 to 76 of the Sexual Offences Act should apply to the proposed new offences. However, we suggest that the definition of consent should include a person’s explicit right and ability to withdraw consent at any point. A person should also have the right to provide conditional consent, e.g. consent to share an intimate image only to an identified group of people or platforms.

The new law should also include provisions on how consent will be evaluated for both “taking” and “sharing” of intimate images. In cases involving sharing, one way to achieve this would be to mandate digital platforms where the images are shared to draft their Terms of Use or Privacy Provisions in a manner that enables consent to be expressly recorded. Other examples could include methods being used by Twitter to prompt users to review before sending 'mean' replies on the platform.¹⁵

4. Proof of harm

We agree fully with the Law Commission’s proposal that “*that proof of actual harm should not be an element of intimate image offences*”. English Law does not require proof that a

¹³ See <https://www.refuge.org.uk/refuge-launches-the-naked-threat-campaign/>

¹⁴ See <https://www.legislation.gov.au/Details/C2018C00356>

¹⁵See https://www.nbcnews.com/tech/social-media/twitter-begins-show-prompts-people-send-mean-replies-rcna839?mc_cid=de40f43038&mc_eid=4bb97759ae

victim has suffered any harm.¹⁶ This is the right approach because intimate image abuse is wrongful regardless of the consequential harm because it is fundamentally a breach of an individual's privacy, sexual autonomy and dignity.

5. Fault Requirement

The Law Commission provisionally proposes “*that any new offences of taking or sharing intimate images without consent should have a fault requirement that the defendant intends to take or share an image or images without reasonably believing that the victim consents*”.

In our view, considering the mental state or thoughts of the defendant when they took or shared the intimate image will present a stumbling block for victims/survivors to be able to obtain legal recourse. Several image-based abuse laws in other countries such the US have been criticised for having the 'intention to harm or harass' requirement because it allows for disclosures of intimate images for profit or entertainment to arguably be defensible because harm was not 'intended'.¹⁷ It may also confuse mens rea with motive.

Similarly the proposed fault requirement would place focus on the defendant's beliefs at the time of sharing or taking instead of focusing on the violation of a reasonable expectation of privacy or the right to dignity that the victim has. Further, there is no general requirement in the criminal law to specify particular motives for criminal offences. Criminal law is generally concerned with an individual's intention to carry out the particular act rather than why they have done a particular act. The reason is aptly considered for evidence and sentencing.

We note that having the proposed fault requirement allows for consideration to be had for users on social media platforms who mindlessly reshare intimate images, sometimes with the assumption that the person depicted consented to the image being shared. However, people in intimate images, even those shared on websites such as Only Fans, usually have a reasonable expectation of privacy save for with the specific person or group of persons with whom the image was explicitly shared. Accordingly, not having the fault requirement will place an onus on social media and other users to reconsider resharing intimate images and will hopefully deter mindlessly resharing intimate images, promote proactive bystander interventions to challenge problematic behaviours and attitudes, which will in turn provide protection for victims/survivors of intimate image abuse. The why/motive can then be considered at sentencing.

6. Hierarchy of offences

The Law Commission proposes a hierarchy of offences based on perpetrators' motives. We disagree with this approach because it suggests that some breaches of an individual's sexual autonomy and privacy are more 'serious' than others and creates an unjustified hierarchy between victims-survivors. This also applies to the point we have made above regarding

¹⁶Clare McGlynn and Erika Rackley, *Policy Briefing on Law Commission Consultation on Intimate Image Abuse*. 5 May 2021.

<https://claremcglynn.files.wordpress.com/2021/05/mcglynnrackley-stakeholder-briefing-5-may-2021-final-1.pdf>

¹⁷ Franks, Mary Anne. (June, 2015). “The ACLU's Frat House Take on 'Revenge Porn'”. Huffington Post. available at https://www.huffpost.com/entry/the-aclus-frat-house-take_b_6980146

intimate images that cause harm on cultural and religious grounds where the Law Commission proposes to provide for them under a more “serious” offence. There is also no evidence that harm is worse when perpetrated for sexual or causing distress motives. It has been noted that victims/survivors experience considerable harm when their images are taken, made or shared. Further, motives are not always easy to identify. Nevertheless, where the court finds the crime was done with additional discrimination this should be considered to merit a harsher sentence.

Conclusion

We once more thank the Law Commission for its considerable research into intimate image abuse and the proposals offered. In our work to end online sexual exploitation and abuse, we highlight the need for enactment and implementation of laws that provide women and girls and other vulnerable people with legal protection and recourse against online sexual harms. The work being undertaken by the Law Commission is a positive step towards that.

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