Intimate Image Abuse – Response to Law Commission Consultation

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1. 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 including to make orders to ensure images deleted and removed are vital to give victim-survivors greater choices for redress and justice.

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.

2. Response to consultation questions

Consultation Question 1.
15.1 We provisionally propose that an image which: (1) shows something that a reasonable person would consider to be sexual because of its nature; or (2) taken as a whole, is such that a reasonable person would consider it to be sexual, should be included within the definition of an intimate image. Do consultees agree?

We agree. It is vital, however, that this is recognised as not only includes images which are straightforwardly 'sexual', such as images of sexual intercourse, but extends to all sexual images, including those that have been altered to become sexual (see also 21 below).

In particular, this must extend to 'semen images': that is, images or videos where the perpetrator has ejaculated over the image, often of a woman's face. Taken as a whole, these images are sexual, in that a reasonable person would consider semen to be sexual. The images are 'made' sexual in the same way that fakeporn is created, with an 'ordinary' image being changed to make it sexual. While the production of such images may form part of consensual sexual activity, when the creation and distribution of the image is non-consensual, this is a disturbing manifestation of sexual abuse and misogyny. These images regularly appear on pornography websites and group fora, often labelled as 'c*m tributes' or 'tributing' – a term we reject as this suggests they are celebratory which is not how they are perceived by victims. Victim support organisations such as the Revenge Porn Helpline have experienced of victims being devastated, humiliated and traumatised by the creation and distribution of these types of images.

We recommend that the Explanatory Notes to any legislation make explicit reference to these images.

Consultation Question 2.
15.2 We provisionally propose that the definition of an intimate image should include nude and semi-nude images, defined as images of a person's genitals, buttocks or breasts, whether exposed or covered with underwear, including partially exposed breasts, whether covered by underwear or not, taken down the depicted person's top. Do consultees agree?

We agree that the definition of an intimate image should include nude and semi-nude images of a person's genitals, buttocks and breasts whether exposed or covered with underwear.

We agree that the definition of an intimate image should include **some** images of partially exposed breasts. We **do not** agree that the definition of intimate image should include *all* images taken down the depicted person's top, ie all forms of so-called 'downblousing'.

We suggest that the term 'downblousing' covers three different types of image:

(a) An image of a woman who is voluntarily choosing to show some underwear and/or cleavage (even 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.

We agree that 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 (para 6.56).

We disagree with the proposal to include image (b) within the scope of the criminal law. To our minds, the only difference between (a) and (b) is the angle of the image, rather than any difference in the extent of breast disclosed or the voluntary nature of exposure.

Our approach is similar to legislation in other jurisdictions, such as New South Wales, where the offence is made out only if there was a reasonable expectation that the person's 'private parts' could not be filmed (as discussed in para 7.44).

The Law Commission refer to Australian research as suggesting that one of the most common forms of intimate image abuse is downblousing (para 7.41). The Australian report refers to 'cleavage' images, classifying these as downblousing.[1] However, it is not clear whether these images are of the type a, b or c referred to above. We do not dispute that having images taken of one's cleavage, without consent, is a horrible act and an invasion of privacy. We are not convinced though that all such image-taking should be criminalised.

Our view is that downblousing images should *only* fall within the definition of an intimate image where the victim's breasts are involuntarily exposed (ie (c) above).

- Image (c) is similar to cases of 'upskirting' in that the 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) is also similar to a situation such as where an image captures a man's involuntarily exposed genitals during him voluntarily taking part in a sports match in public (as happened in one US case).

We do not think these images (of type (c)) require 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 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 in some media and public discussion 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'.

Consultation Question 3.
15.3 We provisionally propose that the chest area of trans women, women who have undergone a mastectomy and girls who have started puberty and are developing breast tissue should be included in a definition of a nude or semi-nude image. Do consultees agree? Do consultees think there are additional examples that should be included in a definition of nude or semi-nude?

[1] Image-based Abuse (esafety.gov.au), page 9.

Yes. 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.

We recommend that the definition also includes reference to the breast area of people identifying as intersex, as in many of the Australian states (as discussed in paras 11.69 and 7.43). This would ensure clarity in the law for such persons.

Consultation Question 4.
15.4 We provisionally propose that any garment which is being worn as underwear should be treated as underwear for the purpose of an intimate image offence. Do consultees agree? Paragraph 6.71

Yes. 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.

Consultation Question 5.
15.5 We provisionally propose that the definition of "nude or semi-nude" should include images which have been altered but leave the victim similarly exposed as they would be if they were wearing underwear. Do consultees agree? Paragraph 6.75

Yes. We agree that nude or sexual images which have been slightly altered to supposedly make them acceptable to share, such as black strips or pixilation across nipples, should also be included. This is vital to protect the sexual autonomy and privacy of victim-survivors.

Consultation Question 6.
15.6 We consider that images where the victim is not readily identifiable should not be excluded from our offences. Do consultees agree? Paragraph 6.79

Yes. We agree that the law must not be limited to images where the victim-survivor is identified. Such a restriction would seriously limit the scope of the law. It would provide an easy loophole for perpetrators by enabling them to distribute images with, for example, the face removed, but the harms would continue to be devastating.

Provisions requiring victim identification have been adopted in many US states. It is clear that this is intended to, and does, limit the application of the provisions.

Consultation Question 7.
15.7 Can consultees provide us with examples of images depicting individuals in a state of undress, showering or bathing, where their genitals, buttocks and breasts are not exposed or covered only with underwear? Can consultees provide insight into the harm caused by the non-consensual taking or sharing of these kinds of images?

No.

Consultation Question 8.
15.8 Do consultees think that images depicting individuals in a state of undress, showering or bathing, where their genitals, buttocks and breasts are not exposed or covered only with underwear, should be included within the definition of an intimate image? Paragraph 6.89

No, with the exception of toileting images.

While there may be images considered 'intimate' which are harmful and exploitative, not all such images warrant criminalisation. The limitation of the offence to nude, semi-nude and sexual images (as defined above) is a useful one here.

One exception is toileting images.

The practice of toileting is a particularly intimate and private act and images taken without consent of such practices not only breach of person's privacy, but also their dignity. We also know that the surreptitious taking of toileting images is a serious worldwide problem affecting mostly women (see, for example, debates and campaigns in South Korea). These images are being taken and shared across porn websites and private fora. Thus, while engaging in toileting may not be as intimate or private for some men in some cultures, as it is for women, due to the fact that women are the predominant victims of these harmful behaviours, the criminal law should cover these toileting images.

This is preferable to the current broader definition ie 'where the person depicted is engaged in an act which is in some sense private'. This encompasses images of people in the shower or changing rooms (where not semi-nude or nude). We do not think that these images (where not nude or semi-nude), or those such as a photo of someone showering behind frosted glass which is not semi/nude), should be included in the definition of an 'intimate image'. 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. We emphasise, however, that if such images are taken as part of a course of conduct, they may come within the civil/criminal law of harassment. In other words, there are other criminal offences which may be deployed to cover harmful behaviours that include the taking or distribution of what might be considered intimate images.

We are mindful that this limited understanding of 'private' may exclude some intimate images of women within minoritized and/or religious communities eg without their expected or chosen attire, as discussed below. However, we recommend that such images are covered in specific provisions.

Consultation Question 9.
15.9 We provisionally propose that "private" images should be captured by a sharing offence as well as a taking offence. Do consultees agree? Paragraph 6.92

We agree that any definition of private images, such as including toileting images, should be captured by the sharing as well as the taking offence.

Consultation Question 10.
15.10 We welcome consultees' views on whether and to what extent images which are considered intimate within particular religious groups should be included in intimate image offences, when the perpetrator is aware that the image is considered intimate by the person depicted. Paragraph 6.125
Recommend inclusion of these images:

We recommend that such images are included in the intimate images offences due to the demonstrable levels of harm taking and sharing such images can engender. We are also strongly of the view that the criminalisation of these images must **not** be limited to only a more 'serious' offence requiring proof of specific motives. This would introduce an unnecessary and unjustifiable hierarchy between victim-survivors'

experiences, particularly in view of the fact that we know that women from black, minoritised and/or religious communities experience higher levels of online abuse and harassment.

We recommend such images are treated as a separate and specific form of 'intimate image,' rather than within the definition of a 'sexual' (unless falling with in the definition off sexual) or 'private' intimate image. We also recommend that before further legislation and further publication of a final report further consultation with organisations by and for black and minoritised women in order to better inform recommendations.

'Intimate Privacy'

We suggest that the law should focus on protecting 'intimate privacy'.[2] 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.

Why taking, sharing and threats to share of intimate images of women within minoritised and/or religious communities should be included within the proposed offences

Non-consensual taking, sharing and threats to share can have devastating effects

- There is a clear body of evidence demonstrating that the non-consensual circulation of intimate images from certain minoritised and/or religious communities is harmful. What constitutes an intimate image extends beyond nude or sexual photos. For some women, to send a photo of her without her hijab, without her consent, may be just as intimate as sending a topless photo.[3]
- Evidence from organisations working with black and minoritised women experiencing domestic abuse and other forms of violence against women are clear that intimate image abuse can be part of a broader pattern of domestic abuse, specifically spiritual abuse.
- Intimate image abuse can also be part of a broader pattern of so-called 'honour' based abuse, violence or killing. We emphasise that such so-called 'honour' based abuse is not only at 'extreme' ends of any spectrum of violence (as suggested in para 5.79) but is part of a broad continuum of everyday violence against women from black and minoritised communities.
- A report from the Australian E-Safety Commissioner, *eSafety for Women from Culturally and Linguistically Diverse Background* (February 2019)[4] details the impact of the circulation and threat to circulate such images:
    - One stakeholder explained how, for the women who experience this kind of abuse, it can be extremely upsetting and humiliating but also that the police rarely took these kinds of threats seriously. This may be due to a lack of cultural understanding or not understanding the impact on the woman. This is reinforced by not having specific laws addressing the 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
- That black and minoritized women have particular and specific needs requiring tailored support programs and services to meet those needs.

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[2] We first set this out this principle as a justification for legislative action in our briefing to stakeholders available here: mcglynnrackley-stakeholder-briefing-5-may-2021-final-1.pdf (wordpress.com)

[3] See, for example, Australian E-Safety Commission website: Ariba | eSafety Commissioner

[4] Women from diverse backgrounds | eSafety Commissioner

– The Australian E-Safety Commissioner, *eSafety for Women from Culturally and Linguistically Diverse Background* (February 2019) reported, for example, that language barriers amplify the harm for women who do not know how and where to seek help, while shaming and traditional gender roles (eg being shamed as a 'bad wife') as well as fears around deportation prevent culturally and linguistically diverse women from seeking support.[5]

Expressive role of criminal law

- The Law Commission's consultation suggests that it may not be 'widely understood' that such intimate image abuse is harmful (para 6.118). We query whether there is evidence to suggest that the public do not understand the harms of this form of abuse. Further, even if this were to be the case, we suggest that this is not a sufficient justification for not covering the images given the weight of evidence outlining the harms. Rather it is evidence for the importance of specific education accompanying any new legislation.
- If there is evidence of a lack of awareness, then we suggest that 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.
– Even if there is no consensus on levels of harm or the necessity of reform, we urge action to include these forms of intimate image abuse and note that there are actions that are criminalised where there is an evident lack of public 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 intimate images relating to certain minoritised and/or religious communities 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 and serious harm.

Following international good practice

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.

[5] Women from diverse backgrounds | eSafety Commissioner

Advantages of this approach

- It is specific to the cultural or religious context and so does not rely on 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.
- We query the justification for the Australian provisions only encompassing the civil law which is reported as this being 'safer' and more 'appropriate' (para 6.110).
- We question who is it 'safer' for? It is not safer for black and minoritised women who experience this abuse and whose harms can be considerable. We also reject the idea that it is more 'appropriate' for some culturally sensitive and harmful images to only be covered by the civil law (such as images of women in certain minoritised and/or religious communities), yet other culturally sensitive images (such as nude or semi-nude images) are covered by both the civil and criminal law.

Disadvantages of this approach

- We recognise that this approach separates out some images of black and minoritized religious and 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.

Consultation with specialist organisations working with black and minoritised women

- In advance of any legislation and further publication of a final report, we urge further consultation with organisations by and for black and minoritised women in order to better inform recommendations.

Consultation Question 11.
15.11 Are consultees aware of any images "of a kind ordinarily seen in public" that should be excluded from the scope of intimate image offences (other than images of people kissing)? Paragraph 6.139

We agree that images of bare male and bare chests of young children should be excluded from the definition of intimate image (para 6.130).

We also think that images of breastfeeding should be excluded – unless the victim's breasts are exposed or partially exposed or only covered with underwear (and as such those images would be covered by the definition of nude or semi-nude images) (para 6.133). We consider that a better way to deal with the perceived harm of the non-consensual taking of breastfeeding images would be to consider a separate, specific offence, as is currently being debated.

Consultation Question 12.
15.12 Do consultees think that there should be: (1) a "not ordinarily seen in public" element to intimate image offences; or (2) a list of images that should be excluded from intimate image offences, for example images of people kissing? Paragraph 6.140

Yes. We agree that there should be a threshold of 'not ordinarily seen in public' as this provides an important limitation on the offence and will likely exclude images of kissing.

Of course, that which is not ordinarily seen 'in public', ie in a 'place to which at the material time the public have or are permitted to have access, whether on payment or otherwise' (as found in eg the Public Order Act 1986) will vary according to the location of the place. Specifically, that which is ordinarily seen 'in public' online will differ to that seen in a local park. Other 'public' spaces may limit visitors – eg a school or pay-to-view website. The test should be what is understood by a reasonable person.

To clarify, this threshold would also exclude ordinary images of breastfeeding which we think is appropriate for the reasons set out above. Such a threshold may provisionally exclude some intimate images of black and minoritised women without their expected or chosen attire, as discussed above. However, we recommend that such images are covered in specific provisions.

Consultation Question 13.
15.13 Are there any forms of "taking" that the current voyeurism or "upskirting" offences, or the taking offence in section 1 of the PCA 1978, fail to capture? Paragraph 7.14

The current 'upskirting' offence is limited to images taken 'with intention of obtaining sexual gratification' or 'humiliating, alarming or distressing the victim'. This excludes images taken such as for a 'laugh', to boost status amongst friends or for monetary gain.

Consultation Question 14.
15.14 We provisionally propose that a taking offence should only include such behaviour where, but for the acts of the perpetrator, the image would not otherwise exist. Do consultees agree? Paragraph 7.24

We agree that a focus on whether the image would exist but for the acts of the perpetrator is a helpful one. However, we disagree with where the consultation draws the line on this. We would like to see the criminal law extended to cover retaining and making an intimate image.

We agree that taking an image of a video call or TikTok video is capturing the victim in a way to which they have not consented (para 7.17). We see parallels here with a 'making' offence which would cover the making of deepfake images (see further Q21 below) and semen images. In each of these cases, the perpetrator is portraying the person in the image in a way to which they have not consented. We would include photocopying of a photo (or taking a picture of the image with another phone) as a form of taking or making, rather than possession (para 7.22; 7.82).

This is different to where an image is otherwise retained. We think there should be a retention offence where the perpetrator intentionally or recklessly retains an intimate image longer or in a form that the person depicted in the image did not consent to: such as taking screenshots of a Snapchat photo where the victim has similarly not consented to the permanency of their image (paras 7.18-20); or downloading an image/video from a website (eg Only Fans) where access, and so the consent of the person depicted, is limited.

In all of these cases, while there may be some form of consent – either to the form or access of the image – this consent is limited. And in all of these cases, this specific, limited consent, has been overruled.

We would, however, add a requirement that the offence requires the intentional or reckless taking, making and retention. This would mean that, for example, an ex-boyfriend who keeps intimate images but is unaware that the person depicted does not consent to the retention, has not committed an offence.

See Q18 for discussion of downloaded photos or videos from a website.

Justifications for this approach

- It is vital that any new legislation is as clear as possible. A simple taking, making and retaining offence enables both the victim and perpetrator, as well as the public generally and criminal justice personnel, to know when an offence is committed.
- It is important not to distinguish between victim-survivors of intimate image abuse depending on whether or not an image is 'made' without their consent. Victims who consented, in limited ways, to having images of them taken, or who took such images themselves, should not be less protected than those who did not consent to the making. If this were the case, victims who have consented in some way to images being taken/shared, albeit in limited circumstances, will experience 'victim-blaming' as is currently common. The focus must remain on non-consent and the perpetrator's actions, not the actions of the victim and whether or not they have voluntarily engaged in some sexual image taking or sharing, including if done for financial gain.
- This approach avoids difficult decisions in relation to whether an image is taken or made.
- The harm to victim-survivors comes from the absence of consent and knowing that someone has an image of them without their consent. This may become heightened when that image is shared, but it exists even when sharing does not take place. The retention without consent engenders a feeling of threat that images may be shared without consent and facilitates threats to distribute without consent.
- There is a considerable risk of harm and this balances out any sense of a perpetrator's freedom of expression.

Consultation Question 15.
15.15 Do consultees have evidence of, or a comment on the prevalence of, installing equipment in order to take an intimate image without consent, where the taking did not then occur? Paragraph 7.28388

No.

Consultation Question 16.
15.16 We provisionally propose that the behaviour prohibited by the current voyeurism and "upskirting" offences should be combined in a single taking offence. Do consultees agree? Paragraph 7.34

We agree. The current laws are an ad hoc and patchwork response to diverse phenomena. The law must be as straightforward as possible, with a single, comprehensive provision.

Consultation Question 17.
15.17 We provisionally propose that taking or recording an image of someone's breasts, or the underwear covering their breasts, down their top without consent ("downblousing") should be a criminal offence. Do consultees agree? Paragraph 7.48

We agree in part.

As we noted in our response to Q2, we do not think that all forms of 'downblousing' should fall within the definition of an 'intimate image'. Our view is that 'downblousing' images should only fall within the definition of an intimate image where the victim's breasts are involuntarily exposed. Such images are a gross invasion of privacy and personal autonomy.

Taking such an image is akin to 'upskirting' in that the (partial) 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. It should be a criminal offence to take such images.

Consultation Question 18.
15.18 We provisionally propose that it should not be an offence to possess an intimate image without consent, even when there was never any consent to possession. Do consultees agree? Paragraph 7.86

We agree. We think a separate possession offence would be a step too far. There is a real danger of over-criminalisation, heightened by the fact that possession offences in this context in England & Wales are relatively uncommon.

As noted above (Q14), it should be an offence to intentionally or recklessly keep an intimate image once the person depicted has 'revoked' their consent. This is often done in order to facilitate the threat of subsequent distribution and as a means of coercive control. Similarly, if an intimate image is 'retained' or 'made' in a form or for beyond a period of time that the person depicted has consented to – eg images take of a snapchat photo the offence of retaining, making or taking will apply. In these circumstances the image will also be 'possessed', however we do not think it is necessary for there to be an additional offence of possession. And, if the image is subsequently distributed, or threats are made to do so, further offences will be committed.

We do not think possession alone, eg downloading an image from a website, should be an offence. Nor should there be an offence where an individual is sent an unwanted image (which they may have immediately deleted but still 'possess'). We recognise that many victims suffer significant harm when their intimate image is widely shared. However, we think this harm is best addressed through clear and comprehensive 'making, taking and retaining' and 'distribution' offences.

Consultation Question 19.
15.19 We invite consultees' views on the following three questions: (1) How prevalent is making intimate images without consent, without subsequently sharing or threatening to share the image? (2) What motivates individuals to make intimate images without consent, without sharing or threatening to share them? (3) How, and to what extent, does making intimate images without consent (without sharing or threatening to share them) harm the individuals in the images? Paragraph 7.107

In relation to question (3), where an individual knows that someone has made an intimate image of them (such as where they have been so informed by the perpetrator), harm may be experienced due to a sense of violation of their sexual privacy in that a sexual image of them has been created without their consent. The harm will also be felt as a sense of 'existential threat' and 'constrained liberty' (as discussed in our research with victim-survivors, McGlynn et al (2020) in *Social and Legal Studies*).

While the victim-survivors we spoke to had not experienced this particular abuse (ie an image made of them but not yet shared or threatened to be shared), they spoke of an 'unnerving sense of fear, worry and uncertainty' where images of them had been taken or shared without consent, with some referring to a 'constant apprehension'. We suggest that these experiences, of constant threat and worry, may be what is experienced where someone has created a sexual image of them without their consent, even though this is not yet shared.

Consultation Question 20.
15.20 We provisionally propose that "sharing" an intimate image should capture: (1) sharing intimate images online, including posting or publishing on websites, sending via email, sending through private messaging services, and livestreaming; (2) sharing intimate images offline, including sending through the post or distribution by hand; and (3) showing intimate images to someone else, including storing images on a device for another to access and showing printed copies to another. Do consultees agree? 15.21 We invite consultees' views on whether there any other forms of sharing, not outlined in the paragraph above, that should be included in the definition of "sharing"? Paragraph 7.124

We agree that all these forms of sharing must be included in any new offence to ensure that it is comprehensive and future-proofed.

Consultation Question 21.
15.22 We provisionally propose that a sharing offence should include images which have been altered to appear intimate (e.g. images which have been photoshopped to appear sexual or nude and images which have been used to create "deepfake" pornography). Do consultees agree? Paragraph 7.138

Yes. We agree that the sharing offence should include faked and altered images. We also think the 'making' offence (Q14) should extend to deepfakes.

In 2017, we argued that 'sexualised photoshopping' (McGlynn, Rackley & Houghton 2017; McGlynn & Rackley 2017) must be seen as a form of image-based sexual abuse and should be covered by the criminal law. In our more recent 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 (McGlynn et al 2019). As one stakeholder said: 'it's still a picture of you …. It's still abuse'. Accordingly, we recommended in our *Shattering Lives* report reforming the law to include deepfakes (see also Rackley et al 2021 "Seeking Justice and Redress for Victim-Survivors of Image-Based Sexual Abuse"). 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.

Other victim-survivors speaking out recently have also revealed the harmful impact of this abuse and reports of the risk of an 'epidemic' of fakeporn unless action is taken.

Therefore, we support the Law Commission's approach which follows existing practice in Scotland, Australia and many other jurisdictions around the world.

Consultation Question 22.
15.23 Can consultees provide us with examples, or comment on the prevalence, of: (1) images depicting sexual assault being shared with the person in the image; (2) intimate images that were taken without consent, or where the person in the image was assured that the image had been deleted, being shared with the person in the image; and (3) intimate images being shared with the person in the image by someone who did not take the image and was not originally sent the image with consent?
15.24 We invite consultees' views as to whether there are there other examples of sharing an intimate image with the person in the image without consent, not included in the paragraph above, which should be criminalised?
15.25 Can consultees describe the harm that sharing an intimate image with the person in the image without consent can cause? Paragraph 7.153

A number of victim-survivors we have spoken to describe how the perpetrator showed, or told them of, intimate images they had taken without their knowledge or consent as a means of control and intimidation. In one case, 'Anna' was unaware of sexual images having been taken of her by her then partner. One day, he took a USB, put it into the TV and the images all appeared. He threatened to distribute the images without consent as a mechanism of abuse and control. He did later distribute the images. This was part of the pattern of abuse that Anna has described as 'torture for the soul' (cited in McGlynn et al 2020, *Social and Legal Studies*).

We also interviewed Katherine who shared the following experience: [Throughout] our whole relationship from the beginning ... like me coming out of the shower, or me getting dressed, undressed, me performing oral sex on him, he'd taken images. Some of them are behind his hand, some of them even were behind my toddler … [I was] totally unaware [these photos were being taken]. I would have got him to delete them straightaway if I'd known about these images … the thought of him taking images makes me feel quite sick, because I thought I was safe in that, the fact that he could never threaten me with anything in terms of images because we don't have any. (McGlynn et al, *Shattering Lives* report)

In terms of the harms, taking and showing the images to the victim-survivor, is an act of violation and abuse of trust. It can be as part of a pattern of abusive conduct. We do not think it is reflective of victim-survivors' experiences to try to separate out the harms of (a) taking and (b) showing the victim the image. For victim-survivors we spoke to, the harms and experiences are interconnected (hence the problems with the current piecemeal legal response). While the act of showing is experienced as shocking and humiliating, and as a deliberate infliction of harm, it is closely integrated with the fact of the image having been taken without consent and the risk of it being shared without consent. This is not to suggest that showing should not be covered by the criminal law, it should. It is to emphasise that the harms are experienced holistically.

Consultation Question 23.
15.26 We provisionally propose that the consent provisions in sections 74 to 76 of the Sexual Offences Act 2003 should apply to intimate image offences. Do consultees agree? Paragraph 8.27

Yes. We agree. While this consent definition has many problems, using the same definition of consent is the most straightforward and clear approach.

Consultation Question 24.
15.27 We provisionally propose that proof of actual harm should not be an element of intimate image offences. Do consultees agree? Paragraph 9.12391

Yes. We agree that proof of actual harm must not be part of any new law.

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 (McGlynn and Rackley, *Image-Based Sexual Abuse*) and our work on the harms of image-based sexual abuse (McGlynn et al 2020, *Social and Legal Studies*).

Where the law does require proof of harm, such as in New Zealand, it has given rise to considerable criticism due to the re-traumatising effects of victim-survivors having to give evidence, the breach of victim-survivor's privacy and the recognition that non-consensual activity is per se harmful, without needing proof of specific harms. For more discussion of the New Zealand context, see our submission to the New Zealand Parliament's Justice Committee review of their current law available here. See also our submission with New Zealand and Australian colleagues here.

Consultation Question 25.
15.28 We provisionally propose that any new offences of taking or sharing intimate images without consent should have a fault requirement that the defendant intends to take or share an image or images without reasonably believing that the victim consents. Do consultees agree? Paragraph 10.40

We agree. There are considerable difficulties with current definitions of consent, and the application of the principles of reasonable belief. We do not therefore agree with the quoted comment in the consultation that the law on consent is 'well-understood' (para 10.39). There are myriad of inconsistencies in how consent is interpreted, and the reliance on 'reasonable' beliefs continues to provide an outlet for outdated assumptions and victim-blaming perspectives. We are concerned that these problems will be replicated in any new law on intimate image abuse.

However, on balance, we think that a consistent approach is preferable to separate laws on consent. We underline the need for a broader review of how consent is defined and interpreted.

We also think this should apply to any making and retention offences.

Consultation Question 26.
15.29 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if — (a) V does not consent to the taking or sharing; and (b) D does not reasonably believe that V consents. Do consultees agree?
15.30 We invite consultees' views as to whether there are examples of behaviours which would be captured by this provisionally proposed offence, taking into account our provisionally proposed defences, which should not be criminalised? Paragraph 10.60

We agree that there should be a 'base' offence which focuses on the key wrong of non-consent, rather than perpetrators' motives, as recommended in our previous research.

Consultation Question 27.
15.31 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if — (a) V does not consent; and (b) D does so with the intention of humiliating, alarming or distressing V or with the intention that D or another person will look at the image for the purpose of humiliating, alarming or distressing V. Do consultees agree? Paragraph 10.73392

We do not agree. See further under question 29 below.

Consultation Question 28.
15.32 We provisionally propose that it should be an offence for a person D intentionally to take or share a sexual, nude, semi-nude or private image of V if — (a) V does not consent; (b) D does not reasonably believe that V consents; and (c) D does so with the intention that he or a third person will, for the purpose of obtaining sexual gratification, look at the image of V. Do consultees agree?
15.33 We invite consultees to provide examples where D intentionally shares an intimate image of V without V's consent for the purpose of obtaining sexual gratification (whether for themselves or another). Paragraph 10.79

We do not agree. See further under question 29 below.

Consultation Question 29.

15.34 We invite consultees' views as to whether there should be an additional offence where the intent is to make a gain. Paragraph 10.87 Consultation Question 30.
15.35 We invite consultees' views as to whether there should be an additional offence of intentionally taking or sharing an intimate image without consent with the intent to control or coerce the person depicted. Paragraph 10.93

We do not think there should be separate offences relating to these motivations.

We do not think there should be a hierarchy of offences based on perpetrators' motives, with some motives being considered more 'serious' than others.

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 (where one of the more 'serious' offences is specified as being based on motives to cause distress).
- The creation of a hierarchy of offences risks undoing the significant 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 of worse harms 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.
- Organisations supporting women experiencing abuse have stated that no victims had ever stated that their experience was worse because a perceived motivation was for 'sexual gratification'.
- 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' (see further below).

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 (McGlynn et al 2019 *Shattering Lives*). 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, rather than understanding them in the context of inequality and misogyny (see 'collector culture' images below).
- 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 (see 'collector culture' images below).

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.

Culpability can be dealt with during sentencing

- As with most other sexual offences and criminal offences in general, the level of culpability of a perpetrator can be taken into consideration at sentencing. There is no need to create separate offences in order to deal with more serious harms or levels of responsibility.

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

'Collector culture' of taking and sharing intimate images without consent

To underline the problems with the proposed hierarchy of offences, we draw attention to the growing phenomenon of 'collector culture' of taking and sharing images, allied to the practices of sharing intimate images to boost the masculinity/status of perpetrators.

We have long known of examples where groups of men have shared intimate sexual images without consent amongst themselves, ostensibly to 'fun' and linked to their status claims among the group.[6] These examples have been raised in previous public debates and we have advocated for law reform because existing laws fail to cover these motivations.[7] Our research with victim-survivors also identified practices of men sharing intimate images amongst themselves, often where victims did not know the images had originally been taken and/or shared.[8] Victim-survivors we spoke to also identified motives of misogyny, entitlement, and male-bonding as the motives they recognised from perpetrators.

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[6] For a selection of news reports on men's social media groups sharing intimate images without consent, see:
https://news.sky.com/story/teens-using-bait-out-groups-to-share-revenge-porn-11158653
https://www.clickorlando.com/news/lawsuit-ucf-frat-brothers-posting-sexual-conquests-to-secret-dog-pound-facebook-group
https://www.buzzfeed.com/bradesposito/mms-iii
https://www.theguardian.com/us-news/2017/mar/06/us-military-investigates-secret-distasteful-facebook-page-of-naked-female-marines

[7] See, for example, McGlynn parliamentary submission on reform of voyeurism provisions to include 'upskirting': Voyeurism (Offences) (No.2) Bill (11th July 2018) (parliament.uk)

[8] Experiences of Alice discussed in Henry, McGlynn et al (2021) *Image-based sexual abuse: a study on the causes and consequences of non-consensual nude or sexual imagery* (Routledge), p 27.

More recent examples of this type of behaviour have been identified in a BBC investigation.[9] Victim-survivors reporting similarly devastating harms as those where perpetrators share images with the intention to cause harm or for sexual gratification. The Revenge Porn Helpline have identified this 'collector culture' as a worrying and growing trend in reports to them.

If a new law introduces a hierarchy of offences on the basis of the motives suggested by the Law Commission, not only is this problematic in terms of misunderstanding the harms experienced by victim-survivors, but it risks making the *law out-of-date from the moment of inception* as it fails to recognise the growing and harmful trend of the 'collector culture' (and other trends as yet unimagined)

Consultation Question 31.
15.36 We invite consultees' views as to whether having a separate base offence and more serious additional intent offences risks impeding the effective prosecution of intimate image abuse. Paragraph 10.95393

We consider that there is a significant risk that having two separate offences will introduce a complexity that will hinder investigations, prosecutions and therefore victim's responses.

Our research (McGlynn et al 2019 *Shattering Lives*) reported victim-survivor experiences of where the police did not take action on reports due either to the increased complexity of proving motive or their general lack of understanding of the law. This echoes other research with police which shows a lack of understanding of the existing law (which is complex, piecemeal and often confusing).

If the law is to be effective, it is vital that it is as straightforward as possible. Introducing a range of different offences, with different thresholds, clearly makes the law more complex and will adversely impact on police investigations and prosecutions.

Consultation Question 32.
15.37 We provisionally propose that where an intimate image was taken without consent in a private place, a reasonable expectation of privacy test should not apply. Do consultees agree? Paragraph 11.81

We disagree. We think that a 'reasonable expectation of privacy' test should apply in all instances. This avoids having to draw difficult distinctions between public, private and semi/quasi- public or private spaces. Rather it focuses attention on the circumstances in which the intimate image was taken. We do not think this will limit the application of the proposed offence in the context of private spaces (ie it is likely that where an intimate image is taken without consent in a private place the person depicted would have a reasonably expectation of privacy).

Consultation Question 33.
15.38 We provisionally propose that where: (1) an intimate image is taken in a place to which members of the public had access (whether or not by payment of a fee); and (2) the victim is, or the defendant reasonably believes the victim is, voluntarily engaging in a sexual or private act, or is voluntarily nude or semi-nude, the prosecution must prove that the victim has a reasonable expectation of privacy in relation to the taking of the image. Do consultees agree?

Yes. We agree.

[9] Stolen naked images traded in cities around the world - BBC News and BBC Stolen naked images traded in cities around the world (stylist.co.uk)

However, we consider that the description of Scots law on upskirting at para 11.101 is incorrect which is relevant in relation to an analysis of excluding images taken in public (see also the reference to Scots law at 11.75). The Law Commission state that Scots law does not cover the sharing of upskirt images. This is not the case.

Section 3 of the Abusive Behaviour and Sexual Harm Act defines intimate image as including images where the persons genitals, buttocks or breasts are exposed or covered only with underwear. This clearly includes non-consensual upskirting images – contrary to quotation used in footnote 77, page 273. Section 2(5) of the Abusive Behaviour and Sexual Harm Act provides for a defence as follows:

> *In proceedings for an offence under subsection (1), A has a defence if the following matter is established—*
>
> *(a) B was in the intimate situation shown in the photograph or film,*
>
> *(b) B was not in the intimate situation as a result of a deliberate act of another person to which B did not agree, and*
>
> *(c) when B was in the intimate situation—*
>
> *(i)B was in a place to which members of the public had access (whether or not on payment of a fee), and*
>
> *(ii)members of the public were present.*

This does not provide a defence to the distribution of a non-consensual upskirt image because:

- The image is an intimate image
- The image was taken as a result of a deliberate act of another to which the victim did not agree; and
- The victim is likely to be in a public place.

This defence was amended during the legislative process specifically in order to cover images of non-consensual sexual activity (such as sexual assaults) and extends to upskirting images. See the discussion in the Justice Committee of 22 March 2016 – a date after the debate referenced by the Law Commission at footnote 77.[10] There are some potentially contradictory messages from Scottish Ministers in earlier debates, but the final text of the Act is clear that the non-consensual distribution of upskirt images is covered, in the same way as images of other sexual assaults.

We would be grateful if the Commission could clarify this in their final report as it otherwise gives a misleading impression on the current state of Scots law.

15.39 We provisionally propose that legislation implementing this test make clear that a victim who is breastfeeding in public or is nude or semi-nude in a public or semi-public changing room has a reasonable expectation of privacy in relation to the taking of any image. Do consultees agree? Paragraph 11.108394

Proposals specifically regarding breastfeeding

The Law Commission consultation states that (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). Further, that 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'. It is recommended, therefore, that there is a specific provision stating that a breastfeeding woman always has

[10] <UNSPECIFIED> (parliament.scot)

a 'reasonable expectation of privacy'. This is justified on the basis that 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 specific provision in legislation that a woman automatically has a reasonable expectation of privacy where she exposes her breast during breastfeeding (and would therefore in any event come within the definition of an intimate image covering semi-nude images).
- 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.

Proposals regarding changing rooms

We agree that someone in a public or semi-public changing room has a reasonable expectation of privacy in relation to the taking of an intimate image of them nude or semi-nude.

Consultation Question 34.

15.40 We provisionally propose that it should not be an offence to share an intimate image without the consent of the person depicted where: (1) the intimate image has, or the defendant reasonably believed that the intimate image has, previously been shared in a place (whether offline or online) to which members of the public had access (whether or not by payment of a fee), and (2) either the person depicted in the image consented to that previous sharing, or the defendant reasonably believed that person depicted in the image consented to that previous sharing. Do consultees agree? Paragraph 11.138

No. We disagree. We do not think that just because an image has initially been voluntarily shared publicly, that the person depicted necessarily and irrevocably loses all control over that image or that they are unable to place limits on the extent of their consent in relation to this sharing. Where such sharing has been done so within limits, these limits must be respected and protected. Clearer lines need be drawn between sharing images which have been voluntarily shared to the public as a whole without restrictions (which we agree should not be a criminal offence) and those which have been shared subject to restrictions.

Voluntary sharing of images to public *as a whole without restrictions*

We agree that where intimate images are shared with consent to the public as a whole and without restrictions, the onward sharing of these images should not be criminalised. For example, further sharing of commercial pornography that has been made public without restriction and voluntarily would not be criminalised.

We share the Commission's view that an intimate image that is Initially shared *without* consent and is then further shared (eg onto a porn or 'revenge porn' site) should constitute an offence assuming that the

defendant had no reasonable belief that the image was consensually shared (eg where finds image on a 'revenge porn' website) (para 11.120).

Voluntary sharing of images *with restrictions* (eg limited section of the public or with time/format restrictions)

Lack of clarity regarding when image is shared in 'public'

We think there is a lack of clarity in the Law Commission's proposals regarding when an image is shared with the public (and therefore onward sharing is not protected).

The Commission states that determining whether the original disclosure was made to the *public* will be a question of fact depending on the facts of each case (para 11.131). It is suggested that it is clear that open magazines and websites would be public and that a private Facebook group is not public.

We are concerned however over the lack of clarity regarding many other types of semi-public activity.

- What about a Facebook group of thousands? Or of hundreds? This is not the public at large, but it is larger than a private group of 50 participants.
- What about OnlyFans and similar sites where images are shared to (possibly large) number of subscribers? The creator is only sharing intimate images to their subscribers (a closed group) and there is explicitly no consent to onward sharing of those images. This is not, therefore, sharing to the public at large without restriction. It may be thought of as semi-public where there are a large number of subscribers (thousands), but equally there may be only a few subscribers (50-100).
- The Law Commission consultation states at paras 11.117-11.118 that sharing amongst a private Facebook group of 5 friends is 'intrinsically private'. It is not clear why this is considered private, but sharing with a private Facebook group of hundreds may not be. We suggest that the same principles apply, namely that the same breach of autonomy and privacy as the Law Commission refers to in this case of first sharing with 5 people are the same whether the sharing is with 50/500/5000 if the consent to onward sharing is limited.

Vital people know the limits and can regulate their behaviour

- If the current proposal is adopted, there is a very real danger that the public in general will not know whether sharing an intimate image to a closed group of people (whether for a fee or not) is covered by the law.
- This lack of clarify is concerning and risks undermining the law.

Consent should be the focus

- We suggest that everyone should be able to determine the scope of their privacy and therefore ability to constrain who sees intimate images.
- Consent should be the primary focus of the law. Therefore, if someone shares intimate images to a closed group (such as on OnlyFans) without consent for onward sharing, that consent should be respected.
- We further consider that there is no justification why sharing an intimate image for a financial reward should make a difference regarding the validity of their consent or the applicability of the criminal law. Indeed, such a distinction risks perpetuating well-known and entrenched 'victim-blaming' attitudes in relation to victims of intimate image abuse who had initially shared the image/s.
- Just because A shares an image with B for a fee should not entitle B to then share that image (eg onto a porn site) without A's consent. The harm to A may be considerable, as where the image was shared without financial gain.

- There are many instances of OnlyFans creators, for example, being 'outed' and this having an adverse impact on their lives. Onward sharing of creators' intimate images without their consent can cause harm, but is also a breach of privacy, consent and sexual autonomy.[11]
- Recent events in Ireland demonstrate that there is public outrage where intimate images are shared without consent, including from OnlyFans and similar outlets.[12] This led to a change in the law in Ireland at the end of 2020.[13]

Our approach and recommendations

- We agree that where images are voluntarily 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 on lawfulness of onward sharing, 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 or sexual autonomy.

The law needs to be clear that where an image is voluntarily shared, the person depicted is able to attach limitations and restrictions to this and that these will be respected. There is no difference to this principle where the image has initially been shared for gain and/or to a potentially large group of people such as OnlyFans. Consent to sharing with a closed/limited group (even if large) does not mean consent to images then being further shared.

Consultation Question 35.
15.41 We invite consultees' views as to whether threats to take, make or share an intimate image with the intent of coercing sexual activity should raise an evidential presumption that there was no consent to sexual activity. Paragraph 12.21

We think such an evidential presumption would be useful.

Consultation Question 36.
15.42 We invite consultees to provide examples where threats to take, make or share intimate images have been used to procure or engage in sexual acts with a person with a mental disorder and information about the use of sections 34 to 37 of the Sexual Offences Act 2003 to prosecute such cases. Paragraph 12.23

No submission.

Consultation Question 37.
15.43 We invite consultees to provide examples where threats to take intimate images have been made.

In our research report with colleagues *Shattering Lives*, we set out the findings from interviews with over 50 stakeholders and 25 victim-survivors in the UK (75 across the UK, Australia and New Zealand). We found that threats can be experienced as 'paralysing and life-threatening'. They are also very common (Henry, McGlynn et al 2021). While many of these threats were followed by non-consensual sharing, threats to share such images can in and of themselves have significant, life-threatening impacts.

For Louise, the fear of the images being shared was such that she tried to end her life:

11 Three men arrested in Dublin over alleged plot to blackmail Only Fans content creator (thejournal.ie)
12 Gardaí investigate as 'thousands of sexual images of Irish women and girls shared online without consent' | The Irish Post
13 Tech guru who took down leaked images server warns Ireland's revenge porn problem is 'bigger than anybody could imagine' (thesun.ie)

> 'I was embarrassed and I was ashamed ... and I felt stupid. ... Even now I'm still not sure whether or not she will send them ... my mental health deteriorated quite significantly ... I took an overdose'.

For Stephen, the threats had a paralysing effect on his daily life:

> ' … before all this happened I had no problem sleeping eight hours a day. [Now] I'll be lucky if I sleep two hours straight and don't get up and check my phone and then I go back to sleep and wake up again and check my phone ... And it's just this panic that something is going to happen. And it's like as time goes on it doesn't really fade. Because I think like the second that I don't, I'm not prepared for it, then it's going to happen.

For others, the threats were part of a means of power and control:

> Alison: 'So I was 18 at the time … I was drunk and [my ex-boyfriend had] taken photos of me … the next day … he showed me them. And I was a bit like "oh no". And then he started saying "oh, I've showed my friends". And each time we'd get into an argument it would be like "oh, I'm going to put them on the website" … He was quite controlling and manipulative … But I just tried to keep the peace because I obviously didn't want them to end up anywhere. So it was quite scary because you're controlled by that.'

Consultation Question 38.
15.44 We invite consultees to provide examples where threats to make intimate images have been made without an accompanying threat to share the image. Paragraph 12.119

No submission.

Consultation Question 39.
15.45 We invite consultees to provide examples where a threat to share an intimate image of V is not directed at V, but is made to a third party. Paragraph 12.137

No submission.

Consultation Question 40.
15.46 We provisionally propose that it should be an offence for D to threaten to share an intimate image of V, where: (a) D intends to cause V to fear that the threat will be carried out; or (b) D is reckless as to whether V will fear that the threat will be carried out. Do consultees agree? 15.47 We provisionally propose that the same definition of "intimate image" is used for both the offences of sharing and threatening to share an intimate image (which will include altered images). Do consultees agree? Paragraph 12.138

Yes. We agree that there should be an offence of this nature.

We recommend that the same definition of intimate image is used, which includes altered images, and intimate images of women from black and minoritised communities as discussed above. The evidence is clear that threats to share intimate images are used against women within minoritised and/or religious communities.

Consultation Question 41.
15.48 We invite consultees' views as to whether the prosecution in a threatening to share an intimate image case should be required to prove that the person depicted did not consent. Paragraph 12.143396

We do not think this is a necessary threshold.

Consultation Question 42.
15.49 We provisionally propose that there should be a defence of reasonable excuse available in the context of our provisionally proposed base offence which includes: (1) taking or sharing the defendant reasonably believed was necessary for the purposes of preventing, detecting, investigating or prosecuting crime; (2) taking or sharing the defendant reasonably believed was necessary for the purposes of legal proceedings; (3) sharing the defendant reasonably believed was necessary for the administration of justice; (4) taking or sharing for a genuine medical, scientific or educational purpose; and (5) taking or sharing that was in the public interest. Do consultees agree? Paragraph 13.193

We accept that a defence of reasonable excuse is necessary in regard to the investigation of crime and sharing in relation to specific legal proceedings with representatives.

We are concerned of the risk that interpretations of what might constitute being necessary for the administration of justice, 'genuine' medical or other reasons and in the public interest might be too broad and ultimately undermine the purpose of the legislation. We recommend therefore that clear examples are given of the limits of these excuses in the explanatory notes.

Consultation Question 43.
15.50 We provisionally propose that victims of the new intimate image abuse offences should have automatic lifetime anonymity. Do consultees agree? Paragraph 14.85

Yes. We agree. We support the proposal to grant anonymity to all those reporting any form of intimate image abuse.

In our research underpinning our *Shattering Lives* report in 2019, victim-survivors told us that the lack of anonymity meant they are less likely to report to the police. Lucy told us "because there is no anonymity ... it's not something [reporting to the police] I would do again. Even if you could guarantee me that the police would be very sympathetic and take it seriously and investigate, I still wouldn't do it because there's no anonymity".

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.

Consultation Question 44.
15.51 We provisionally propose that victims of the new intimate image abuse offences should automatically be eligible for special measures at trial. Do consultees agree? Paragraph 14.89397

Yes. We agree. We support the recommendations for further measures to protect complainants during any trial process.

Consultation Question 45. 15.52 We provisionally propose that restrictions on the cross-examination of victims of sexual offences should extend to victims of the new intimate image abuse offences. Do consultees agree? Paragraph 14.93

Yes. We agree. Research has consistently shown that questioning about previous sexual history hinders victim-survivors from reporting abuse.[14] In addition, such evidence is irrelevant to the question of whether there was consent on the particular occasion in question.

Consultation Question 46. 15.53 We provisionally propose that notification requirements should be automatically applied for the offence of taking or sharing an intimate image without consent for the purpose of obtaining sexual gratification when an appropriate seriousness threshold is met. Do consultees agree? Paragraph 14.103

We do not support a separate offence where there is proof of a motivation of sexual gratification (see question 29 above).

However, we consider that notification requirements should be available on satisfaction of an appropriate threshold and where the relevant tests are met regarding the nature and impact of the offender's conduct.

Consultation Question 47. 15.54 We provisionally propose that Sexual Harm Prevention Orders be available for all of our provisionally proposed intimate image offences. Do consultees agree?

We agree that these orders should be available on the satisfaction of an appropriate threshold of seriousness, such as a significant length of punishment or imprisonment.

3. Additional comments

a) A new statutory civil claim and court orders

We understand that the remit of the consultation is criminal law reform. However, as noted in Appendix 1, there are a number of potential civil remedies for intimate image abuse.

We think it is vital that there is a holisitic and comprehensive response to intimate image abuse and that includes civil law measures. **We encourage the Law Commission, so far as it is able within its remit, to make a more positive case for civil law reform, alongside any new criminal offences and to recommend that England & Wales 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.
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What has been done elsewhere?

[14] See further: McGlynn, Clare (2017). Rape Trials and Sexual History Evidence: reforming the law on third party evidence. *Journal of Criminal Law* 81(5): 367-392.

- 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.
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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.

b) Sustained and effective resourcing of support organisations

In our *Shattering Lives* report, 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.

c) 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 *Shattering Lives* report recommended the establishment of an Office for Online Safety.

Role of eSafety (or similar) regulator may include:

- Powers to order take-down of images and enforce civil orders
- Provision of specialist advice, support and assistance to victim-survivors to get images/videos returned, destroyed, deleted from the internet
- Provision of 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
- Providing and championing 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.

4. 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.
- McGlynn, Clare, Rackley, Erika & Houghton, Ruth (2017). Beyond 'Revenge Porn': The Continuum of Image-Based Sexual Abuse. *Feminist Legal Studies* 25(1): 25-46.
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  - **PLEASE NOTE the authorship of this report is McGlynn, Rackley, Johnson, Henry, Flynn, Powell, Gavey, Scott (as in the link given here). The Law Commission consultation report refers to the authors as McGlynn, Rackley, Johnson. If citing in further reports, please use this full citation.**
- McGlynn, C., Johnson, K., Rackley, E., et al (2020) "'It's Torture for the Soul': The Harms of Image-Based Sexual Abuse", *Social & Legal Studies*. DOI: 10.1177/0964663920947791
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5. 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 New Zealand, Korea and North America, as well as working with social media companies including Facebook, TikTok and Google 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.